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THE SIXTH ABRAHAM L. POMERANTZ LECTURE

FORUMS OF THE FUTURE: THE ROLE OF SPECIALIZED COURTS IN RESOLVING BUSINESS DISPUTES*

Rochelle C. Dreyfuss[†]

INTRODUCTION

Lawyers generally think of procedural law as the immutable backdrop against which they practice. Composed of an amalgam of constitutional, statutory, and administrative provisions, procedure is not as amenable to change as is the common law. Further, for those who think that, in theory, rules of procedure should be outcome neutral, the extent to which substance is, in fact, modulated by process can be hard to appreciate. In recent years, however, these perceptions have begun to change. Dan Quayle, for example, expressly linked the United

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† Professor of Law, New York University. I would like to acknowledge research assistance from the Filomen D'Agostino and Max E. Greenberg Research Fund. I would also like to thank the NYU Brown Bag lunchers, Geoffrey Miller, Jefferey Stempel, Stanley Seigel, Helen Scott, and Jack Slain for their many helpful comments. Kathleen Jennings provided research assistance of her usual spectacular quality.

States' problems with competing globally to the unwieldiness of its litigation system.¹ Dissatisfaction with outcomes also has led many jurisdictions to undertake the difficult project of reviewing process.² Some places have adopted a trans-substantive approach: that is, they have instituted reforms that affect all disputes, regardless of their substantive content.

Other jurisdictions have, however, taken the opposite tack and targeted procedural reform efforts to specific substantive areas, especially to fields intimately tied to the economy such as corporate and business law. One result has been that several states are moving to emulate Delaware, the one state that has taken substance-specific procedure to the extreme: it maintains a special forum to resolve corporate governance disputes.

Given Delaware's success in attracting incorporations,³ the esteem in which many commentators hold Delaware corporate law,⁴ and that, in part, these successes are attributed to its special tribunal,⁵ other states have followed Delaware's propitious lead. Pennsylvania is about to establish a special-

¹ David Margolick, *Address by Quayle on Justice Proposals Irks Bars Association*, N.Y. TIMES, Aug. 14, 1991, at A1 ("compared with less litigious countries, the United States is handicapped in world markets"); Alesandra Stanley, *The 1992 Campaign: Issues—Tort Reform; Selling Voters on Bush, As Nemesis of Lawyers*, N.Y. TIMES, Aug. 31, 1992, at A1 ("excessive litigation had forced up the cost of insurance, which in turn had forced up the costs of goods and services, causing the United States to lose its competitive edge with other industrialized countries")

² See, e.g., Sandra Torrey, *Quayle and Bush Administration Take on Civil Justice Reform*, WASH. POST, Feb. 3, 1992, at F5. Max Boot, *Chorus of Reformers Adds New Pitch*, CHRISTIAN SCI. MONITOR, Jan. 25, 1994, at 12. The federal courts, for example, were studied by a special congressional committee. See FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURT STUDY COMMITTEE (1990). For the most part, the important changes later made in federal procedure apply to every case.

³ Delaware is home to half of the publicly traded Fortune 500 companies and to more than 40% of all companies listed on the New York Stock Exchange. Leo Herzel & Laura D. Richman, *Foreword* to R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS*, at F-1 (2d ed. 1990); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1443 (1992).

⁴ See, e.g., Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 919-20 (1982); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 258 (1977).

⁵ See, e.g., Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 280 (1985).

ized court for adjudicating commercial and corporate disputes;⁶ New York is in the midst of an experiment with a specialized Part for commercial and corporate matters;⁷ and California is closely studying the matter of specializing the adjudication of business cases.⁸ Indeed, even Delaware may expand the scope of its specialized adjudication: a pending bill would establish a new tribunal with broader adjudicatory authority over business matters.⁹

This Article addresses substance-specific strategies by examining the trend toward adjudicating business disputes in a specialized tribunal.¹⁰ Part I briefly describes the Delaware Chancery Court and the court proposed in pending Pennsylvania legislation. Delaware's preeminence in corporate matters makes its court the standard by which to judge all other such courts and Pennsylvania is well enough along in the process of creating a new court to provide a concrete context within which to consider the issues that specialization raises for business law. Part II builds on the scholarly research in the area of specialized adjudication,¹¹ as well as my own work on special-

⁶ See, e.g., Pa. S. 309, 178th Gen'l Assemb., Reg. Sess. (Feb. 7, 1994).

⁷ See, e.g., Gary Spencer, *Cuomo Seeks State Commercial Court*, N.Y. L.J., Jan. 6, 1994, at 1.

⁸ See, e.g., Cal. S. 1797 § 5, 137th Gen'l Assemb., Reg. Sess. (1993-94).

⁹ S.J. Res. 28, 2d Sess., available in LEXIS, Del Library, Detext file (Feb. 4, 1994).

¹⁰ I have commented elsewhere on some of the trans-substantive reforms made in federal law following the work of the Federal Courts Study Committee, see, e.g., Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9 (1994); Rochelle C. Dreyfuss, *The Debate Over § 1367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13 (1992).

¹¹ See generally ABA STANDING COMM. ON FEDERAL JUDICIAL IMPROVEMENTS, *THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH* 10-24 (1989); RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); see also PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* (1976); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE*, reprinted in 67 F.R.D. 195 (1975); David F. Cavers, *Law and Science: Some Points of Confrontation*, in *LAW AND THE SOCIAL ROLE OF SCIENCE* 5 (Harry W. Jones ed., 1966); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981); Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REF. 471 (1983); Richard Posner, *Will the Federal Courts of Appeals Survive Until 1984?: An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761 (1983); Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425 (1951).

ized courts established under Article III of the Constitution,¹² to create a framework for analyzing the current trend. Part II then applies this framework to demonstrate why Delaware's special forum works so well. Part III proceeds to the actual analysis of the future for these forums, considering whether Delaware's success is transferrable—first, to other states, and second, to fields other than corporate governance. Part IV looks at the somewhat different question of the effect that interstate competition in specialized commercial adjudication will have on the substance of business law and on the ability of other states to mirror Delaware's success.

On the question of the role that these new forums will play in the future, my conclusions are not, on the whole, particularly optimistic. Delaware's success is partly due to its being the first mover in the field of specialized business adjudication, and to its very special history, homogeneous population, and unique finances. Unless they are able to duplicate these factors, other states will not be able to capture the benefits of specialization as easily as Delaware. Moreover, success in adjudication tends to be field-dependent: corporate law has many of the features that make for good results; commercial law has significantly fewer. Thus, since most proposals aim to specialize both commercial and corporate cases, they may not, ultimately, make as large a contribution to business law and dispute resolution as their proponents expect. Finally, considerable danger exists that states, in their desire to compete successfully with Delaware (and each other) will favor the interests of the businesses that litigate before the specialized tribunals over the interests of the unseen entities affected by their decisions: consumers, suppliers, competitors, employees, investors, and the environment.

¹² U.S. CONST., art. III; Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377; Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989) [hereinafter *Case Study*].

I. SPECIALIZED BUSINESS COURTS: DELAWARE AND PENNSYLVANIA

Arguments both advocating and criticizing specialization have been well rehearsed.¹³ For the most part, however, these arguments are made in the abstract, with little attention given to the extent to which context affects a specialized bench's ability to function effectively. Rather than fall prey to the same vice, this paper takes a comparative approach. As noted above, Delaware's Chancery Court is renowned for its contributions to the corporate area, in terms of both the quality of law it has created and its efficiency in resolving disputes. A comparison of Pennsylvania's current proposal to this court affords an opportunity to study the phenomenon of specializing business litigation without courting the dangers of abstraction.

A. *Delaware's Chancery Court*

Strict proceduralists will find it odd that Delaware's Chancery Court is discussed in an article about specialized adjudication. Specialized courts usually are defined as forums of highly limited jurisdiction to which all of the cases of a particular type are channeled. Strictly speaking, Chancery Court does not meet this definition. It does not hear all corporate cases that arise in Delaware, nor is its docket exclusively dedicated to corporate matters. It was not even established with specialization in mind. However, historical accident produced a court that, in point of fact, does adjudicate Delaware cases raising corporate governance issues. Because these cases take up a significant portion of the court's time, Chancery's bench has developed the expertise in corporate matters that is the hallmark of a specialized judiciary. Thus, Chancery can be understood only through the lens of its history.

At the time of the American Revolution, the majority of colonies had continued the English practice of maintaining two sets of courts—one for cases at law and one for cases in equity. The law courts were creatures of statute, where the writ system, jury trials, and money damages were the norm. In con-

¹³ See *supra* notes 11-12.

trast, equity was dispensed by the Crown, whose representatives heard argument and took evidence regarding claims for equitable relief—specific performance, injunctions, rescission, reformation, restitution, and administrative remedies—in cases where legal relief was inadequate or unavailable. In most places, the latter system of courts were unpopular. The royal prerogative that created these courts, the absence of a jury in their decisionmaking, and the discretionary nature of their authority, were thought to concentrate too much power in government. Accordingly, most states quickly abolished these courts, merging law and equity into a single tribunal. Consequently, business cases, both corporate and commercial, came to be heard in courts of general jurisdiction.¹⁴

Delaware's courts were unique in the colonies. Because the Delaware law courts exercised equity jurisdiction during the colonial period, equity was not a subject of controversy when the Nation was founded. Lacking a citizenry hostile to equity, Delaware was free to structure its judicial system from first principles. Its 1792 Constitution expressly separated equity jurisdiction from common law jurisdiction, created a Chancellor, and vested in him the power to hold Courts of Chancery around the state.¹⁵ Chancery's acceptance by the population was established quickly through the State's choices of early chancellors. The first was William Killen, whose service during the Revolutionary War and as Chief Justice under Delaware's previous constitution helped to establish Chancery's credibility. The second Chancellor, Nicholas Ridgely, quickly realized the importance of regulating the court's procedure and integrating it into Delaware's judicial system. His successors continued in this work, keeping the rules of equity current with the procedural theories of the times. With a small population that could be administered to easily by a single equity court, Chancery's position as the appropriate court for disputes requiring equitable relief was never challenged.

Today, Chancery's history continues to define its power. Its

¹⁴ This history is drawn from William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819 (1993). See also William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351 (1992).

