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Two Cheers for Specialization

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TWO CHEERS FOR SPECIALIZATION*

Jeffrey W. Stempel[†]

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INTRODUCTION

Commenting upon a scholarly paper is considerably easier if the paper presents obvious flaws or points of disagreement. Owing to the modern scholarly tradition, in law and other disciplines, of severely criticizing or even "trashing" the work upon which one is to comment, I had hoped to have the opportunity to pounce upon the principal paper in this Symposium. Unfortunately, Rochelle Dreyfuss's excellent assessment prevents me from riding the critical wave of the modern ethos. Much of her analysis is unassailable.¹

Nonetheless, I will attempt to raise at least a few countervailing views on the issue of specialized business courts. In addition, rather than simply praising Professor Dreyfuss, I will take the opportunity to build on her thorough analysis of the issue and raise some additional questions about specialized dispute resolution, both in business disputes and other contexts. I particularly want to further explore some of the generic

¹ I found myself facing essentially the same situation at the 1994 Annual Meeting of the Association of American Law Schools. At a Civil Procedure Section program on the new Federal Rules regarding discovery, Professor Dreyfuss presented with her usual thoroughness and insight a paper on amended Rules 26-37, leaving me essentially no room to contradict her. See Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9 (1994); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem,"* 46 FLA. L. REV. 57 (1994). See generally Symposium, *Recent Changes in the Rules of Pretrial Fact Development: What Do they Disclose About Litigation and the Legal Profession?*, 46 FLA. L. REV. 1 (1994). As the foregoing citations indicate, however, the elegance of Professor Dreyfuss's work neither stopped me from commenting nor made me particularly succinct.

issues of judicial specialization that she mentioned as only a minor element in her discussion of the Delaware Chancery experience and her view of its unlikely repetition for commercial law in Pennsylvania and elsewhere.

At the outset, some clarification of terminology is necessary. Judge Pauline Newman's Federal Circuit colleague, S. Jay Plager, for example, has criticized commentators for using the term "specialized" court too loosely² and ignoring the distinction between specialized subject matter and specialized judges.³ What, then, is the meaning of specialization? Traditionally, specialization means specialized subject matter; for example, a court has jurisdiction, usually exclusive jurisdiction, in a single area of law.⁴ According to Prof. Dreyfuss, "[s]pecialized courts usually are defined as forums of *highly* limited jurisdiction to which *all* of the cases of a particular type are channeled."⁵

Specialization thus traditionally is seen as a combination of "the extent to which particular kinds of cases dominate a

² S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 863 (1990).

Professor Revesz begins his article with a statement that "[t]here are . . . two Article III courts staffed by full-time specialized judges: the Court of Appeals for the Federal Circuit and the Court of International Trade." Building on that erroneous perception, Professor Revesz goes on to construct a theoretical matrix on the basis of which he then analyzes the desirability of vesting the review of administrative action in specialized courts with specialized judges (predictably he finds it undesirable), and gives his assessment of the relative merits of different types of such specialized courts.

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

Judge Plager's assessment is a bit misleading and unfair to Professor Revesz in that it both quibbles unnecessarily with the choice of terminology and because the Revesz position against specialized courts does not hinge upon the precise degree to which judges are "specialized." Rather, Revesz seems to oppose any appellate system where judges are assigned exclusive review of discreet categories of cases. See Revesz, *supra*, at 1165.

³ Plager, *supra* note 2, at 863. I should add, however, that Judge Plager's pique over nomenclature cannot be attributed to mere curmudgeonliness. He in fact praises Professor Dreyfuss for observing the distinction in her examination of the Federal Circuit.

⁴ See Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 4 (1989).

⁵ Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 5 (1995) (emphasis added).

court's work, and the extent to which particular kinds of cases are concentrated in a single court"⁶ with "the narrowness of a court's work [seen as] the more significant of the two dimensions."⁷ But, as Judge Plager points out, "it does not follow that if a court specializes in one or more areas of the law, the judges appointed to the court should be specialists in those areas."⁸ In discussing specialization, I shall endeavor to use the term to mean restricted and concentrated jurisdiction, even where the concentration is not exclusive or all-encompassing.⁹ I also will use the term as something of a catchall for tribunals that are in some way more focused in their mission, procedure or personnel than are the courts we normally refer to as generalist.

Definitional caveats aside, Professor Dreyfuss's paper prompts a number of responses. First, in the interest of at least pretending to be a tough critic, I want to raise just a little skepticism about the efficacy of the Delaware Chancery Court and Delaware corporate law. Although Professor Dreyfuss's endorsement of the Chancery experience generally is convincing, her presentation suggests a litigation nirvana that seems too good to be true—and therefore probably is.

Second, I want to discuss specialized adjudication from the perspective of the "sociology of the profession." In particular, I want to focus on whether wider adoption of specialized adjudication, in corporate or other contexts, will prompt improvement or diminution in the quality of our judges and their decisions. The issue of court organization is related to overall judicial quality—effective specialization may alter the entire adjudica-

⁶ Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 127, 218 (1991) (citing Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823, 826-27 (1977)).

⁷ *Id.*

⁸ Plager, *supra* note 2, at 858.

⁹ It bears re-emphasizing as well that, according to the traditional definition of specialization (exclusive, highly specialized jurisdictional focus), few of the courts we commonly regard as specialized are in fact specialized. Consequently, in the interests of brevity and pragmatism, I will, like Prof. Dreyfuss and others before me, refer to the Delaware Chancery Court and the Federal Circuit as specialist courts when they might more accurately be described as semi-specialized courts. Although I do not wish to take issue with Judge Plager at this point, it seems to me that specialization of subject matter frequently and perhaps inevitably leads to some greater specialization of judicial function.

tion system in which the specialized tribunal operates. Finally, lest we forget, the profession includes practitioners, as well as judges and academicians, whose quality must be considered in evaluating the costs and benefits of specialized tribunals.¹⁰

Third, I want to place today's analysis of the Delaware Chancery Court and Professor Dreyfuss' work regarding the Federal Circuit within the general literature of specialized courts. The academic literature has been largely pessimistic about specialized tribunals, and Professor Dreyfuss has agreed with much of it.¹¹ However, in her specific examinations of two specialized courts—Delaware Chancery and the Federal Circuit—she gives both institutions high marks. Her findings suggest both that the naysaying about specialization probably is overstated and that specialized adjudication looks better up close than it does from afar. Perhaps theoretical negativism about specialization is not only overstated but outright wrong in some important ways.

Finally, I want to propose that future federal specialized adjudication efforts be constructed like specialized Article I trial tribunals, reviewable by general jurisdiction Article III appellate courts. Existing literature (as supplemented by Professor Dreyfuss's thoughtful paper) suggests that this is emerging as the theoretically optimal mode of specialization, albeit with the caveat that every situation is context-specific. This model must be carefully targeted, however, and used only for substantive areas of law that are highly likely to react well to specialized court adjudication.

Notwithstanding these caveats, it appears that state courts, although not locked into the same constitutional system as the federal judiciary, could profit from imitating this hybrid model for certain sorts of high volume, patternized litigation that is relatively more susceptible to objective, politically neutral analysis. In addition, both Professor Dreyfuss's work presented today and her earlier study of the Federal Circuit sug-

¹⁰ Professor Dreyfuss does not make this oversight. She considers the role of the corporate bar on Delaware courts and law. See Dreyfuss, *supra* note 5, at 39-40.