¹⁵ DEL. CONST. of 1792, art. VI, § 14 (1792).

caseload includes cases involving trusts and estates, fiduciary duties, guardianships, and civil rights actions seeking only injunctive relief. Corporate governance cases also comprise part of this docket. These cases appear on Chancery's docket, however, not because the Delaware Legislature carved out this jurisdiction, but because these cases generally raise the kinds of questions with which equity deals: the duty of disclosure, the duty of good faith, and the like. Moreover, corporate cases often involve demands for the kind of relief—accountings, appointments of receivers, and orders to transfer corporate shares—that were traditionally available only at equity. Finally, because Delaware procedure treats class actions and shareholder derivative actions as equitable in nature, Chancery Court hears all corporate cases structured along those lines.

The foregoing is not to say that Chancery has remained static since the time of the Revolution. Among other changes, the bench was enlarged several times, and currently seats five members. Since 1951, Chancery opinions are reviewed by the same court that reviews law cases, the Supreme Court of Delaware. Furthermore, cases like *Harman v. Masoneilan International*,¹⁶ have expanded Chancery's powers to award monetary damages, so that the court can provide all the relief required to resolve corporate disputes fully.

But it is important to emphasize what has not changed. High-quality jurists continue to sit on Chancery's bench and have continued, in the Killen tradition, to move between the courts of law and equity. For example, several chancellors, including Daniel Wolcott, Howard Bramhall, and Joseph Walsh

¹⁶ 442 A.2d 487 (Del. 1982). *Harman* involved a claim for breach of fiduciary duties by majority shareholders that was brought under circumstances in which rescission was not an available remedy. Despite the fact that this equitable form of relief could not be granted, the Supreme Court upheld Chancery's jurisdiction. First, it held that the exclusivity of equity subject matter jurisdiction depends on the nature of the claim, not on the relief sought, *id.* at 498. Second, the court found that even if the claim fell within the concurrent jurisdiction of law and equity courts, the case should be heard by Chancery because the remedy at law was inadequate: the action at law requires proof of scienter, the damages would be limited to those directly or proximately resulting from the wrongful act, and the plaintiff could sue only as an individual. In contrast, equitable actions measure the defendant's conduct against a fiduciary standard, the damages awarded represent the monetary equivalent of rescission, and the availability of the class action means that the plaintiff could sue on behalf of all those similarly situated, *id.* at 499-500.

moved from Chancery to the Delaware Supreme Court; William Duffy, Joseph Walsh, and William Chandler transferred from the Superior Court to Chancery; and Collins Seitz was elevated from Chancery to the United States Courts of Appeals for the Third Circuit. And, of course, the chancellors and vice chancellors continue to decide *all* Delaware cases seeking equity. Indeed, to many, the court's finest hour was not a landmark corporate law case such as *Ringling v. Ringling Brothers-Barnum & Bailey Combined Shows, Inc.*,¹⁷ or a multi-million dollar merger case, such as *In re R.J.R. Nabisco, Inc. Shareholders Litigation*,¹⁸ but rather, *Belton v. Gebhart*,¹⁹ where Chancellor Seitz held the segregated education of black schoolchildren unconstitutional.²⁰

B. Pennsylvania's "Chancery Court"

Pennsylvania's business court is at the opposite end of the development spectrum from Delaware's: so far, it exists only in legislative proposals. But lacking the tradition of Delaware's Chancery Court can be an advantage. It gives Pennsylvania the freedom to craft a new tribunal that precisely meets the needs of business. At the same time, however, the absence of an historical pedigree means that Pennsylvania must take affirmative steps to establish this new tribunal's credibility.

The proponents of the Pennsylvania legislation intend the state's Chancery Court to be a truly specialized forum. Its subject matter jurisdiction is defined so that the court can focus on business disputes and move them through the adjudication system rapidly. Criminal cases, which take up a large share of most general court dockets and require priority handling, are, therefore, expressly excluded.²¹ Also excluded are all "nonbusiness claims,"²² such as civil tort cases involving natural parties, civil matters involving occupational health and

¹⁷ 49 A.2d 603 (Del. Ch. 1946).

¹⁸ No. CIV.A. 10,389, 1989 WL 7036 (Del. Ch. Jan. 31, 1989).

¹⁹ 87 A.2d 862 (Del. Ch.), *aff'd*, 91 A.2d 137 (Del. Super. Ct. 1952).

²⁰ It is noteworthy that *Belton* was the only case heard with *Brown v. Board of Education*, 349 U.S. 294 (1955), that the United States Supreme Court affirmed.

²¹ Pa. S. 309, *supra* note 6, § 20(b). The one exception is criminal contempt cases.

²² Pa. S. 309, *supra* note 6, at Joint Resolution Preamble.

safety, labor relations, and workers' compensation, and cases in which consumers are indispensable parties.²³ Instead, the court will use the docket time that Delaware expends on noncorporate equity cases to resolve a broader range of business disputes. The court's affirmative jurisdiction is defined as "all cases involving corporations and other associations, mercantile and commercial matters or the employment of directors and officers of corporations and other associations."²⁴ In other words, the court will be the forum for all commercial and corporate litigation, both in law and in equity.

The court's specialized jurisdiction will be bolstered by procedural rules tailored to its litigants' needs. Judges (chancellors) must be "recognized experts" or "have at least ten years' substantial experience in the practice or teaching" of one of the court's subject areas;²⁵ and no more than a majority of the judges can be from the same political party.²⁶ The court will be supervised by an "independent governing authority,"²⁷ authorized to order deviations from general rules of practice or procedure.²⁸

The law itself embodies two such deviations. First, jury trials will be abolished except in "cases of indirect criminal contempt."²⁹ Second, the proposal limits the extent to which generalist judges can undermine the expertise of the new court by separating the new tribunal into two divisions—one for trials and the other for appeals.³⁰ It is expected that, in most cases, review will be limited to the specialist appellate bench. That is, although the bill creates an opportunity to seek further review in a generalist court—the Supreme Court of Pennsylvania—that opportunity is quite limited. The Supreme Court is given only 90 days to act affirmatively on a review petition.³¹

²³ Pa. S. 309, *supra* note 6, § 20(b).

²⁴ Pa. S. 309, *supra* note 6, § 20; *see also id.* at Joint Resolution Preamble, para. 2.

²⁵ Pa. S. 309, *supra* note 6, § 19(c).

²⁶ Pa. S. 309, *supra* note 6, § 19(c).

²⁷ The governing authority appears to be the Chancellor. *See* Pa. S. 308 § 1741, 178th Gen'l Assemb., Reg. Sess. (1993-94).

²⁸ Pa. S. 309, *supra* note 6, § 23(a), (d).

²⁹ Pa. S. 309, *supra* note 6, § 23(c).

³⁰ Pa. S. 309, *supra* note 6, § 19(b).

³¹ Pa. S. 308, *supra* note 27, § 724(b).

The court's administration will be somewhat complex. The Governor will appoint judges with the advice and consent of two-thirds of the Senate, from a list of candidates submitted by a special Chancery-nominating Commission,³² which will itself be selected with a rather elaborate procedure.³³ Judges will hold office for approximately four years, and then will stand for one retention election, after which they will hold office subject to Pennsylvania's rules on retirement.³⁴

To the extent possible, the court will be supported by its users. Its operating and capital expenses will be paid from a "Chancery Court Fund," which will receive all court fees as well as surcharges upon "corporation and other association filing fees received by the Commonwealth."³⁵ These charges will, however, be supplemented by legislative appropriations as needed.³⁶

Of course, strict proceduralists will find it just as odd to call the specialized court proposed in Pennsylvania a "Chancery Court" as to label Delaware's Chancery Court "specialized." After all, Pennsylvania's court is not, strictly speaking, a chancery court, as it will hear cases at law as well as cases in equity. Its name does indicate, however, that the court will dispense largely with the sine qua non of law: the right to a trial by jury. In all probability, the name was picked to glean some of the respect accorded to Delaware's Chancery Court. Whether this court will improve the adjudication of business disputes remains to be seen.

³² Pa. S. 309, *supra* note 6, § 21.

³³ Pa. S. 309, *supra* note 6, § 21. Four commissioners would be appointed by the Governor, two by the Supreme Court, two by the president pro tempore of the Senate, two by the Speaker of the House of Representatives, two by the minority leader of the Senate and two by the minority leader of the House. The Governor's choices must be nonlawyers, and no more than two may be from the same political party. There are similar sorts of constraints on the other appointments. As a result, only about half of the other commissioners could be members of the Pennsylvania bar and they would be fairly evenly divided by political party. Appointment would be for a four year term and could be renewed once.

³⁴ Pa. S. 309, *supra* note 6, § 22.

³⁵ Pa. S. 309, *supra* note 6, § 23(f).

³⁶ Pa. S. 309, *supra* note 6, § 23(f).

II. SPECIALIZED ADJUDICATION: A FRAMEWORK FOR ANALYSIS

Predicting whether proposals like the one before the Pennsylvania legislature will produce better courts or better quality adjudication depends, of course, on what counts as a "good" court or a "good" adjudication. One can measure the success of a court in a variety of ways. Objective factors, such as the court's docket-clearing rate, or the number of litigants choosing the court rather than other tribunals with comparable adjudicatory authority form one standard. Subjective measures include the satisfaction that litigants express in the adjudication they received, the regard with which the court is held among lawyers, academics and judges; and the degree to which the citizens of the jurisdiction and those who consume the law the court administers accept the court's output.

In fact, very little empirical research has been conducted on any of these factors, nor is there agreement on which are most important. In two prior articles, however, an approach to the problem was taken that may help predict the role these business forums will play in the future.³⁷ These articles examined the history of all federal specialized courts established under Article III of the Constitution with particular attention paid to their decisions and to the views expressed—in both the legal literature and the popular press—by those who were affected by them. The output of the courts that reviewed these decisions and applied them was also explored, as were the contemporaneous comments of neutral observers. Courts of short duration, such as the Commerce Court, were compared with longer-lived tribunals, such as the so-called Temporary Emergency Court of Appeals ("TECA").³⁸ From these comparisons, three constellations of issues emerged as useful in predicting success. These criteria—the quality of decisionmaking, efficiency, and the appearance of due process—explain why the Delaware Chancery Court has performed so well.

³⁷ See *supra* note 12.

³⁸ Congress was so pleased with the Temporary Emergency Court of Appeals ("TECA") that it allowed the "temporary" emergency to last for nearly two decades.

A. *Quality of Decisionmaking*

Quality of decisionmaking encompasses three interrelated concepts: accuracy, precision and coherence. "Accuracy" refers to the extent to which the law produces the objectively correct result. In all cases, this is the result that most fully reflects the true facts of the events giving rise to the litigation.³⁹ More important for these purposes, however, it is the result that best integrates the needs and circumstances of the litigants with accepted public norms and social policy. Additionally, in statutory cases, an accurate result is the result that most fully reflects the thinking of the jurisdiction's legislature.

Accuracy is of obvious importance. If courts are flagrantly inaccurate, the rule of law becomes a meaningless concept. To the extent it would be governed at all, the populace would be subject to the haphazard results of particular cases rather than to legislative or judicial direction. Even subtle departures from accuracy can impair the success of a judicial enterprise, because observers rely fairly heavily on accuracy when judging a court. The Commerce Court, which was created in 1910 to adjudicate disputes involving the railways, provides an apt example. Its high reversal rate by the Supreme Court, when coupled with its role in the controversial business of railway regulation, led Congress to abolish it in 1913, a mere three years after its creation.⁴⁰

"Precision" is sometimes confused with accuracy because in common parlance they are synonymous. As used here, however, precision refers to reproducibility—the extent to which the court reaches the same result in equivalent cases. Precision is significant because the law should treat equivalently situated litigants alike. In addition, the law must be perceived as stable and predictable so that people can conform their behavior to it. Precise decisionmaking is also of value to the administration of justice because, at least in theory, if parties can predict the

³⁹ Cf. Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1 (1994) (formulating a test of accuracy in tort litigation).

⁴⁰ See Harold H. Bruff, *Specialized Courts in Administrative Law*, 42 ADMIN. L. REV. 329, 335-36 (1991); George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238 (1964); Dreyfuss, *Specialized Adjudication*, *supra* note 12, at 393 n.60.

outcome of disputes themselves, they will resort less frequently to judicial intervention. Thus, while it is desirable for courts to reach the right (accurate) result in every case, reaching reproducible results across the array of cases a court hears is more important in some respects.

To achieve precision, however, courts must sometimes sacrifice accuracy to ease of application. The trade-off that is made can affect a court's reputation. For instance, the United States Court of Appeals for the Federal Circuit, the nation's appellate court for patent cases, has been criticized for judging the patentability of an invention with objective criteria that have little to do with inventiveness.⁴¹ However, because these criteria do make patentability decisions more precise the court's reputation has, to many observers, been enhanced by its decision to mandate their use.⁴²

"Coherence" is the last parameter in the quality constellation. Every branch of the law has themes, that is, a variety of policies it seeks to further. Coherence refers to how the court knits these strands together. Do they combine to further social policy, or do they operate at cross purposes? Do new decisions demonstrate continuity with prior law, or does the law veer in unpredictable directions? Does it practice what Justice William Brennan informally called "damage control": when the court makes an important change, does the court follow the change with a hard look at how the new rule works in practice? Does the court manage to resolve the implementation problems that develop?

Coherence, like accuracy and precision, is a rule-of-law issue. But for those who utilize (rather than merely observe) a court, coherence can be a more important measure than either accuracy or precision. Utilizers tend to evaluate accuracy and precision by whether they win or lose. Coherence, however, reflects how a particular decision fits into a body of law. It therefore can be assessed independently of outcome. Looking again at the Federal Circuit, while many commentators express concern that the court overly protects patentees, its ability to articulate coherent patent policy, without doubt, has

⁴¹ See, e.g., Robert P. Merges, *Patent Standards and Commercial Success: Economic Perspectives on Innovation*, 76 CAL. L. REV. 803 (1988).

⁴² See, e.g., Dreyfuss, *Case Study*, *supra* note 12, at 8-13.

contributed significantly to its public acceptance.⁴³

B. *Efficiency*

The second constellation of issues that measure the functioning of a judicial system concern efficiency. Efficiency, like quality of decisionmaking, is multi-faceted. To utilizers of the system, timing is probably primary: can the court decide its cases within the time frame the litigants require? The Emergency Court of Appeals, established during the Second World War to control prices and wages, in many respects, was an inconvenient tribunal whose procedures teetered on the edge of constitutionality.⁴⁴ But the times demanded quick decisions, and the court was counted a success because it disposed of its cases rapidly.⁴⁵

Sometimes, however, this ability to dispose of cases rapidly is achieved at a price society may not be willing to pay. If many judges are required to achieve this goal, the court then will speak with many voices. The law can become occluded with inconsistent decisions that breed yet more lawsuits. Thus, a second measure of efficiency is the number of judges (and judge-hours) required to handle the docket.

Similarly, if rapid decisionmaking is achieved by dividing disputes into small units for easy adjudication, the system may work well as measured by standard parameters such as the median decision times and publication rates. But these rates only reflect the clearing rate for the units, and not for the dispute as a whole. For the parties, a decision to divide up the dispute can be inconvenient, as it forces them to pursue several suits simultaneously, sometimes in different forums. Bifurcation can also breed opportunistic litigation strategies, such as forum shopping and sharp pleading practices that produce workload problem of their own. Thus, a third measure of efficiency is the number of cases and issues that the structure of the judicial system itself generates.

⁴³ See Dreyfuss, *Case Study*, *supra* note 12, at 21-23.

⁴⁴ *Cf. Yakus v. United States*, 321 U.S. 414 (1944).

⁴⁵ See Dreyfuss, *Specialized Adjudication*, *supra* note 12, at 393-96.

C. *Due Process*

The final constellation of issues is one that can be called due process, but is more accurately conceptualized as the perception of due process. Thus, those who utilize a given judicial system have a constitutional right to due process. Accordingly, most of the features that the public looks at in assessing due process are, indeed, coextensive with constitutional requirements. They include notice, a meaningful opportunity to be heard, compulsory process, and a neutral adjudicator. In studying what observers say about newly created courts, however, it is clear that compliance, or the appearance of compliance with constitutional norms is not always enough to allay public concern.

In fact, serious questions are raised whenever a tribunal utilizes novel procedures. One example is the International Trade Commission ("ITC"), which has authority over certain disputes that arise in connection with the importation of patented goods. Although its procedures provide all the process that is considered constitutionally due, the United States has been the target of complaints by importers under the General Agreement on Tariffs and Trade ("GATT") on the ground that the ITC's procedures differed from those used by the district courts. Ironically, the ITC's process was specially tailored to the needs of importers. For example, because importers generally want decisions quickly, the ITC's rules of procedure put cases on expedited schedules, limited discovery, and circumscribed the ability to assert counterclaims. The departure from district court procedure, however, created a perception of bias. Since the United States could not allay that perception, an arbitration Panel created to resolve disputes pursuant to the treaty found the United States in violation of the GATT.⁴⁶

A little reflection reveals why the use of trans-substantive procedure is so desirable. To that end, it is important to remember that not all those who are affected by a court's deci-

⁴⁶ GENERAL AGREEMENT ON TARIFFS AND TRADE PANEL, REPORT ON SECTION 337 OF THE TARIFF ACT OF 1930 (1989). See generally *USTR Presents Section 337 Amendments Needed for GATT Implementation*, 48 PAT. TRADEMARK & COPYRIGHT J. (BNA) 120 (1994).

sions will experience the process directly. For these third parties, systemic guarantees of fairness are essential and trans-substantivity provides some assurance that the court hears and considers all viewpoints. In contrast, when rules are substance-specific, there is cause to worry that the dispute resolution mechanism has become politicized, that its rules are a product of concerted efforts by those special interest groups that have the most resources.⁴⁷ If the same rules apply to all cases, then parochial interests seeking to alter procedure are forced to contend with a wide array of opponents—opposition can come from anyone affected by adjudication anywhere, including courts of general jurisdiction. Absent some unique circumstance, the rules that result from this broader give-and-take are likely to be evenhanded. In short, a new tribunal derives public acceptance from utilizing familiar procedures but a red flag is raised whenever the trans-substantive approach is abandoned.

D. *Specialization in Delaware's Chancery Court*

With these criteria laid out, it is fairly easy to understand why specialized adjudication has been so controversial. What is somewhat harder to explain is why Delaware's Chancery Court has enjoyed sustained success. If each criterion is examined in turn, however, the apparent anomaly can be explained easily.

1. Quality

In some ways, specialized courts do very well on this criterion. Narrowing jurisdiction to a single field generally produces a relatively small bench. Its judges see the same issues repeatedly and thus have both the time and the motivation to do the research and thinking needed to resolve them accurately.⁴⁸

⁴⁷ Another example is the sustained suspicion leveled at the Foreign Intelligence Surveillance Courts, which were established, in part, so that special procedures for handling matters of national security interest could be utilized. *See, e.g.,* Tom Ricks, *A Secret U.S. Court Where One Side Always Seems to Win*, CHRISTIAN SCI. MONITOR, May 21, 1982, at 1; Philip Taubman, *Sons of the Black Chamber*, N.Y. TIMES, Sept. 19, 1982, § 7, at 9.

⁴⁸ *Cf.* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

The size of the tribunal also promotes collegiality; the judges come to understand each other's views well enough to articulate the law with precision. Furthermore, since the judges see the same issues crop up in many contexts, they have the capacity to write law that is coherent and the luxury—and insight—to do damage control.

At the same time, however, specialized courts function in isolation, which impacts on quality in a negative way. Since all cases in a single field are funnelled to that court, little opportunity exists to exchange theories, to debate positions with other courts, or to compare how different rules work in practice. There is, in short, no opportunity for the percolation that tests, refines, and improves new ideas. In addition, since specialization cuts the court off from other areas of the law, the thinking of generalists will not often contribute to the specialized field's development. Such cross pollination among legal theories is a significant source of change in the law; important methods of reasoning sometimes emerge rather naturally in one field, and can be applied meaningfully to other areas.⁴⁹

Most disturbingly, a specialized court may become blind to externalities. In an adversarial litigation system, it is the parties who frame the issues. Those not participating in the litigation are not heard, regardless of whether they will be affected by the outcome. In courts of general jurisdiction, this problem is countered, in part, by judges' exposure to a fuller array of cases. Parties not heard in one context appear in another, giving the court a fairly broad perspective on how its decisionmaking impacts on the citizenry. Lacking this perspective, a specialized court may not be fully cognizant of the systematic effects of its jurisprudence.⁵⁰

The Federal Circuit is an example of this problem. Antitrust law has long attracted the interest of a broad range of

⁴⁹ See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977) (demonstrating expansion of economic analysis from antitrust law to other fields); Charles F. Weiss, *Sociobiology and the Law: The Biology of Altruism in the Courtroom of the Future*, 85 MICH. L. REV. 1041 (1987) (use of sociobiology in trusts and estates as well as other areas) (reviewing JOHN H. BECKSTRAM, *SOCIOBIOLOGY & THE LAW: THE BIOLOGY OF ALTRUISM IN THE COURTROOM OF THE FUTURE* (1985)).