¹¹ On the whole, however, I would characterize Dreyfuss as a moderate proponent of specialization, or at least someone who favors additional cautious experimentation with specialization. See Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377, 439-41.

gest that complete and narrow specialization does not work as well as what might be termed "semi-specialization."

I. RAISING ADDITIONAL QUESTIONS ABOUT THE DREYFUSS ANALYSIS OF DELAWARE

A. *Whither Goeth the Corporate Race?*

Professor Dreyfuss adopts what might be termed the more conservative and deferential view of the efficacy of Delaware corporate law in her paper and her presentation.¹² This approach generally views the market as making a statement with which one should not lightly quarrel. Because Delaware continues to attract incorporations, this view posits that the state's attraction is the superiority of its corporate law compared to other states, which lack a semi-specialized Chancery Court. Consequently, in a race to the top of corporate standards, legal rules and adjudications, Delaware's success in the market suggests that Delaware's legal product is good.¹³

Other respected commentators, however, view corporate law standards as a "race to the bottom" in which states scramble over one another to impose the fewest obligations upon corporate management in an attempt to keep and attract incorporations that will bring valued tax revenue to the jurisdiction.¹⁴

At one point near the end of her paper Dreyfuss acknowl-

¹² Dreyfuss, *supra* note 5, at 2, 29.

¹³ See Dreyfuss, *supra* note 5, at 2 (citing 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)); see also Roberta A. Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORGANIZATION 225, 280 (1985); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 258 (1977). My primary expertise involves civil procedure and litigation generally and I claim no sophisticated assessment of corporate law theory or practice. Consequently, I neither endorse nor reject what might be termed the Winter-Romano-Fischel hypothesis of a corporate law race to the top.

¹⁴ See, e.g., Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (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 (1987).

edges these conflicting views.¹⁵ Within a few lines, however, she implies that the reader need not worry about the naysayers and should accept the "race to the top" construct.¹⁶ For example, Dreyfuss cites Judge Ralph Winter,¹⁷ Judge Frank Easterbrook,¹⁸ and Professor Daniel Fischel¹⁹ for the proposition that the market indeed forces managers to prioritize shareholders' best interests, even to the point of lobbying the Delaware legislature aggressively on their behalf. Although this trio of prominent legal thinkers may be right, invoking their names as conclusive proof sounds a bit like citing Ronald Reagan, Dan Quayle and Phil Gramm for the proposition that any type of national health care initiative is doomed to failure.

It appears to me that this issue continues to be a debate rather than a settled question.²⁰ Perhaps I have been too long in the academy, where the intellectual rage is philosophical pragmatism, skepticism, and the contingency of knowledge, (a fad sufficiently powerful that it has enraptured even prominent conservatives such as Seventh Circuit Judge Richard Posner).²¹ Nonetheless, I have the uneasy feeling that it is too early in the day to deem the debate ended and declare the race-to-the-top school the clear, final and inevitable winner.

B. *Incorporation Behavior: A Flawed Yardstick?*

Related to that debate is the concern over the accuracy of using incorporation as the measure of the success of

¹⁵ Dreyfuss, *supra* note 5, at 40-41.

¹⁶ Dreyfuss, *supra* note 5, at 29-32.

¹⁷ Dreyfuss, *supra* note 5, at 22, (citing Winter, *supra* note 13, at 251).

¹⁸ Dreyfuss, *supra* note 5, at 22, (citing Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540 (1984)).

¹⁹ Dreyfuss, *supra* note 5, at 22, (citing Fischel, *supra* note 13, at 913); see also Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983).

²⁰ It does appear that the race to the top theorists are winning. This may result from the inexorable ascent of the better viewpoint. It also may stem from the bully pulpit of power that this side of the debate enjoyed during the 1980s through federal executive and judicial appointments or because faith in (even reverence for) markets is now ideologically in vogue.

²¹ See generally RICHARD A. POSNER, *OVERCOMING LAW* (1995); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

Delaware's specialization court. For example, one can argue with some force that incorporation decisions do not necessarily reflect infatuation with the state's law of corporate governance. The incorporation decision, particularly the decision to stay, may be influenced more by tax rates, the degree of regulator scrutiny history, inertia or other favorable factors only loosely related to the state's judicial structure. Dreyfuss herself invokes the example of the Delaware legislature's responsiveness to corporate law problems. In particular, she refers to the Supreme Court's 1977 decision, *Shaffer v. Heitner*,²² which rejected a plaintiff shareholder's attempt to obtain personal jurisdiction over the directors of Delaware corporations through "attaching" the corporate ledger in Delaware and forcing the defendants to come to the state to defend their "property."²³ As Dreyfuss notes, the legislature quickly passed a law providing that the director of a Delaware-chartered corporation constructively had consented to suit in Delaware.²⁴ Although the Delaware legislature may indeed appeal to investment capital, the Delaware judiciary does not necessarily have similar attractiveness.

In addition, the legislative response may be less pro-shareholder than Dreyfuss portrays it. The legislative response to *Shaffer*, for example, may have been prompted more by a feared decline in litigation-related revenue for the state economy than by any consideration of dissident shareholders' rights. The legislative reform may even have been the product of the brute lobbying force of the state's corporate bar.²⁵ Dreyfuss's description, however, puts a most positive spin on this event.²⁶ Of course, she may be positing correctly that a legis-

²² 433 U.S. 186 (1977).

²³ *Id.* at 192.

²⁴ Dreyfuss, *supra* note 5, at 23 n.73 (citing DEL. CODE ANN. tit. 10 § 3114 (Supp. 1990)).

²⁵ Dreyfuss points out that the Delaware corporate bar indeed appears powerful but also is evenly divided between plaintiff-defendant interests, management-shareholder interests and other significant interest groups that employ lawyers. See Dreyfuss, *supra* note 5, at 19. Dreyfuss, however, may have unduly minimized the degree to which the private bar so dominates a relatively small state government and Attorney General's office, such that private interests (even usually benign ones such as shareholder wealth) routinely overwhelm any serious reflection on public interests implicated in corporate litigation.

²⁶ Dreyfuss, *supra* note 5, at 29 ("Delaware's legislature is more than simply responsive—it seems to take a lively interest in producing a genuinely functional

lature acts wisely in part because it is influenced by a wise specialized court. But if her view of the court is incorrect it also undermines similarly optimistic views of Delaware law and the role of Chancery. Furthermore, Dreyfuss underemphasizes that even if Delaware has raced to the top rather than to the bottom, its success results from a mix of factors in addition to the Chancery Court's semi-specialized nature.²⁷

C. *The Elusive Determination of the Public Interest and Resistance to Special Interest Groups*

Much of the literature about specialized courts recognizes that a specialized court with indirect financial clout is subject to interest group pressure.²⁸ Dreyfuss has noted the considerable risk that competition with Delaware and those states considering specialized business tribunals will prompt other states to "favor the interests of the businesses who litigate before the specialized tribunal over the interests of the unseen entities affected by their decisions—consumers, suppliers, competitors, employees, investors, and the environment."²⁹ The point is well taken but Dreyfuss ignores that it applies with equal force to Delaware Chancery, at least in theory and perhaps in practice.