⁵⁰ Cf. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-79 (1986) (criticizing alternative dispute resolution for similar reasons).

economists. Fierce debates have developed over the proper economic analysis of monopolization issues; these exchanges have worked their way into the courtroom and influenced the decisions of the courts of general jurisdiction.⁵¹ But despite the fact that economic analysis is equally pertinent to patent law, the judges of the Federal Circuit (with some exceptions) have displayed little inclination to keep abreast of developments in economic theory. Thus, although patent law is more coherent than it once was, specialization has had the effect of isolating its development.⁵²

Judging from the academic literature, Delaware's Chancery Court seems to have captured the benefits of specialization fully, without paying a high cost in terms of quality erosion. A good demonstration of the benefits is derived from comparing the New York Court of Appeals' opinion in *Auerbach v. Bennett*,⁵³ with Chancery's *Maldonado v. Flynn*.⁵⁴ Both cases use the business judgment rule to keep the court from second guessing a special litigation committee's decision to terminate a derivative suit. But New York uses the rule like a blunt instrument, treating each case as if it presented the same sort of conflict. In contrast, Delaware has developed a test aimed at distinguishing disabling conflicts of interest from the conflicts inherent in every situation in which derivative suits are dismissed. This nuanced approach, which acknowledges the shareholders' interest in corporate claims and recognizes the extent to which derivative actions undermine the assumptions on which the business judgment rule is based, is possible because of Chancery Court's exposure and because of the logistics of deciding cases in Delaware. Chancery sees enough corporate cases to have the time and the contextual information needed to fully appreciate the assumptions and operation of the business judgment rule. Of course, the New

⁵¹ RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIST NOTES AND OTHER MATERIALS* 152-71 (2d ed. 1980); ELEANOR M. FOX & LAWRENCE A. SULLIVAN, *CASES AND MATERIAL ON ANTITRUST* 3-11 (1989).

⁵² See, e.g., *Mallinckrodt Inc. v. Medipart Inc.*, 24 U.S.P.Q.2d 1173 (Fed. Cir. 1992).

⁵³ 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979).

⁵⁴ 413 A.2d 1251 (Del. Ch.), *rev'd in part sub nom.*, *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1980) (retaining the key distinctions set out by the Chancery Court).

York Court of Appeals, although it is generalized, probably sees enough corporate cases to do the same. But because the New York court presides over a vastly understaffed system, it has a major incentive to find ways of removing cases from its docket. *Auerbach* does just that. Whether or not one agrees that *Maldonado's* more nuanced approach is the better rule, the judicial effort required to administer it means that this approach can be adopted only by a court, like Chancery, that has the luxury of docket space.

Similarly, the costs of specialization seem minimal in Delaware. Certain features of corporate law, and the manner in which it is practiced may explain why. At least in Delaware, corporate litigants (or, in shareholder derivative cases, their attorneys) usually are matched evenly, and capable of mounting sophisticated legal attacks. Thus, whatever the court lacks in terms of percolation is often more than made up for in the quality of the argument it hears. There is also a rich academic literature on corporate governance issues that does not exist in most other fields. Even a superficial examination of Delaware Chancery decisions reveals how nicely this literature substitutes for percolation and cross pollination. Indeed, Chancery has not been subjected to the criticism—leveled at other specialized courts⁵⁵—that it cites academic and theoretical literature too infrequently.

2. Efficiency

A similar analysis can be made with respect to efficiency. When Congress was considering specializing patent law, Judge Markey, who was to be the specialized tribunal's first Chief Judge, testified. What he said was: "if 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 . . . than someone who does brain surgery once every couple of years."⁵⁶ It is not clear that judges need to be brain surgeons. The sentiment,

⁵⁵ See Harold Wegner, *Whither Scholarly Writing in the Patent World*, 1 *DINWOODY CTR. J.* 7 (1993).

⁵⁶ *Court of Appeals for the Federal Circuit, 1981: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice*, 97th Cong., 1st Sess. 42-43 (1981) (statement of Howard T. Markey, Chief Judge, Court of Customs and Patent Appeals).

however, is surely correct: specialization can help judges work more efficiently.

On the other hand, specialization also can produce inefficiencies. If the law becomes truly predictable and stable, often one side will know that it will lose in the specialized tribunal, and so has the incentive to structure the litigation so as to bring it within the jurisdiction of a different court. The result of forum shopping is satellite litigation on pleading and jurisdictional issues. In its patent docket, at least in its early years, more than 10% of the Federal Circuit's reported decisions were devoted to these sorts of issues, that is, to the creation of what can be called boundary law. The court thus spent substantial time on issues that would not have existed, but for Congress's decision to specialize patent law.⁵⁷

Another source of inefficiency exists when a specialized court is too narrowly focused on particular issues. In such instances, standard measurements of docket-clearing rates reflect that the court is doing well. However, the parties cannot resolve their dispute without litigating in several forums. The result for the dispute can be delay, confusion, and loss of rights. For instance, TECA, established during the economic upheaval of the early 1970s to regulate prices, had what is called "issue jurisdiction."⁵⁸ To resolve a dispute that contained price-regulating issues in it, the parties had to divide their case between TECA and the regional circuits, with each court deciding its portion of the case on its own timetable. Since appellate jurisdiction is measured from entry of judgment,⁵⁹ and it was not always clear when an appeal was ripe, it was not unknown for parties to inadvertently lose the right to appeal portions of their cases.⁶⁰

Here once again, Delaware Chancery has succeeded nicely. Its understanding of financial markets has enabled it to decide questions in the time frame required by the fast-paced transactions it regularly reviews. A recent instance is QVC's and

⁵⁷ Dreyfuss, *Case Study*, supra note 12, at 31 n.186.

⁵⁸ See, e.g., *Coastal States Mktg., Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 182 (2d Cir. 1979).

⁵⁹ FED. R. APP. P. 4.

⁶⁰ See, e.g., *United States v. Cooper*, 482 F.2d 1393, 1399-1400 (Temp. Emer. Ct. App. 1979). See generally, Note, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 MINN. L. REV. 1247 (1980).

Viacom's tender offers for Paramount.⁶¹ The case was briefed in two and one half weeks, and Vice Chancellor Jacobs assimilated over 400 pages of briefs in nine days.⁶²

Despite the fact that demands for monetary relief are an important element in many of the cases Chancery hears, and that traditionally equity courts have had rather limited power in this area, Delaware has also managed to avoid the TECA problem of requiring parties to bifurcate their cases. Here, the close attention that Delaware's chancellors and its Supreme Court have paid to procedure becomes important. Because of the flexibility of equity, Chancery's authority can be expanded to ensure that litigants enjoy one-stop shopping.⁶³ Thus, Chancery resolves disputes, not merely issues.

3. Due Process

The perception of due process is the area in which specialized courts most often break down. First, they inevitably develop specialized procedures which, as noted above, is a red flag to observers. Moreover, specialized courts present reason for concern about politicization and bias. As an example, consider judicial appointments. It is surely the case that special interest groups would like to influence all judicial appointments. Lobbying for appointments to a court of general jurisdiction, however, is not cost-effective. First, no one judge will spend enough time on any one set of issues to justify an expenditure of significant resources. Second, any expenditure would be diluted by the efforts of other groups interested in other portions of the court's docket. But specialized courts are different: fewer groups are concerned with these appointments. Moreover, if an interest group manages to elevate someone to the bench, there is the possibility (if not the actuality) of a payback in many future cases. Thus, the fear of capture by the better-heeled side.

Similarly, there are sometimes allegations that even if the judges are chosen in a fair process, one side will be better situ-

⁶¹ See, e.g., *QVC Network Inc. v. Paramount Communications Inc.*, 635 A.2d 1245 (Del. Ch. 1993), *aff'd*, 637 A.2d 34 (Del. 1994).

⁶² *Id.* at 1246.

⁶³ See, e.g., *Harman v. Masoneilan Int'l*, 442 A.2d 487 (Del. 1982).

ated to capture their hearts as they sit on the bench. Commentators have long noted that, in general, repeat players have an advantage over one-time litigants.⁶⁴ This problem is exacerbated on a specialized bench, where repeaters sometimes know all of the judges, are well-acquainted with the eccentricities of the court's local rules and specialized law, and are positioned to find suitable vehicles for advocating changes in the law that they deem appropriate. One-time litigants operate at a severe disadvantage.

Once again, factors about corporate law and its practice make the Delaware experience encouraging. Those interested in appointments are sophisticated enough and wealthy enough to balance out each others' lobbying and efforts.⁶⁵ Thus, minimal evidence of capture at the appointment stage exists. As to capture while on the bench, the litigants are generally equal in terms of their financing and the quality of their representation. And, although many litigants are repeat players, they tend to play both sides of an issue, depending on the dispute. Consequently, their interests tend to be in quality per se, not in a particular result. For example, a corporation making a tender offer in one transaction may be fighting one in the next deal, giving it little incentive to bias the judges in favor of one particular view on any issue of tender offer law.⁶⁶

If the views of commentators like Ralph Winter, Frank Easterbrook, and Daniel Fischel are believed, then Delaware's success on this criterion also can be attributed, in part, to the constraints under which corporate management is said to operate.⁶⁷ These writers note that, although Delaware's apparent

⁶⁴ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

⁶⁵ Alternatively, they are all smart enough to save their money.

⁶⁶ This is not to say that undue influence and capture are not conceivable, only that they are less likely in a court run like Delaware's Chancery Court than in other specialized tribunals. In fact, although there has been no evidence of undue influence on appointments to Delaware's Chancery Court, controversy has surrounded a recent appointment to the Delaware Supreme Court. See *The Controversial Delaware Court Nomination: Did Skadden Arps Partners on the Nominating Committee Use their Clout?*, NAT'L L.J., July 11, 1994, at A17; John Close, *Corporate Control Alert*, AM. L., July/Aug. 1994, at 23; Nicholas Varchaver, *Justice Denied in Delaware*, AM. L., July/Aug. 1994, at 23. The Delaware Supreme Court also has a strong influence on Delaware corporate law. See *infra* text accompanying note 81.

⁶⁷ See, e.g., Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare*:

desire to attract incorporations could lead it to write law especially favorable to those making incorporation decisions, the state has not, in fact, always raced the other states to the bottom in terms of shareholder-protective measures. Instead, its substantive law is, in many ways, more solicitous of shareholders than the laws of other states. These commentators attribute this phenomenon to the fact that corporate managers' strongest incentive is to attract the outside capital that enables their businesses to expand.⁶⁸ In order to attract these investments, managers must put aside their own private interests and instead lobby for laws (or choose to incorporate in states) where the law promotes shareholder value.

If this proposition is true with regard to the substance of corporate law, it should be equally true regarding procedure. Unless shareholders believe they will receive due process in Delaware courts, they will be reluctant to invest in Delaware corporations. And since, as previously noted, observers need more than the minimal requirements of due process to believe a court is evenhanded, the incentives that motivate corporate management to favor laws that promote shareholder value also will work toward the adoption of systemic guarantees of fairness.⁶⁹

III. PORTABILITY

Under the criteria developed to determine the efficacy of a judicial system—quality decisionmaking, efficiency, and appearance of due process—specializing corporate law works well, at least for Delaware. To predict the future of specialized

Theories and Evidence, 9 DEL. J. CORP. L. 540 (1984); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983); Fischel, *supra* note 4, at 913; Winter, *supra* note 4, at 251.

⁶⁸ Easterbrook, *supra* note 67, at 545; Easterbrook & Fischel, *supra* note 67, at 403; Fischel, *supra* note 4 at 919; Winter, *supra* note 4 at 257.

⁶⁹ Indeed, one demonstration of this effect is the rapidity with which Delaware enacted law to assert jurisdiction over directors of Delaware corporations after the U.S. Supreme Court invalidated its sequestration statute. *See Shaffer v. Heitner*, 433 U.S. 186 (1977); *see also* DEL. CODE ANN. tit. 10 § 3114 (1977). Delaware's new measure does not serve management particularly well (in fact, it enhances their risk of liability), but it does provide a guarantee to shareholders that Delaware courts will be in a position to hear them when they assert claims against management.

dispute resolution in business cases it is next necessary to determine whether the Delaware experience is portable: transferrable to other states and to other areas of the law.

A. *Transfer of the Delaware Model to Other States*

The question, then, is how likely is it that other states—or more concretely, Pennsylvania—will duplicate the success enjoyed by Delaware. The answer, once again, depends on what is meant by success. Certainly, one reason states are considering specialization is to meet their adjudicatory needs more effectively. Accordingly, one measure of success is the one just applied to Delaware—quality decisions, efficient adjudication and public perception of fairness.

It is, however, highly likely that states are making this move for another reason as well: to capture a piece of the incorporation business that now flows so freely to Delaware. Indeed, in the preamble to the bill that would create the Chancery Court in Pennsylvania, the Commonwealth specifically refers to improving its “economic climate.”⁷⁰ Presumably, legislators expect that making the state’s adjudicatory procedure more attractive to those who make incorporation decisions, in-state chartering will increase and Pennsylvania will earn some of the incorporation fees and franchise taxes that currently flow into the treasury of Delaware. Moreover, they may be hoping that adjudication of such cases in Pennsylvania will enhance the Commonwealth’s influence on the substance of corporate law,⁷¹ and may even lead to an upsurge in business

⁷⁰ PA. S.309, *supra* note 6 (Preamble). In the same vein, the Philadelphia Bar Association’s Chancellor-Elect Lawrence Beaser, in discussing the Pennsylvania proposal, stated that “[a] specialized business court would encourage business expansion and development in Pennsylvania.” Hank Grezlak, *Beaser Sounds Call for Court Reforms: Incoming Chancellor Also Pledges Support for Needy Children*, LEGAL INTELLIGENCER, Dec. 3, 1993, at 1.

New York’s experiments with a commercial court is couched in terms of providing expertise, reducing backlog, and ensuring consistency. But “keep[ing] New York hospitable to business,” Gary Spencer, *Commercial Court Parts to Open in Manhattan*, N.Y. L.J., Sept. 14, 1992, at 1 (quoting Howard N. Lefkowitz of Proskauer Rose Goetz & Mendelsohn), and “improv[ing] the business climate,” Spencer, *supra* note 7, at 1 (quoting Governor Mario Cuomo), also are considerations that are mentioned.

⁷¹ Cf. LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 178 (1991) (describing the influence-building effect of forum shopping).

for one of the most powerful lobbying groups on these matters—the Pennsylvania corporate bar.⁷² Thus, another measure of success is the degree to which a specialized court will indeed attract new business.

Unfortunately, it is difficult to believe that Pennsylvania's new forum will be a success on any of these terms, for Delaware has advantages that no other state can ever enjoy. First, there is the history of its Chancery Court. As a product of post-Revolutionary War legislation, Delaware never removed corporate law from the mainstream of cases to give it special treatment. As a consequence there was never a time when the specialized rules that Chancery uses came under scrutiny. Equity courts, for example, never utilized jury trials, so that dispensing with them even in cases like *Harman v. Masoneilan International*,⁷³ which involved monetary relief and therefore would be tried to a jury in most states, is not remarkable for Delaware. In contrast, Pennsylvania's removal of corporate and commercial cases from the purview of the jury is bound to create problems. Indeed, it is thought to be one of the reasons the proposal has yet to be enacted.⁷⁴ Abolishing the jury flies in the face of Pennsylvania's historical decision to merge equity into law. Moreover, its substance-specific procedure generates the kind of suspicions generally created by departures from trans-substance.⁷⁵

The fact that Delaware's Chancery Court is not really specialized also gives it important advantages. Procedurally, the court can tailor its processes to the needs of corporate

⁷² See Thomas A. Slowey, *Pennsylvania Chancery Court is a Sound Proposal; But Merit Selection and No Jury Trials Stand as Controversial Components*, PA. L. WKLY., May 2, 1994, available in LEXIS, Legnew Library, Palawj File.

⁷³ 442 A.2d 487 (Del. 1982).

⁷⁴ Slowey, *supra* note 72, at 9.

⁷⁵ Significantly, in an earlier draft of the Pennsylvania legislation, the jury would have been retained in cases involving sole proprietors subjected to compulsory process. Pa. S. 308 § 814(b) (1), 176th Leg. (1993). Possibly, the drafters provided this exception because they thought that even if the public does not comprehend all of the problems associated with specialized adjudication, it would sympathize with the poor merchant forced to defend in Pennsylvania without the benefit of a jury of peers. The current version of the statute dispenses with this provision—probably because it would have required the kind of fine-line drawing that generates satellite litigation and inefficiencies. But Pennsylvania cannot have it both ways. To obtain efficiency, it must change procedure, even in sensitive areas. However, changing procedure undermines the appearance of due process.

cases without appearing to depart from trans-substantive law. That is, since the fluidity of equitable procedure applies to all cases in Chancery, the court cannot be suspected of choosing rules particularly felicitous to, say, the directors of Delaware corporations. In addition, because the court entertains cases outside the corporate area, citizens from all walks of life come into regular contact with the tribunal. Since they can experience the evenhanded process directly, they do not need the systemic guarantee of fairness that trans-substantivity provides.

From a substantive point of view, Chancery's noncorporate jurisdiction cuts down on the court's isolation and facilitates cross pollination. For example, the court encounters fiduciary duty questions in a variety of contexts. Thus it can approach corporate cases from a wider perspective. Moreover, Chancery has the tools to keep corporate law doctrines in line with developments outside the corporate sphere. Cross pollination is aided by the tradition in Delaware of jurists moving back and forth between Chancery and courts of general jurisdiction. Not only does this tradition provide a natural vehicle for cross pollination, but it also has the effect of making new appointments significant to a broad constituency, thereby reducing the influence of interest groups.⁷⁶

Pennsylvania's legislation does not, in fact, ignore these important ingredients to Delaware's success. But although its attempts to duplicate them are interesting, they are likely to be of limited utility. Procedurally, one way to enjoy the benefits of tailored procedures without raising the red flag of substance-specificity is to give the litigants a choice between a specialized forum and the courts of general jurisdiction. Federal tax law is administered on this model, and the right to litigate internal revenue matters outside the Tax Court is said to allay litigants' suspicions that the process is stacked in favor of the government.⁷⁷ Moreover, the willingness of taxpayers to

⁷⁶ Even so, some commentators have voiced concern regarding the public-regarding components of corporate law. See, e.g., Lucian A. Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Toward Proxy Contests*, 78 CAL. L. REV. 1073 (1990); Stanford J. Grossman & Oliver D. Hart, *Takeover Bids, the Free-Rider Problem, and the Theory of the Corporation*, 11 BELL J. ECON. 42 (1980).

⁷⁷ Dreyfuss, *Specialized Adjudication*, *supra* note 12, at 436; see also Jordan, *supra* note 11, at 752-54.

use the special tribunal shows outsiders that those positioned to know the court think its procedures are evenhanded. Providing this choice of forums does, however, have significant costs. The state must support two courts that decide similar issues; if the two do not perceive the law in the same way, the inconsistencies that develop may undermine the quality objectives of specialization. Furthermore, the side that expects to lose in the specialty tribunal is likely to engage in inefficient litigation strategies designed for forum shopping purposes.

Pennsylvania tries to capture the benefits of choice without paying these costs by making Chancery's jurisdiction exclusive,⁷⁸ while simultaneously recognizing choice of forum clauses.⁷⁹ The result is that, as in the Tax Court example, parties can avoid the forum at relatively low cost. That they choose to stay in the specialized court provides evidence that the court's procedures are fair. But, unlike the Tax Court model, this strategy allows the state to avoid the cost of maintaining two courts to hear business cases. It also eliminates the problem of inconsistent decisions, because the cases that are heard in other courts may not be decided under Pennsylvania law at all, or if Pennsylvania law is used, the court will apply it in a nonprecedent-setting manner.

Admittedly, this is a truly clever approach to the due process problem. It is not, however, a perfect solution. It applies only to parties who are positioned to bargain for a choice of forum clause, thereby leaving open the possibility that other litigants will receive less process than is due. Moreover, the power to opt out of Pennsylvania undermines the goal of attracting more adjudication to the Commonwealth. Finally, this solution does little to improve the quality of law or dispute resolution within Pennsylvania.

On the substantive front, the State does, however, have other ideas. First, the proposal's merit-appointment procedures create high standards for chancellorships. The appointment process is, however, very convoluted and rather costly. For instance, the process for choosing the nominating commission focuses rather heavily on balancing the party affiliation of commissioners. Although this focus was probably aimed at

⁷⁸ See Pa. S. 308, *supra* note 27, § 832(d).