Most commentators have described Chancery's jurisprudence as largely tending to favor shareholders over incumbent

product.").

²⁷ Some attorneys in the Delaware corporate bar, however, give the Chancery Court even higher marks for speedy and less expensive disposition of cases than does Dreyfuss. For example, practitioners have praised Chancery for its use of streamlined summary proceedings for deciding applications to review corporate records and election results. See Edward P. Welch & Andrew J. Turezyn, *The Delaware Court of Chancery's Use of Summary Proceedings in Three Cases Shows that Complex Issues Can Be Decided Quickly*, NAT'L L.J., Oct. 10, 1994, at B4. If such praise is warranted, it seems likely that a specialized tribunal is more likely than a generalized court to successfully adopt a streamlined method of case disposition without unduly sacrificing accuracy or fairness. If the special court has not been compromised by special interests its expertise in the field should better enable it to carve away procedural fat without nicking the essential meat of due process we have come to expect from both special and general courts. At the same time, there lurks the danger that judges deeply steeped in a special field will tend to erroneously undervalue procedural protections out of a belief that they largely have "seen it all" before.

²⁸ See *infra* text accompanying notes 98-121.

²⁹ Dreyfuss, *supra* note 5, at 4.

management, although Delaware case law, especially that of the Delaware Supreme Court, permits management considerable discretion to reject or fight tender offers, even when the tender clearly offers short-term benefits to shareholders.³⁰ Although enhancing shareholder value may seem preferable to protecting management, it is far from clear that shareholders' rights should always take precedence over the interests of the public, the government and the communities populated by the corporation's employees.³¹ Indeed, the Delaware Supreme Court has expressly permitted corporate managers to consider these factors in determining whether to defend against a takeover.³² Because the effect of Chancery and its jurisprudence upon these entities remains sufficiently unclear, a bit of restraint is counseled before praising either the Chancery record or concept too effusively. For example, the leading Delaware decision permitting consideration of nonshareholder corporate constituencies, *Unocal v. Mesa Petroleum*, resulted when the Supreme Court reversed Chancery in part.³³

Additionally, since Delaware charters so many companies

³⁰ See, e.g., *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1153 (Del. 1989); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987); Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers: Bridging the Unocal/Revlon Gap*, 35 ARIZ. L. REV. 989 (1993) [hereinafter *Hostile Takeovers*]; Robert A. Ragazzo, *The Legitimacy of Takeover Defense in the '90s*, 41 DEPAUL L. REV. 689, 718-31 (1992).

³¹ See Frank J. Garcia, *Protecting Nonshareholder Interests in the Market for Corporate Control: A Role for State Takeover Statutes*, 23 U. MICH. J.L. REF. 507 (1990); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency States*, 61 GEO. WASH. L. REV. 14 (1992). However, shareholder preeminence seems by far the dominant view both in America and other capitalist nations. See *Owners Versus Managers*, ECONOMIST, Oct. 8, 1994, at 20. But see MARK J. ROE, STRONG MANAGERS, WEAK OWNERS (1994) (modern corporation arose from combination of political and economic factors and is not as shareholder-centered in objectives as modern conventional wisdom suggests).

³² See *Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946, 955 (Del. 1985). If a corporation determines to sell, however, it must then work to maximize the sale price for shareholders. See *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173, 182 (Del. 1986). Since *Revlon*, the Delaware Supreme Court only has forbidden consideration of nonshareholder interests when the corporation has determined to sell 100% of its stock. See Ragazzo, *Hostile Takeovers*, *supra* note 30, at 1030-35.

³³ See *Unocal*, 493 A.2d at 946, *rev'g*, NO. CIV.A. 7997, 1985 WL 44691 (Del. Ch. May 13, 1985). But Justice Moore, the author of *Unocal*, denies that the supreme court fails to protect shareholder interests. See Andrew G.T. Moore II, *The 1980s—Did We Save the Stockholders While the Corporation Burned?*, 70 WASH. U. L.Q. 277, 285 (1992).

with minimal physical in-state presence, there is little or no political cost to Chancery or to Delaware for deciding in favor of shareholders (or, for that matter, incumbent management or corporate "raiders") even if it results in lost jobs, relocated plants or decimated communities in another locale. Lawyer-economists may argue that ignoring such considerations is efficient and good. The alternative may be having corporate law matters adjudicated in a less expert (and even less competent) forum that has some arguable link to the nonequity entities affected by battles over corporate control and administration. It remains inconclusive, however, whether generalized or specialized tribunals are likely to take different tacks. Therefore more research is needed before rushing to embrace specialized courts as a way of minimizing the influence of extraneous factors and misplaced sympathy on adjudication. Furthermore, due to this lack of a firm factual assessment, we should not retain generalized courts out of a belief that they give a less-biased hearing.

Scholars should be more precise about what exactly they are praising when praising Delaware jurisprudence. For example, some of the leading opinions cited as evidence of the quality of Delaware jurisprudence were authored by the Delaware Supreme Court rather than the Chancery Court.³⁴ In many of these cases, the supreme court reversed or modified chancery court decisions.³⁵ In fact, many observers associate the per-

³⁴ See, e.g., *Paramount*, 571 A.2d at 1140; *Unocal*, 493 A.2d at 946.

³⁵ See, e.g., *Paramount*, 571 A.2d at 1140 (affirming result of Court of Chancery but reformulating issue and applying different rationale); *Unocal*, 493 A.2d at 946 (reversing Court of Chancery). Of course, it always is debatable whether the Chancery Court product was superior to that of the supreme court. To the extent that scholarly commentary favors the Chancery Court in these cases, this suggests that perhaps specialized courts really are superior, at least for corporate governance matters. If most commentary takes the opposite view it would provide another arrow in the quiver of those who wish to shoot down the specialized-court trial balloon. Reaction to this split has been mixed. Compare Garcia, *supra* note 31, (generally approving supreme court deference to corporate management and nonshareholder interest) and Ragazzo, *Hostile Takeovers*, *supra* note 30, at 990-95 with Jonathan R. Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467 and Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (criticizing decisions that look beyond sale price to shareholders).

Professor Dreyfuss regards the occasional divergence of Chancery and the Delaware Supreme Court as a healthy indication that the generalist court is pro-

ceived high quality of Delaware jurisprudence with the "generalist" supreme court rather than with the "specialized" chancery court.³⁶

Yet Delaware is hardly a perfect laboratory for comparing the relative virtues of generalized and specialized courts since, as Dreyfuss notes, Chancery's scope of equity jurisdiction is wide and its judges preside over matters other than corporate governance.³⁷ In addition, because such a high volume of corporate litigation comprises the Delaware Supreme Court's docket, the court is decidedly less generalist than the average state high court. Considering the complexity of many of the corporate law issues presented, the Delaware Supreme Court most likely exerts more time and energy on corporate governance disputes than its overall caseload profile would suggest.