⁷⁹ See, e.g., Pa. S. 308, *supra* note 27, § 302(b).

achieving impartiality, the procedure appears to be extraordinarily political. More important, this complexity will raise—indeed, already has raised—substantial questions about the care with which the rest of the Pennsylvania judiciary is chosen.⁸⁰

The legislation's second attempt to improve substance is more imaginative. By substituting commercial cases for the part of the docket that Delaware devotes to non-corporate equity cases, Pennsylvania will give its specialty court a broader perspective on issues affecting corporations than Delaware's Chancery Court enjoys. Since this part of the Pennsylvania court's jurisdiction includes nongovernance issues, the ability of managers to influence judicial appointments is substantially diluted. But even here, problems may arise. To keep the docket manageable (and perhaps to reduce the suspicions aroused by abolishing jury trials), business cases that involve consumers and workers are excluded from the court's jurisdiction. To be sure, issues such as health and safety, labor relations, and workers' compensation, are only tangentially related to the commercial and corporate governance areas in which the court is to develop expertise. However, removing these cases from the docket means that the Court will not see the impact of its decisions on real people. The quality of the common law it produces may suffer as a result.

Delaware's history includes another feature that will be difficult to duplicate. Delaware's quality of decisionmaking is facilitated by the way that Chancery and the Supreme Court of Delaware interact. In many other specialization contexts, review by a court of general jurisdiction is a mixed blessing. On the one hand, the generalist viewpoint provides an important check on the special court's isolation. On the other, lacking the knowledge the special court possesses, a generalist appellate court can easily tamper with output in a way that destroys all of the advantages of specialization. In Delaware, however, this is not a serious problem. Because of the state's small size, and because of the number of in-state corporations relative to that size, corporate cases make up a large share of the Supreme Court's docket as well. Its own expertise means that it usually can appreciate all of the factors Chancery took into account in

⁸⁰ See Slowey, *supra* note 72.

reaching its decisions. The Supreme Court's perspective may lead it to a different conclusion, but at least it has fully considered the same questions.⁸¹ In contrast, Pennsylvania exacerbates the problem of specialization by establishing both a trial and appellate specialized bench. This structure reduces the leavening that comes from generalist input and enhances the problems of capture. Moreover, circumscribing the role of the Pennsylvania Supreme Court can only lead to questions about the quality of that tribunal.⁸²

Delaware has two advantages that go beyond its history: its finances and population. Delaware is small and homogeneous; its revenue needs are modest. These factors make a difference in whether other states can produce a law and adjudication package that will fulfill the goal of attracting new incorporations and a difference in whether the citizens of these states will see the court as benefitting themselves.⁸³

First, there is the question of responsiveness. Delaware has more than just statutes, case law, and judges that appeal to those making incorporation decisions. It also has a legislature that responds quickly whenever incoherence develops or exogenous circumstances interfere with the legislature's intents with regard to corporations.⁸⁴ Surely, this ability to move quickly must be a strong selling point to corporate managers, who are aware that even carefully crafted laws may require change as new circumstances arise.

Indeed, Delaware's legislature is more than simply responsive—it seems to take a lively interest in producing a genuinely functional product. Compare, for example, its antitakeover statute with New York's.⁸⁵ The latter is another blunt instrument; Delaware, as usual, takes a nuanced approach, regulating only those offers that present structural problems. Com-

⁸¹ See, e.g., *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1992).

⁸² In Pennsylvania, this perception is enhanced by the fact that one of its Supreme Court justices was indicted for drug-related offenses while the proposal was under discussion. See *Slowey*, *supra* note 72. Pennsylvania is not unique, however, in having experienced this sort of problem with its judiciary.

⁸³ See generally *Herzel & Richman*, *supra* note 3.

⁸⁴ An example, once again, is the rapidity with which the legislature moved to re-instate its intent to assert personal jurisdiction over directors of Delaware corporations after the U.S. Supreme Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977). See DEL. CODE ANN. tit. 10, § 3114 (1977).

⁸⁵ DEL. GEN. CORP. L. § 203; N.Y. BUS. CORP. LAW § 912 (McKinney 1990).

mentators posit that the incorporation fees and franchise taxes explain the difference in approach. Their significance to Delaware's revenue base keeps the legislative eye on the corporate ball.⁸⁶ In contrast, most states—including Pennsylvania—are too big for these effects to take hold. Franchise taxes in these states will never be important enough to focus legislators' attention on corporate law at a level anywhere near Delaware's.

Second, intermeddling can be a problem. Because of its size, Delaware does not have as many interest groups concerned with the substantive content of its corporate law as other states have. Pennsylvania, for example, has substantial members of financial institutions, bondholders, shareholders, corporate employees, and entities who contract with corporations to exert—or try to exert—influence on legislation. Admittedly, some of these groups want the same things the corporations want. Others share the desire to increase state chartering. But some interest groups prefer law that enhances their substantive position, even if that reduces the number of in-state incorporations. To the extent these groups are more effective in other states than they are in Delaware—and Pennsylvania's anti-takeover law⁸⁷ and tax laws⁸⁸ indicate that they are very effective indeed—Delaware will always be able to offer the package of law plus adjudication that is the most desirable to corporations.

Third, for populous states, specialization raises difficult allocation questions. Judicial resources are limited. Those used to establish a specialized court must come from somewhere, and that place is most likely the courts of general jurisdiction. In Delaware, diversion of resources is not likely to be a problem. None of the courts is especially overworked, and besides, Chancery's broad equity jurisdiction means that the entire population of the state enjoys the benefits of a good Chancery Court. In other states, this diversion of resources may not be as acceptable. As between first-rate adjudication of corporate

⁸⁶ In 1990, corporate franchise taxes and fees accounted for approximately 20% of Delaware's general revenue funds. See Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 888 n.8 (1990).

⁸⁷ PA. BUS. CORP. L. §§ 2551-2556 (1989 & Supp. 1992).

⁸⁸ Slowey, *supra* note 72 (noting the difference in the corporate tax rates in Delaware and Pennsylvania).

governance issues and removing drug dealers from the streets quickly, few Pennsylvanians are likely to seek the deployment of first-rate jurists' talents in the manner that Delaware has chosen. Indeed, the Commonwealth's attempt to make the new court user-supported is probably motivated, at least in part, by this concern.⁸⁹

Of course, Pennsylvania may not think of itself as diverting resources. Rather, its legislators may believe that only special courts will attract high caliber jurists; that the same people would simply not serve on benches that see mainly drug deals. They may also believe that the efficacy of the courts of general jurisdiction will be enhanced if complex business matters were removed from their dockets. But even if these assessments are correct, public perceptions count. Utilizing public funds to exclusively support the interests of businesses and corporations is not likely to be greeted with favor.⁹⁰

Delaware has a final edge worth noting—the advantage of being the first mover. That is, as the first to establish a special court that has, in turn, attracted in-state charters, it has more to offer to corporations: more precedents, that resolve more issues, and present more varied fact patterns than any other state. Delaware law is, in short, unusually capable of exceptionally fine distinctions. Moreover, the continuity of the court's positions from case to case and situation to situation provides parties with an extraordinary ability to predict where the court is moving.⁹¹ Professor Roberta Romano, among

⁸⁹ See Pa. S. 308, *supra* note 27, § 23(f). This is also a problem for New York, where the commercial court idea has already been attacked for its "negative impact . . . upon the 'prestige and resources' of the Supreme Court and its non-commercial litigants." Martin Fox, *Bar Report Urges Expansion Of Commercial Parts*, N.Y. L.J., July 20, 1994, at 1 (quoting a New York County Lawyers' Association report).

⁹⁰ See, e.g., Jennifer Thelan, *Bar Governors Stay Neutral on Business Court Legislation*, AM. LAW., Mar. 1, 1994, at 2 (noting that legislation to experiment with a specialized business court in Los Angeles was blocked because it would have cost the State of California \$2 million to fund).

⁹¹ An example here is the case law regarding the validity of anti-takeover defenses. See, e.g., *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994); *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Cheff v. Mathes*, 199 A.2d 548 (1964). Of course, beauty is in the eye of the beholder; some commentators may view these cases as articulating vague and inconsistent standards. That possibility is the dangerous side of hearing many cases on similar

many others, believes that precision, rather than accuracy or any other factor, makes Delaware such an attractive place to incorporate.⁹² It is doubtful that any other state could hope to catch up.

B. *Transfer of the Delaware Model to Other Fields*

States attracted by the Delaware model have sought not only to emulate it, but also to expand upon it. Thus, Pennsylvania's decision to augment the court's adjudicatory authority over corporate cases with a range of commercial disputes is echoed in the proposals under consideration in both California and New York. In a most interesting development, even Delaware is considering the establishment of a hybrid Chancery/Superior Court to expedite the resolution of major commercial and business cases.⁹³ And so to the next question: how portable is Delaware's success in specializing corporate governance disputes to cases in other fields?

Here, it is possible to be somewhat more sanguine, for commercial law and practice share many of the characteristics that helped to explain the success of Delaware Chancery. Commercial law is, like corporate law, an area where specialized adjudication would be especially useful. Since most mercantile decisions involve considerable planning, a stable body of clear law is of particular value. Transactions occur quickly, and so rapid decisionmaking is advantageous. Most important, many legal issues depend on the customs of the trade.⁹⁴ Adjudicating these cases in a specialized court would obviate the need to call a succession of expert witnesses and result in more accurate decisionmaking.

Similarly, the costs of specialized commercial adjudication would mirror the costs of specialized corporate adjudication. Litigants in commercial cases are almost by definition solvent. They are often evenly matched. Cases are argued by sophisticated, repeat players, most of whom cannot predict the side of an issue on which they will appear the next time around.

issues.

⁹² Romano, *supra* note 5, at 280.

⁹³ S.J. Res. 28, *supra* note 9.

⁹⁴ See, e.g., U.C.C. § 2-207 (1994).

Thus, as with Delaware's corporate litigants, commercial parties lack the incentive to sway judges in particular directions. And because these cases almost always involve contractual arrangements, they even have a systemic guarantee of fairness: if the court were unfair, the parties would use choice of forum clauses to opt out of the state's adjudicatory mechanisms.

At the same time, however, there are reasons to be concerned about the role that these courts will play in resolving the business disputes of the future. For one, the match-ups in commercial cases are not quite as even as in corporate cases. For example, although Pennsylvania's legislation otherwise excludes cases involving natural persons, it does include cases involving "sole proprietors."⁹⁵ Such litigants are not likely to be as well financed and legally sophisticated as large commercial enterprises. To make matters worse, these less well-positioned litigants are the ones most likely disadvantaged by the elimination of jury trials.