In short, Delaware Chancery is perhaps best described as "semi-specialized," while the Delaware Supreme Court may be characterized as "semi-generalist." The courts' unique natures make it difficult to assess whether satisfaction with either court lends support to the desirability of specialization in other jurisdictions. In my assessment, while the Delaware experience supports at least partial specialization efforts under appropriate circumstances, it also warns against excessive specialization. Delaware's experience may bolster semi-specialization rather than provide a shining example of specialized courts. Considering Delaware's historic and jurisdictional features, which make it a particularly apt state for corporate law semi-specialization,³⁸ the state's success is something less than a conclusive statement in favor of widespread specialization of the nation's courts.

Nonetheless, my informal conversations over the years with practitioners suggest that lawyers who litigate corporate law issues generally praise both the Chancery Court and the

viding a meaningful review of the specialized court. See Dreyfuss, *supra* note 5, at 28. I am inclined to agree but again note, as does Dreyfuss, that the Delaware Supreme Court is not a purely generalist court, since it focuses on corporate governance as does much of the state's judicial business.

³⁶ The supreme court occasionally is biting in its criticism of Chancery. See, e.g., *Nixon v. Blackwell*, 626 A.2d 1366, 1381 (Del. 1993) (concluding that Chancery applied erroneous legal standards and made "findings of fact [that] were not the product of an orderly and deductive reasoning process").

³⁷ See Dreyfuss, *supra* note 5, at 20-21.

³⁸ Dreyfuss, *supra* note 5 at 25-32.

supreme court in Delaware. In general, they are most impressed with the intellectual caliber of the judges and their speed and efficiency in administering litigation. Perhaps, as Judge Gibbons suggests in his comments to the Symposium,³⁹ the quality of the judges and the degree of institutional support they receive determine judicial effectiveness. A high quality generalist court may be possible only where the local legal and political culture support it. Where judgeships are prestigious and sought after by top quality attorneys and filled according to a merit system, it may be that any variety of resulting court (generalist, semi-specialist or specialist) excels.⁴⁰ Even the most merit-based, nonpartisan selection system, however, will have trouble finding good judges if it fails to provide decent pay, prestige and logistical support for the office.

Apparently, the Delaware Supreme Court and Delaware Chancery occasionally disagree over significant issues of corporate law. If the frequency and magnitude of this disagreement is large enough, this would tend to alter analysis of the specialized court issue. For example, if the Delaware Supreme Court frequently and inconsistently countermands Chancery, the argument that specialized tribunals lead to greater precision is undermined. If one thinks the supreme court is correct, the view that specialized courts obtain more accurate adjudicatory results is similarly undermined. Applying generalizations about the Delaware experience to the debate over specialized courts requires a more in-depth analysis of the variations between these two prestigious Delaware courts.⁴¹

II. RECRUITING AND RETAINING THE BEST ADJUDICATORS

More than a dozen years ago, Judge Richard Posner argued with characteristic wit (and with a shot at the Left):

³⁹ See John J. Gibbons, *The Quality of the Judges Is What Counts in the End*, 61 BROOK. L. REV. 45 (1995) (comparing experience of specialization in state family courts and federal bankruptcy court as examples of relatively unsuccessful and successful specialization, respectively).

⁴⁰ See *infra* text accompanying notes 42-61 (discussing judicial quality).

⁴¹ These differences also have implications for the emerging view that specialized courts are most effective when used for trial adjudication but subject to general appellate review. See *infra* text accompanying notes 143-44.

One does not have to be a Marxist, steeped in notions of anomie and alienation, to realize that monotonous jobs are unfulfilling for many people, especially educated and intelligent people, and that the growth of specialization has given to many white-collar jobs a degree of monotony formerly found only on assembly lines. [Judicial activity] is repeated over and over and over again [and thus has] an undeniable element of the monotonous. . . . While there are able people who would like nothing better than to spend twenty or thirty years just judging appeals in tax or patent or social security or antitrust cases, I do not think it would be easy to maintain a high quality federal appeals bench on such a diet.⁴²

Despite Judge Posner's eloquence, I do not expect a sudden, furious exodus of judges leaving the nation's courts. Even with an unfortunate degree of repetition and other drawbacks,⁴³ the judiciary, particularly the federal bench, continues to attract many of the most talented lawyers and public servants.⁴⁴

⁴² Richard A. 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, 779-80 (1983) [hereinafter *Essay on Delegation*]. Judge Posner has implicitly reiterated these views concerning judicial motivation and satisfaction. See POSNER, *OVERCOMING LAW*, *supra* note 21, at 123-44; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 19.7, at 534-35 (1992); Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 S. CT. ECON. REV. 2 (1993).

No wonder Judge Gibbons left the bench for academia! Reading Posner's passage I am amazed that Judge Gibbons survived as he did for more than two decades on the bench. Can Judge Newman's return to private practice—or perhaps even to a chemistry lab—be far behind?

⁴³ See generally Lauren Robel, *Caseload and Judging: Judicial Adaptions to Caseload*, 1990 B.Y.U. L. REV. 3.

⁴⁴ See EMILY F. VAN TASSEL, *WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789-1992*, at 126 (1993) (of 2627 judges in study, only 15 resigned due to admitted dissatisfaction with job).

In touching upon this issue before this panel, 50% of which is composed of two renowned judges, I feel a bit like the character standing on line at the movies with Woody Allen and Diane Keaton in *Annie Hall*. In one scene Woody and Diane are standing on line next to an insufferable bore who regales his companion with pompous pseudo-intellectualisms about Marshall McLuhan, the media expert. See generally MARSHALL MCLUHAN & R. POWERS, *THE GLOBAL VILLAGE: TRANSFORMATIONS IN WORLD LIFE AND MEDIA IN THE 21ST CENTURY* (1968); MARSHALL MCLUHAN & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE* (1965); MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (2d ed. 1964). At that point, Woody pulls the real Marshall McLuhan from behind a curtain and McLuhan tells the blowhard that he completely misunderstands the media guru's writings. In similar fashion, saying anything about judges and their work or attitudes in front of Judges Gibbons and Newman exposes me to the imminent possi-

Yet, at the same time, Judge Posner understates the problem when he suggests that the "monotony problem" in judging varies greatly between generalist and specialist courts.⁴⁵ Repetition, boredom and frustration affect even the elite Article III federal courts of our system, and are disincentives to attracting and retaining the best jurists.⁴⁶

Similarly, in America's urban areas, federal trial courts are perilously close to becoming specialized criminal courts. Indeed, they may be on their way to becoming specialized drug courts. Critics of specialized courts often speak as though they are comparing the specialized courts to idealized general courts that brim with the vitality of a balanced caseload. When compared to the reality of presiding over drug busts and cargo thefts at Kennedy Airport, serving on a specialized court devoted to business disputes, even a narrow swath of business disputes, might look pretty attractive.

Hence, I hesitate to accept as gospel the notion that greater judicial specialization inevitably brings with it at least some decline in the quality of the adjudicators. The experience of the

bility of embarrassment via the "Marshall McLuhan Putdown." Notwithstanding this danger, I cannot resist some observations about the purported "judicial recruitment" problem in the specialized courts.

⁴⁵ See *infra* text accompanying note 55.

⁴⁶ See Robel, *supra* note 43, at 8-11. In addition to field surveys and statistics on attrition in the judiciary, two anecdotes stand out in my mind as illustrating this point. I can still vividly recall a program I attended as a young and fairly impressionable law student at which former Judge Marvin Frankel was one of the participants. A fellow student asked Frankel why he left the bench. With a tone of world-weariness, Frankel looked at my classmate and said, "if I had to give just one more jury instruction in a drug possession and distribution case—just one—I would have gone out of my mind." Frankel then took on a somewhat more sprightly but related tone saying "I was raised in the Jewish tradition that said you should be learning something new at your job, at least once in a while" and that judging no longer fulfilled that requirement for him. Judge Frankel was one of the 15 federal judges since 1789 to have resigned due to dissatisfaction. See VAN TASSEL, *supra* note 44, at 126-30. Joining Frankel in this club are former judges Robert Bork and Philip Tone.

More recently, I spoke with a newly appointed federal judge who was formerly a law school dean in the New York area and a former U.S. Attorney with extensive criminal law experience. I commented that I assumed he would be eager to adjudicate the crowded criminal docket of his court and was perhaps only mildly interested in civil litigation. "Oh no," he replied, "the civil stuff is what will make it interesting. The criminal matters can get pretty repetitive."

It appears to me that both these judges are right and that Judge Posner is both right and wrong.

Federal Circuit, in fact, as Dreyfuss chronicles in her lengthy 1989 case study, suggests quite the opposite. Significantly, many observers see a further improvement in quality of the Federal Circuit since its status was upgraded to that of an appellate court of Article III stature.⁴⁷ This suggests that the critical value in attracting top quality judges may not be due to the scope of the court's subject matter so much as it is the stature of the court—a point essentially made in Judge Gibbons' commentary comparing the family court and bankruptcy court experiences.⁴⁸

As Dreyfuss reminds us, and her earlier work studying the Federal Circuit confirms,⁴⁹ stature cannot be conferred magically from on high or manufactured overnight but rather requires history, tradition, performance and good fortune.⁵⁰ She generally praises the Federal Circuit's performance and few seem to disagree. Yet in the marketplace of legal stature the Federal Circuit seems less prestigious than the "regular" federal Courts of Appeals, including the "new" Eleventh Circuit that was created at approximately the same time by dividing the old Fifth Circuit. Although it is probably bad manners to say so on a program with a distinguished Federal Circuit judge, I am willing to bet that law students seeking judicial clerkships—from the most elite institutions to the most fledgling operations beginning to seek accreditation—would rather obtain a job clerking in the Second or Third or other generalist circuit than with the Federal Circuit.

This probably results from the misplaced elitism of a profession of resumé-builders seeking to maximize our options. The caliber of the Federal Circuit bench, however, seems at least the equivalent of the other circuits. In fact, the quality of Federal Circuit opinions frequently seems distinctly higher than that typically found in the some generalist Circuits.⁵¹

⁴⁷ See Dreyfuss, *supra* note 4, at 65-67.

⁴⁸ See Gibbons, *supra* note 39 at 46-47.

⁴⁹ See Dreyfuss, *supra* note 4, at 60-64.

⁵⁰ By contrast, in Professor Dreyfuss's view, circumstances have combined to make Delaware Chancery a court of stature unlikely to be replicated by the commercial court proposals under consideration in Pennsylvania. Dreyfuss, *supra* note 5, at 24-32.

⁵¹ This blunt opinion is an impressionistic one formed from years of reading cases. I have never systematically categorized or studied jurisprudence by circuit and, of course, I could be wrong.

What then, other than history, accounts for the stature differences? Are they inextricably linked to specialization? Will these differences disappear over time and are they cause for action or concern?

Specialized jurists generally are accorded less prestige than generalized jurists and certainly less prestige than they deserve. Part of the problem, of course, is the larger problem of federal-state status. Most specialized judges operate in state systems which by definition lack federal stature, much less Article III stature. Furthermore, many of the state specialty courts—such as the Family Court and the Surrogate's Court in New York—are devoted to topics that the profession's elite has denominated, unfairly in my view, as less important areas of law or even legal backwaters.⁵²

In essence, there is stigma in specialization. Problematically, it has become fashionable for those who urge a contraction of federal jurisdiction, in some small-stakes cases, to prioritize efficiency over correct procedure. At the risk of sounding antediluvian, I continue to hold to the romantic notion that courts really should take all disputes seriously and strive to adjudicate them accurately and fairly (so long as the cost of doing so is not prohibitive). Specialization is troubling when it appears to produce second-rate adjudication. Specialization that accepts second-class adjudication as a starting point is abominable and should not be supported by the legal profession.

Consequently, specialization initiatives should be warmly received only if they include reasonable attempts to close the "stature gap." One obvious avenue for this is to raise the trappings of stature attendant to the office. For example, any specialized judges in the federal system could be made Article III judges. The experience of the Federal Circuit, however, reveals that this alone will not completely close the stature gap. In

⁵² The former is unfairly characterized as a forum for hashing out marital spats and trading on gossip when it in fact addresses many of the key issues concerning our social fabric. The latter is viewed as the dusty domain of tortured Edwardian prose and arcane technicalities as well as something of a vulture's club for feasting on the remains of the decedent's accumulated wealth. Rumors of favoritism abound as well. But, when forced to reflect, we all would agree that the marshalling and disposition of citizen wealth is a most fundamentally important task in a capitalist society.

addition, there may be sound management reasons for declining to provide specialized judges with the life tenure and salary protections of Article III judgeship. For example, as many noted during the time of the post-*Northern Pipeline* debate regarding the future of bankruptcy judges,⁵³ the size of the specialized caseload may wax and wane. By contrast, the need for generalized judges is likely to remain steady and probably will increase. Moreover, whatever the projections of future caseload demands, a political ceiling also restrains the number of Article III judges that Congress and the Executive will permit.

My preliminary view holds that policymakers have revered the Article III judgeship excessively and have been too grudging in extending it to areas of specialization such as bankruptcy, international trade and challenges to administrative action. In reality, the steady demand for bankruptcy adjudication during the past twenty years suggests that fears of a sharp downturn in the market for special expertise may be overstated. Although the possibility still exists that caseloads will shift, in the event of a dearth of cases within specialist judges' areas of expertise, Congress could require Article III judges to hear cases according to need.

Other methods also may enhance the stature of specialized courts, if the body politic holds firmly to the view that adding waves of Article III specialized judges would inhibit flexibility, planning and fiscal health of the judiciary too greatly. Even without life tenure, specialized judges can enjoy stature enhancements. The most obvious way is through salary increas-

⁵³ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), held that bankruptcy courts, as Article I courts, could constitutionally exercise jurisdiction only over "core" bankruptcy matters and did not have final adjudicatory authority over those claims arising in bankruptcy that involved non-bankruptcy matters (such as state-law-based contract claims). The Court realized that its 5 to 4 decision would throw sand in the gears of the judicial machine and stayed its mandate. It took Congress until 1984 to rectify the problem by amending the statute to give bankruptcy judges authority over "core" bankruptcy matters but treat their decisions on non-core matters as the equivalent of a magistrate's report and recommendation.