There is also an important difference between the systemic guarantees of fairness available in corporate cases and those available in commercial cases. The ease with which the parties can avoid the forum provides the public with assurance that the *litigants* are treated fairly, but does not provide insurance that the court will fairly consider the interests of *nonparties*. After all, commercial players are not in competition for capital investments in the way that corporate managers are, and therefore do not need to be as concerned with public perceptions. Thus, there is little reason to expect that they will advocate rules that are favorable to outsiders. Indeed, there is reason to believe the opposite: recent scholarship has begun to demonstrate that the Uniform Commercial Code has been heavily influenced by the fact that merchants are routinely asked to comment on drafts of new versions of the Code, while consumers and other nonmerchants are excluded from the codification process.⁹⁶

The move toward specializing commercial disputes may, in

⁹⁵ See Pa. S. 308, *supra* note 27, § 20(b)(1).

⁹⁶ Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993).

addition, have severe efficiency implications. First, there is the issue of boundary disputes. Pennsylvania's commercial jurisdiction provision is quite complicated. The policy is easy to understand—the state is trying to limit the court to genuinely mercantile claims and exclude claims involving individuals and nonmerchant issues. However, to achieve that end, the jurisdiction provision has many exceptions, such as special rules for cases in which individuals are indispensable parties.⁹⁷ Furthermore, the law contains extensive transfer provisions.⁹⁸ The statute also includes a rather unique provision that denies the court's decisions *res judicata* effect in certain of these circumstances.⁹⁹ The opportunities here for sharp pleading practice, forum shopping, and satellite litigation are vast.¹⁰⁰

Specializing commercial disputes raises a second efficiency issue. Because of specialized courts' precision, which reduces the demand for adjudicatory services, and their expertise, which reduces the number of judge-hours required to meet the demand, specialized courts are sometimes thought to pay for themselves. This is not, however, likely to be the case for commercial disputes. The problem here is on the supply side. If specialized commercial courts turn out to be appealing, and if they indeed clear their dockets quickly, then they will generate a substantial amount of new business, for many of the cases that currently go to arbitration will come back into the public system.¹⁰¹

Granted, returning private cases to the public fold has some advantages. Critics of alternative dispute resolution ("ADR") have pointed out that extensive reliance on extra-judi-

⁹⁷ See Pa. S. 309, *supra* note 6, § 20.

⁹⁸ See Pa. S. 308, *supra* note 27, §§ 5412-5448.

⁹⁹ Pa. S. 308, *supra* note 27, § 837.

¹⁰⁰ The New York experiment provides even further grounds for concern. Although a final report on the experiment currently running in Manhattan is yet to be written, the judges who sit on the court have been interviewed about their experiences. Several were asked to describe the court's adjudicatory authority and, discomfitingly, they did not respond consistently. Most distressing was Justice Cahn, who said: "a commercial case is what I think it is." Gary Spencer, *Commercial Parts Praised at Bar Meeting*, N.Y. L.J., Jan. 27, 1994, at 1.

¹⁰¹ The Pennsylvania legislation actually provides for arbitration of some disputes. See Pa. S. 308, *supra* note 27, § 7362. Delaware's legislation, which has a \$1 million amount-in-controversy requirement, seems to be directed, at least in part, at increasing the number of lucrative cases requiring Delaware lawyers. See S.J. Res. 28, *supra* note 9.

cial devices can lead to a deterioration of the law. Since arbitration awards often are not published as reasoned decisions and some are expressly made confidential, the rules of law applied in these cases cannot be easily determined, scrutinized, or applied to similarly situated litigants. Moreover, because there is no public debate over awards, arbitrators receive little feedback on how they are doing or on the effects of their decisions on nonparties.¹⁰² If adjudication could be made attractive enough to reverse the popularity of arbitration, these problems would be diminished. They would not, however disappear. As noted above, specialty courts share with arbitration the problems of isolation and lack of percolation.

And then there is due process. Many of these proposals call for highly truncated adjudication of mercantile claims. For example, Delaware's plan, as proposed in May 1993 by the Commission on Major Commercial Litigation Reform, is to provide parties involved in major litigation—defined as exceeding \$1 million dollars in controversy—with the option of having their cases decided by a member of a special panel of judges in a summary procedure. This procedure would abrogate the jury-trial right, even in money damage cases. Scheduling and discovery would be expedited: parties would have limited periods (30-50 days) in which to disclose witness lists and documents to be relied on at trial, and to request other documents; depositions would have to be completed within 120 days of the filing of the answer; and all discovery would be completed within 180 days of the filing of the last answer. No motions for summary judgment would be allowed. Discovery would also be limited to 10 interrogatories per side and 10 requests to admit per party; each side could take the deposition of only four nonparties. The trial would also be truncated: parties could elect to forgo live witnesses and to submit their arguments entirely in writing. If live witnesses were used, the trial would be scheduled to begin within 30-60 days from the close of discovery and would last no more than a week: one day for opening and closing statements, with four days for direct and cross examination, allocated equally to both sides.

This plan is a major departure from trans-substantive

¹⁰² See Edwards, *supra* note 50; William N. Eskridge Jr., *Metaprocedure*, 98 YALE L.J. 945, 959 (1989).

process. Worryingly, the departure does appear clearly to benefit one side, for the party that starts out with more information and relies on technical legalistic arguments will find these rules less disadvantageous. Now, Delaware plans to use this process only when both sides consent. It can, however, be difficult at times to know when consent has been freely and knowingly given.¹⁰³ Furthermore, while Delaware plans to limit use of this forum to controversies that involve more than \$1 million, the high stakes at issue in such cases are not necessarily a measure of legal sophistication.

In the final analysis, it is difficult to see the current crop of proposals for specialized business courts as progress. Indeed, the move toward creating specialized commercial courts that dispense specialized commercial law is reminiscent of the Middle Ages, when the Law Merchant governed the legal relationships of those engaged in commerce.¹⁰⁴ The development of the Law Merchant was surely a major advance over the methods of dispute resolution that preceded it, but it could not endure once society became complex and interdependent. Lord Mansfield's achievement in folding the Law Merchant into the body of general law should not be forgotten when considering the current crop of proposals.¹⁰⁵

IV. INTERSTATE COMPETITION

Predicting the effects of specialized tribunals requires consideration of a final question. If states are, indeed, choosing

¹⁰³ An example is *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). See generally Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51 (1992). Cf. Judith Resnick, *Judging Consent*, 1987 U. CHI. LEGAL F. 43 (criticizing consent decrees on many of the same grounds noted here).

¹⁰⁴ See generally LEON E. TRACKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 1 (1983); Paul Lansing & Nina Miley, *The Right to a Jury Trial in Complex Commercial Litigation: A Comparative Law Perspective*, 14 LOY. L.A. INT'L & COMP. L.J. 121 (1991).

¹⁰⁵ I am indebted to Professor Allen Kamp for pointing out that in at least one draft the Uniform Sales Act included a special adjudicatory procedure for business cases. See Conference of Comm'rs on Uniform State Laws, Revised Uniform Sales Act §§ 59-59D (2d Draft 1941). The intent was to "get questions of mercantile facts settled competently," with a "higher degree of safety and reckonability than has been available in our law since Mansfield's jury." *Id.* at 252 (Introductory Comment). Significantly, this proposal went nowhere.

to establish specialized corporate and commercial courts as a means for attracting commerce, or in-state incorporations, or business for the bar, then the dynamics of the competition among states for these benefits will affect substance and procedure also. Thus, it is necessary to consider how the constellations of quality, efficiency, and process will be influenced by the desire of each state to take adjudicatory business away from the others.

Efficiency can be disposed of easily. At least with regard to corporate cases, efficiency is not a likely arena for competition. Cases cannot be adjudicated any more efficiently than Delaware is currently adjudicating them. Thus the only way states could move their dockets more quickly, would be to compromise on the due process or quality parameters.

A. *Due Process*

In some ways, competition on process would be a welcome development. As noted earlier, much attention has lately been paid to the ponderousness of American civil procedure. Experimenting with change has, however, proved to be difficult. Not only are the vested interests of dominant groups hard to ignore, there is always a suspicion that change will have unpredictable, adverse consequences on the least powerful members of society. But the proposals discussed in this Article stand on a different footing. Because of the limits these proposals place on adjudicatory authority, the entities affected will be, for the most part, sophisticated, well-heeled, and positioned to protect themselves through their own influence on the legislative process. As a result, innovations can be made without fear that they will impact unfairly on one particular side.

More important, the litigants in these actions have considerable freedom of movement. They can use choice of forum clauses and incorporation decisions to "buy" the tribunal that best suits their needs at relatively low cost. The result is a kind of market in adjudication services. As in other markets, competition creates discipline and inspires the participants to produce ever better products.¹⁰⁶

¹⁰⁶ Cf. Solimine, *supra* note 103, at 75 (making similar comments with regard to forum-selection clauses in general).

Two features of the pending proposals are particularly indicative of the benefits that may emerge. First, all would abolish jury trials for most cases. Civil jury trials have been the subject of considerable debate in recent years. They tend to take a long time and they impose heavy duties on the citizenry. Additionally, there are concerns about jurors' ability to reach accurate results, particularly in cases involving complex facts, complex law, or especially sympathetic circumstances. In fact, England abolished the civil jury,¹⁰⁷ and some states have made modest attempts to follow suit in particular circumstances.¹⁰⁸ In the federal system, Congress occasionally has structured rights of action in a manner that avoids jury trials;¹⁰⁹ litigants from time to time argue for the right to bench trials;¹¹⁰ and courts have become increasingly fastidious about withdrawing matters from the jury that are inappropriately decided there.¹¹¹ But despite this ferment, jury trials are said to enjoy great popularity. For that reason, virtually no attempts have been made to overturn the Seventh Amendment or analogous state constitutional rights.

In this context, a state's decision, in the face of competition in adjudicatory services, to abolish jury trials is extremely significant. It means that the assumption of popular support

¹⁰⁷ See Section 6(1) of the Administration of Justice Act (1933) (Miscellaneous Provisions). The Act contains exceptions for charges of fraud and claims of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage.

¹⁰⁸ For example, many states have curtailed jury trials in workmen's compensation and no-fault insurance cases. See, e.g., *Pinnick v. Cleary*, 271 N.E.2d 592 (Mass. 1971) (no-fault insurance); *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911) (workmen's compensation).

¹⁰⁹ See, e.g., *Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977) (upholding assignment of "public right" created by the Occupational Safety and Health Act to adjudication by an administrative agency rather than a jury).