Congress considered making bankruptcy judges Article III judges with life tenure and protection against salary reduction, but refrained, largely out of a fear that the future federal judicial docket might not require a full complement of bankruptcy judges. Although Article I judges have job security (10 years for bankruptcy judges), their positions can be more easily eliminated than those of Article III judges.

es. If we want specialized judges to shed their Rodney Dangerfield robes and obtain their proper share of respect, we probably should pay them more—significantly more—than we pay generalist judges of the same judicial system. Like it or not, in our society people tend to equate income and wealth with ability and prestige. A better-paid post generally will attract better candidates and generally will be more respected by users and viewers of the court system.⁵⁴ Income differential might well influence a potential nominee's choice. Even those nominees who do not "need" the money may be influenced by the perception of prestige higher salaries create. Most lawyers of stature have more than a bit of ego and like to be paid what they think they are worth.

In addition, specialized judges could be given superior facilities and equipment, including more staff and a generous travel or professional education budget.⁵⁵ For example, specialists who are at a disadvantage in recruiting law clerks perhaps should be allowed to interview and hire law clerks well before their generalist colleagues.⁵⁶ Specialty courts should be

⁵⁴ A historical anecdote tends to confirm that money matters more to prospective judges than the conventional wisdom cares to admit. See generally GORDON RICH, *A BRIEF HISTORY OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS* (1980). President William Howard Taft's original nominee for presiding judge of the court was Alfred Coxe, who was then a sitting judge on the Sixth Circuit. Why would a sitting regional circuit judge consider making such a switch? Perhaps it was the adventure of being on the ground floor of a great new project or the opportunity to exercise administrative leadership as presiding judge. Or perhaps it was the money. The Tariff Act of 1909, Ch. 6, § 29, 36 Stat. 11, 105 (1909), set the Customs Court judicial salary at \$10,000 while the normal Article III appeals court salary was \$7000. The distinction was controversial and was eliminated before any Customs Court judges took office. See RICH, *supra*, at 7-8. "Following the equalization of the salaries of judges, Judge Coxe indicated that he was no longer interesting in serving on the new court." Revesz, *supra* note 2, at 1154-55 n.174 (citing RICH, *supra*, at 8).

Although it is tempting to characterize Judge Coxe in hindsight as a venal and short-sighted jurist, most of us at least would be interested in the opportunity to increase our pay by 43%. For example, if an Article III federal district or circuit judge's pay increased by that proportion, they would earn around \$180,000 per year rather than the \$130,000 they currently receive.

⁵⁵ I remember as a law student rethinking my position about the relative prestige of the Court of Claims when I was told by a former law clerk that the building housing the court in Washington, D.C. was state-of-the-art and included an on-site health club facility. Of course, this did not prompt me to view the Claims Court as more prestigious than federal district courts, but it certainly raised the Claims Court's stature a notch when I found out it was receiving decent logistical support from Congress.

⁵⁶ Unfortunately, it appears that many judges view clerkship application dead-

the first to get new technologies, enhanced security⁵⁷ or any other perquisite of judicial office.

Ultimately, however, one cannot expect mere money and perks realistically to equalize the historic status gap between generalist and specialist courts. Some differential may be inherent in the history of the nation—generalist courts pre-date specialist ones. Furthermore, the enterprise of identifying a court as specialized is shadowed by the ethos of frontier democracy and the myth of the well-rounded citizen observed by deToqueville nearly two centuries ago.⁵⁸ Consequently, differentiating a court from the mainstream implies that both it and its subject matter are less important.

The twentieth century's focus on constitutional law and civil rights exacerbates this negative impression of specialized courts. This focus has become particularly pronounced since *Brown v. Board of Education*⁵⁹ and has shaped virtually all aspects of America's modern political community. It is no accident that the most prominent figures in modern American jurisprudence (whether judge, professor or practitioner) have been constitutionalists.⁶⁰ Not surprisingly, no court reformer has suggested a specialized constitutional court and such a suggestion would likely not be embraced by the profession.⁶¹

lines and restrictions as suggestions rather than commandments. The target time for law students to apply for federal court clerkships has crept up earlier and earlier in students' law school careers and now appears to feature second-year law students applying at the end of the Fall Semester. If specialist federal judges were "allowed" to interview and hire during the Fall Semester, the odds are that generalist judges would start doing so as well, regardless of any ostensible restrictions.

⁵⁷ After the murder of Eleventh Circuit Judge Robert Vance in 1989, the Judicial Conference of the United States explored the prospect of, among other things, equipping judges' cars with automatic starters. Congress so quickly balked at the \$300 per car price tag that the suggestion was never officially considered via an appropriation or authorization bill. John Murawski, *Torching of Judge's Van Puts Focus on Security*, LEGAL TIMES, June 29, 1992, at 2.

⁵⁸ See generally ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (1835).

⁵⁹ 347 U.S. 483 (1954).

⁶⁰ See, e.g., BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 164-66 (1994).

⁶¹ In addition, the prevailing view is that specialization is unlikely to work well where the specialized subject matter is one that is highly contentious. See Dreyfuss, *supra* note 11, at 414-18. Dreyfuss concludes as I do that a specialized constitutional tribunal fails on its merits as well. Judge Posner also agrees. See Posner, *Essay on Delegation*, *supra* note 42, at 780. It bears mentioning, however, that resistance to the notion logically would be both for legitimate reasons and

Arguments over Article I versus Article III status thus frequently skirt the quality question itself. If, for example, it is true that specialized tribunals attract less able personnel, restricting specialist judges to only Article I status will not solve this problem so much as it will sweep it under the rug. Although we can take some comfort in having a relatively small, elite, top notch Article III judiciary, this provides cold comfort if the base of our system is filled with Article I tribunals staffed with inadequately supported, inferior personnel deciding vital social matters.

The debate over the merits of specialization and the sociology of the professions also must consider the role lawyers play. Compared to the amount of theorizing regarding the effects of specialization on judicial recruitment, discussion of the effects of specialization on the behavior of lawyers has been neglected. The limited existing conventional wisdom suggests that lawyer quality will be relatively unaffected by specialization.⁶²

Lawyer behavior is even less considered than lawyer recruitment. Specialization, however, may offer some improvement to the profession. When appearing before a generalist judge who is relatively unfamiliar with a particular type of case, advocates today generally "overlawyer" by spelling out all conceivably relevant or useful facts in the record.⁶³ Lawyers in non-specialized courts provide extensive background information and outline the basic legal framework in briefs and motion papers, or they wax eloquent about the legislative background of the statute at issue in the case. A full-flowered litigating method should be less necessary before a specialized

reasons rooted in the constitutional bar's desire to preserve its relative stature in American law.

⁶² For example, Judge Posner implies that lawyers are not nearly so affected by the boredom and recruitment problem within a specialized court system as are judges. Posner, *Essay on Delegation*, *supra* note 42, at 779-80. Acknowledging that "most good lawyers today are specialists," he stresses the

distinction between specialization of function and specialization of subject matter. The antitrust lawyer specializes in one field of law but his daily rounds are more varied than those of the appellate judges—sometimes he is trying (more likely pretrying) a case, sometimes he is arguing an appeal, sometimes he is counseling a client. He does not "relate to" his field in a single way.

Id. at 780.

⁶³ For example, a witness at a deposition or on the stand may be asked for extensive explanation about the business or product involved in the litigation.

tribunal, and as lawyers realize this they will streamline their cases accordingly. While some cases undoubtedly will require extensive activity, in a specialized forum lawyers are likely to direct more of this activity toward the vital aspects of the case rather than to matters likely to be self-evident to the experienced, specialized judges.

Specialized court litigators and judges possibly will be drawn toward the minutiae of their cases as only experts can. Just as one school of thought argues that specialized or expert judges are more likely to discern and differ over the fine points of a matter,⁶⁴ specialist lawyers may prove even more adept than "generic" lawyers at turning mountains into molehills. Yet, for the most part, top-notch lawyers increasingly are specialists and therefore more likely than neophytes to discern which litigation activities are worthwhile. When these lawyers over-litigate a case it is usually a function of the high stakes involved in the case rather than a product of the lawyer's expertise.⁶⁵ Where specialized courts process less-complex cases involving less risk, lawyers as well as judges should be able to apply economies of scale to reduce the costs of proceedings. Unfortunately, this posited efficiency may advantage more powerful repeat litigants at the expense of weaker parties with less access to sophisticated legal assistance.

III. THE SPECIFICS OF SPECIALIZATION: HAVE SPECIALIZED TRIBUNALS RECEIVED A BUM RAP?

Reasonable lawyers can and do differ about the wisdom of increased specialization, yet both sides tend to agree on the ostensible advantages and disadvantages of specialized tribunals, even if they disagree about the significance of these factors. The standard arguments of those in favor of specialization, already well summarized by Professor Dreyfuss, posit that its advantages include: improved precision and predictability of adjudication; more accurate adjudication; more coherent articulation of legal standards; greater expertise of the

⁶⁴ See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); Posner, *Essay on Delegation*, *supra* note 42, at 781.

⁶⁵ See Geoffrey C. Hazard, Jr. et al., *Advertising By Lawyers: A Market Analysis*, 58 N.Y.U. L. REV. 1084, 1091-92 (1983).

bench; economies of scale that flow from division of labor, particularly including speed, reduced costs and greater efficiency through streamlining of repetitive tasks and wasted motions.⁶⁶

In contrast, an equally long list of arguments against specialization posits that a specialized court is less desirable for such reasons as its tendency to: attract lower quality jurists; become isolated and unable to reap the benefits of "percolation" and "cross-fertilization" that often provide additional information and current developments in the law to generalist courts; be vulnerable to interest-group manipulation, particularly in the selection of judges; lack independence since they are more easily monitored by the legislature and the executive; lack the widespread public acceptance and perception of fairness that traditionally surround generalist courts; lack geographic diversity; create difficulties in dividing the spheres of authority among a mix of generalist and specialized courts; and, make the judicial system less responsive to changes in the caseload mix of the court system.⁶⁷

Although observers on both sides of the debate over judicial specialization have marshalled sophisticated arguments, they tend to overstate their cases, creating caricatures of general and specialized courts. The tendency to overmodel the issue is so pronounced that one must search hard for examples of real world courts that actually meet the standard academic definition of specialized courts as "forums of highly limited jurisdiction to which all of the cases of a particular type are channeled."⁶⁸ The most widely cited and studied examples—Delaware Chancery, the Federal Circuit⁶⁹ and the federal Bankruptcy Court⁷⁰—are described more accurately as semi-specialized courts, since they either are not stringently limited or do not exercise complete dominion over an area.

⁶⁶ See Dreyfuss, *supra* note 5, at 10-20.

⁶⁷ See Dreyfuss, *supra* note 5, at 17-22; Posner, *Essay on Delegation*, *supra* note 42, at 777-90.

⁶⁸ Dreyfuss, *supra* note 5, at 5.

⁶⁹ See generally Dreyfuss, *supra* note 4.

⁷⁰ See TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS (1989); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669 (1993); Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large Publicly Held Companies*, 78 CORNELL L. REV. 597 (1993).

As Dreyfuss notes, Delaware Chancery was structured as a general equity court but happens to be located in a state where equitable relief is frequently sought concerning important corporate matters.⁷¹ Chancery frequently decides the most prominent corporate battles of the day—which tends to support Dreyfuss's assessment of its high quality—but lacks exclusive jurisdiction. Often disputants can litigate outside Delaware, even if Delaware substantive law is controlling.⁷²

The Federal Circuit, as Dreyfuss⁷³ and Judge Newman⁷⁴ have noted, is specialized but hardly narrow. Although predominantly known as a patent law court, it addresses a wide range of issues—including tax, Indian claims, trademark, childhood vaccine, veterans appeals and government contract law. Judge Newman even questions the very accuracy of describing the Federal Circuit as a court concentrating on patent law, since only sixteen percent of its filings are patent law cases.⁷⁵ In addition, as Dreyfuss has noted, the well-pleaded complaint rule, which requires that plaintiff's complaint present patent issues as part of an essential ingredient in a patent claim, further limits the Federal Circuit's ability to decide patent issues. Patent issues raised in defense still can be adjudicated in the other general jurisdiction regional federal courts.⁷⁶

Similarly, the bankruptcy court exclusively controls core

⁷¹ Dreyfuss, *supra* note 5, at 6.

⁷² See, e.g., *Lyman Lumber Co. v. Favorite Constr. Co.*, 584 N.W.2d 484, 489 (Minn. Ct. App. 1994).

⁷³ See Dreyfuss, *supra* note 4, at 30-52.

⁷⁴ See Pauline Newman, *The Sixth Abraham L. Pomerantz Lecture: Commentary on the Paper by Professor Dreyfuss*, 61 BROOK. L. REV. 53, 58-60 (1995); Pauline Newman, *The Federal Circuit: Judicial Ability or Judicial Activism?*, 42 AM. U. L. REV. 683, 683-84 (1993).

⁷⁵ This figure may be deceptive, however, in that it focuses only on the aggregate number of filings. As Felix Frankfurter and others have long noted, all cases are not created equal. See WILLIAM O. DOUGLAS, *THE COURT YEARS* 45 (1980). Some require distinctly more effort to adjudicate. It seems reasonable that patent cases may require more judicial time and effort than other cases on the Federal Circuit docket. In addition, the relative decline in patent cases as a percentage of the total Federal Circuit docket also can be seen as reflecting a reduced litigation rate resulting from the increased predictability and coherence brought to this area of law by the court. Cf. Dreyfuss, *supra* note 4, at 23-24. It appears, however, that the proportionate decline in the patent cases as a percentage of the docket results simply from the greater increase in other areas of the court's workload.

⁷⁶ See Dreyfuss, *supra* note 4, at 33-36.

bankruptcy matters but cannot render final judgment on non-bankruptcy legal claims affecting debtors or their estates.⁷⁷ In cases affecting an estate, Article I bankruptcy judges are limited to making reports and recommendations.⁷⁸ In addition, bankruptcy judge determinations are subjected to review by the generalist federal district and circuit courts.⁷⁹

The boundary between specialized and generalist courts, however, is not nearly so bright as commonly assumed. The supposedly general courts in our system may have a less diverse menu of cases than is commonly assumed—at least when one measures how generalized judges spend their time, particularly in the courtroom rather than in chambers.⁸⁰ The objections to specialized tribunals probably are overstated: generalized courts are not nearly so intellectually attractive and Olympian in perspective; specialized courts are not nearly so narrow and monotonous.