¹¹⁰ The most popular argument for an exception to the right to a jury trial is the so-called complexity exception. See, e.g., *In re Financial Sec. Litigs.*, 609 F.2d 411 (9th Cir. 1979) (reversing lower court's refusal to hold jury trial on complexity grounds); see also Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980). But see Morris S. Arnold, *An Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980) (no such exception).

¹¹¹ See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) (raising the standard for admitting scientific evidence); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (lowering the standard for granting summary judgment).

for the jury may not be as strong as is generally thought. Demonstrated satisfaction with specialized courts could serve as a signal that the time has come to stop chipping away at jury trial rights, and instead to attack the system at its roots.

The other interesting feature of these proposals is their striking similarity to the recent changes in the Federal Rules of Civil Procedure. Both Delaware's hybrid court and the new federal rules impose limitations on discovery;¹¹² the New York experiment shares with the new federal rules increased reliance on early case conferences and judicial control.¹¹³ Once again, in the federal system, these changes are considered highly controversial. To the extent they can, many districts have opted out.¹¹⁴ As with bench trials, the use of these procedures by litigants who are well positioned to avoid them may be the best way to demonstrate their value. In the end, the proposed commercial and corporate courts may make their most important mark by serving as laboratories that provide a clear demonstration that particular innovations work and are valued.¹¹⁵

Important caveats are, nonetheless, in order. The best process for corporate and commercial litigants may not be appropriate for everyone on whom the law impacts. As noted above, there is an unsettling quality to a tribunal like Pennsylvania's, which will hear commercial and corporate cases but never see the consumers and employees who are affected by its decisions. Admittedly, decisions involving these interests will lack full *res judicata* effect.¹¹⁶ But *res judicata* is significant only if a judgment is collaterally attacked. Those affected by the court's actions may not have the resources to mount the appropriate challenges. More important, the legitimacy of a court depends on its judges accepting moral responsibility for affecting genuine parties.¹¹⁷ Because these special

¹¹² See FED. R. CIV. P. 30(a)(2)(A) (limiting parties to 10 depositions) and 33(a) (25 interrogatories).

¹¹³ FED. R. CIV. P. 16, 26(d), (f); Spencer, *supra* note 100, at 1.

¹¹⁴ 9 CIVIL TRIAL MANUAL (BNA) 572 (1994).

¹¹⁵ Certainly, the United States will never follow Britain and abolish the civil jury until people see that state cases are fairly tried even without juries.

¹¹⁶ See *supra* text accompanying note 99.

¹¹⁷ 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 2d § 3529 (1984) (noting the legitimacy function served by justiciability doctrines such as standing, mootness, and the ban on advisory opinions).

res judicata rules limit the reach of the courts' decisions, they undermine accountability and, ultimately, affect the reliability of decisionmaking.

Also worrisome is the fact that the group best positioned to affect procedural rules in any given jurisdiction is not made up of litigants or third parties: it is the bar. Professors Geoffrey Miller and Jonathan Macey have, for example, shown that the Delaware corporate bar has such heavy influence on Delaware corporate law that it substantially dilutes corporate management's efforts to create substantive law attractive to shareholders.¹¹⁸ If lawyer-leverage is a real phenomenon, it is likely to be even more true of procedure than it is of substance. Attorneys, after all, are affected more directly by procedure than by substance, and consequently may have more interest in influencing procedure. And because procedure is arcane, the public is less likely to be aware of what lawyers' influence accomplishes. If lawyers are also given the opportunity to forum shop and play jurisdictions off against one another, interstate competition for adjudication business could increase the extent to which jurisdictions create law that mainly benefits lawyers.¹¹⁹

B. Quality

That leaves the question that is perhaps of greatest interest to corporate and commercial litigants: the effect that the

¹¹⁸ See Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987). Two of the examples these authors give are Delaware's failure to require shareholders in derivative suits to post a bond, and the ease with which corporate books can be inspected. *Id.* at 511-12. Both rules tend to increase the number of cases that can be pursued successfully in Delaware, which may enrich the bar at the possible expense of corporate managers and shareholder values. Other commentators have also noted the influence of the bar on Delaware law. See Bebchuk, *supra* note 3, at 1448-51; William L. Cary, *Federalism and Corporate Law: Reflections on Delaware*, 83 YALE L.J. 663, 686-88 (1974); John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV. 759, 763 (1987).

¹¹⁹ This is not to say that there would not be checks on the bar's ability to create lawyer-favoring rules. As competition in the bar becomes more heated and clients become more cost-conscious, lawyers who increase expenses will be disfavored—as will states where the costs of adjudication are high. The bar's incentive will then be to lobby for streamlined procedure.

move toward specialized adjudication will have on the substantive content of commercial and corporate law. For corporate law, it is, unfortunately, no easier to decide this question than to determine how corporate law has been shaped by legislative competition among the states. Much ink has been spilled on the issue of whether corporate law is racing to the top or racing to the bottom, and this Article is not the place to review the literature or to choose a particular side. What can be said, however, is that the emergence of specialized corporate courts is likely to pick up the pace at which this race is run. Those who agree with Professor William Cary, and believe that state competition for in-state chartering drives corporate law to the bottom should, therefore, be particularly wary of these new forums. Those on the Easterbrook-Fischel-Winter side of the debate should see them as especially advantageous.

Of course, it can be argued that the debate on the legislative race is not apposite to the question of a judicial race, because the legislative debate is premised in part on the idea that legislators are motivated to please those who make incorporation decisions. Since legislators are accountable to the citizens of the state in a way that judges are not, it could be said that there is no judicial "race" at all; judges do what is right, not what is expedient for the state.

The distinction between judges and legislators is not, however, completely convincing. Judges live in their jurisdictions, and so they too want a healthy treasury. Those who run for retention election have some formal accountability to the electorate.¹²⁰ Judges also care about the success of the court on which they sit. Since success is often measured by filings, legislative overrulings, and funding, judges' actual incentives can be aligned rather closely to those of legislators.¹²¹ Furthermore, even if judges are insulated from popular pressure, they may think the normatively correct way to decide open questions is to be faithful to legislative intent, and to promote the interests of the state. Since specialized courts are more accurate—that is, they discern legislative intent and public policy better than generalized courts—competitive specialization may push the law to the top—or, depending on view-

¹²⁰ See, e.g., Cary, *supra* note 118, at 690.

¹²¹ See, e.g., Bebchuk, *supra* note 3, at 1453 n.74.

point—to the bottom, faster.

As to commercial law, even less can be said. Since all states adhere to the Uniform Commercial Code ("UCC"),¹²² there is little legislative competition for the best mercantile law, and so the question of interstate legislative competition has not been debated in recent years. But the absence of legislative competition does not necessarily coincide with an absence of judicial competition. The UCC requires judicial interpretation. Besides, the Code does not control every mercantile issue or dispute. A live question therefore remains as to the direction in which the race in commercial law will be run.

At least two reasons support the belief that the judicial race will be run to the bottom—that is, that it will tend to increasingly favor business interests over the interests of those affected by businesses, such as consumers, employees, and the environment. First, there is the problem of isolation. Pennsylvania, for example, has defined the jurisdiction of its Chancery Court in a manner that specifically excludes the possibility that any natural person will ever be heard as a party litigant. Thus, no opportunity exists for the court to see the effects of its adjudication outside the narrow context presented by the litigants. Admittedly, the adversariness of the parties may mean that one side or the other will act as a proxy for outside interests. This will not, however, always be the case. As anti-trust theory suggests, even diametrically opposed commercial interests negotiating at arms length can reach outcomes that create significant externalities.¹²³ The dangers of imposing costs on third parties are unlikely to be any lower in the context of adjudication than in the context of negotiation, at least when the forum for the adjudication is too isolated to appreciate the nature or extent of spillover effects.

Second, and even more problematic, is the fact that the court may, for reasons stated previously, decide cases in a way that enhances economic opportunities within the state, favoring in-state businesses as well as businesses that are best positioned to utilize choice of forum clauses. Of course, this analy-

¹²² All 50 states have adopted at least parts of the UCC. See 1 U.L.A., U.C.C., Pocket Part 1-2 (West 1994).

¹²³ See generally ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 1 (1978).

sis is basically the commercial variant of the classic race-to-the-bottom position in the corporate literature. The difference here, however, is that the counterarguments made by the top-bound theorists do not exist in the commercial context. That is, Easterbrook, Fischel, and their colleagues do not dispute that corporate managers can influence law, or that they have interests contrary to the interest of shareholders. Instead, they argue that management's strongest incentive is to attract new capital, and that this interest requires them to lobby for laws that increase shareholder value. But that element—the desire to please third parties—is not usually present in commercial litigation. For example, although merchants do have an interest in attracting consumers, they do not fulfill that interest by crafting good commercial law because no direct link between this law and purchasing decisions exists. Similarly, if there were full employment, commercial actors would be concerned about creating law that attracts high quality employees, but full employment has been rare in this century. Thus, in the end, commercial actors have less of a reason to sacrifice private values to the interests of others than do corporate managers.

Of course, it could be argued that any inclination to favor in-staters would also surface in courts of general jurisdiction. Certainly, claims have made that these courts might produce product liability rules that favor in-state plaintiffs.¹¹⁸ Because such effects have not been materialized, perhaps there is no danger here. On the other hand, competition occurs only when it is clear to the players that there are choices worth making, and then only if the litigants can control the forum in which they appear. The advent of specialized tribunals highlights the existence of alternatives, and the enforceability of choice of forum clauses makes these alternatives viable. Thus, even if there is no race now, one may begin when the dynamic of choice takes hold.

¹¹⁸ See, e.g., Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in *NEW DIRECTIONS IN LIABILITY LAW* 90 (Walter Olsen ed., 1988). But see, e.g., Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 *GEO. L.J.* 617 (1992) (concluding that, at least in states with manufacturing, there are offsetting incentives). See also Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 *GEO. L.J.* 583 (1992).

CONCLUSION

The success of Delaware's Chancery Court—or perhaps loudly voiced dissatisfaction with the litigiousness of American society—has brought new legislative attention to adjudicatory mechanisms. This opportunity for procedural innovation is extremely welcome, if not long overdue. However, the proposals currently under consideration have not been fully thought out. The success of Delaware's Chancery Courts is largely the product of Delaware's unique history and circumstances. Moreover, successful specialization in corporate law is partly the product of the way that corporate law is practiced. Thus, the portability of the Delaware corporate model to other contexts is an open question. Interstate competition in specialized adjudication may add a new dimension to the problem. The race to improve adjudication and to enhance economic opportunities may, as in corporate statutory law, be to the top. But the downside risk should not be ignored.