Professor Dreyfuss's "reality check" assessments of Delaware Chancery and the Federal Circuit refute the weight of academic conventional wisdom and reveal two semi-specialized courts that function fairly effectively. Although, as Dreyfuss emphasizes, it may be difficult to replicate the positive aspects of these courts, their tangible adjudication should not be dismissed casually with an "it can't work anywhere else" response. Professor Dreyfuss's endorsement of these courts in part results from their semi-specialized or hybrid nature. It also suggests that the array of criticisms directed toward specialization are overstated, even when applied to the prototypical narrowly specialized courts of theory.

A. *Quality*

I already have discussed the excessive pessimism regarding the quality of jurists in a specialized courts. As Judge Gibbons observes in his comments about Dreyfuss's paper, the manner in which judges are identified, recruited, screened and

⁷⁷ See 28 U.S.C. § 157 (Supp. VI 1994); *Northern Pipeline Constr. Co. v. Marathon Pipeline*, 458 U.S. 50 (1982).

⁷⁸ 28 U.S.C. § 157(c)(1) (Supp. VI 1994).

⁷⁹ 28 U.S.C. § 158 (Supp. VI 1994).

⁸⁰ See *supra* note 46, discussing anecdotes about federal judge inundation with criminal drug matters.

selected probably affects the quality of the bench more than does the composition of the particular court's doctrine.⁸¹ The perception of specialized court judges as inferior may result from our stewardship of these courts rather than of specialization generally. Further examination of particular specialized courts may indicate that the shortcomings of such courts stem from factors other than specialization.⁸² In any event, more research is needed.

B. *Isolation*

Similar to reservations about the quality of judges in a system of specialized tribunals, commentators also have overstated their isolation argument. Critics of specialized courts contend that they are less likely to render sound decisions because of their lack of exposure to the range of cases, legal theories and doctrinal refinements enjoyed by generalist judges.⁸³ In addition, because specialized courts at the appellate level are the proverbial "last word" on their subject matter, they are thought to have less "percolation" of ideas than the regional variation of generalist appellate panels.⁸⁴

The percolation argument typically is advanced with the federal appeals courts as the implicit model. The percolation hypothesis works best where courts are dispersed geographically and given independent authority. This allows alternative lines of analysis to develop without the truncation that may result from early and tight judicial control of a topic. Of course, this percolation and cross-fertilization often comes at the cost of increased expense and delay, as well as decreases in preci-

⁸¹ See Gibbons, *supra* note 39, at 46-47 (contrasting generally high quality of federal bankruptcy court with less satisfactory experience of state family courts).

⁸² See Gibbons, *supra* note 39, at 47.

⁸³ See Dreyfuss, *supra* note 5, at 17; Posner, *Essay on Delegation*, *supra* note 42, at 787. As a possible example of the dangers of specialist oversight, see Committee on Patents, Association of the Bar of the City of New York, *The Fromson Rule: Should the Respect for Patent Rights Take Procedure Over the Attorney-Client Privilege*, 49 RECORD 969 (1994) (criticizing Federal Circuit for insufficient protection of privilege in order to focus on substantive patent law outcome). I note Professor Dreyfuss was a member of the Committee on Patents at the time of the Report.

⁸⁴ See Dreyfuss, *supra* note 5, at 17; Posner, *Essay on Delegation*, *supra* note 42, at 787.

sion, predictability and coherence.⁸⁵ Although further empirical experience is needed to evaluate this tradeoff, the question itself suggests that specialized courts have been maligned too greatly. Under this model, percolation and cross-fertilization may be worth sacrificing for greater precision and coherence. Looking to percolation in the state systems, however, yields the opposite result.

While the percolation thesis falters when applied to a state system where courts and judges are in closer geographical and cultural proximity, it is somewhat workable in larger states. For example, the four intermediate appellate departments in the New York judicial system often differ on issues—as do panels within each department and trial court judges—even though all are ostensibly obliged to follow intermediate appellate precedent, even that of other appellate departments. Thus, when the New York Court of Appeals reviews a Second Department case that arose from a dispute in Kings County, the high court often has an array of alternative approaches to consider. Consequently, the posited benefits of percolation seem genuine.

Percolation-based arguments against actual specialization, however, only provide a loose fit between theory and reality. Despite the wide adherence to the percolation and cross-fertilization arguments, there appears to be no dramatic evidence of specialized courts making erroneous decisions, deciding issues too quickly or too firmly, or basing their decisions on too narrow a base of fact, law or nonlegal information. Most of the examples cited in support of this argument against specialized courts have referred to generalist court episodes of late-breaking epiphany, and rhetorically ask: what would have happened if a specialized court had addressed the issue?

The implicit answer is that doctrinal or other refinements designed to overcome injustice are less likely to occur in the specialized court. This argument seems unpersuasive. For example, commentators have noted that in the famous *Dalkon*

⁸⁵ During the past decade, the seemingly prevailing scholarly opinion concluded that intercircuit conflicts were not a sufficiently serious problem to merit greater Supreme Court review of such conflicts. See JOHN SEXTON & SAMUEL ESTREICHER, *THE SUPREME COURT AND ITS WORKLOAD* 1 (1986). However, a recent study suggests that a more serious intercircuit conflicts exist than had been previously thought. See Marcia Coyle, *Study: Circuit Conflicts Are Left Unaddressed*, *NAT'L L.J.*, Oct. 17, 1994, at A18.

Shield litigation, defendant A.H. Robins initially succeeded with a defense strategy that denied any liability, failed to produce incriminating documents, and attempted to make every case a referendum on the worth of each plaintiff.⁸⁶ For the first few years of the litigation, most generalist courts permitted A.H. Robins to probe extensively during discovery into each plaintiff's personal sexual history—an experience sufficiently uncomfortable to prompt many plaintiffs into earlier settlement for less money.⁸⁷ Some courts permitted such matter to be introduced at trial, and this may well have aided in some of the early defense verdicts in the Dalkon Shield saga.⁸⁸

But in the mid-1980s, the A.H. Robins defense began to erode and soon failed as a result of different judicial attitudes towards limiting the admissibility of evidence and the scope of discovery in order to protect women's privacy.⁸⁹ In addition, witnesses and suppressed documents surfaced that refuted earlier A.H. Robins's assertions and tended to ease plaintiffs' means of proving negligence or even willful disregard of plaintiffs' rights.⁹⁰ In short, judges got tougher on Robins and

⁸⁶ In particular, A.H. Robins argued that the infertility or infection allegedly caused by the Dalkon Shield could have resulted from the other factors such as pelvic inflammatory disease that arguably was correlated to venereal disease or multiple sex partners or both. See MARSHALL B. CLINARD, *CORPORATE CORRUPTION: THE ABUSE OF POWER* 105 (1990); SHELDON ENGELMAYER & ROBERT WAGMAN, *LORD'S JUSTICE* (1985); MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN & THE DALKON SHIELD* (1985); Richard L. Marcus, Book Note, 99 *HARV. L. REV.* 875 (1986).

⁸⁷ See, e.g., Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 *U. ILL. L. FORUM* 457; see also Roger Tuttle, *The Dalkon Shield Disaster Ten Years Later—A Historical Perspective*, 54 *OKLA. L.J.* 2501 (1983); Marcus, *supra* note 86 at 876 n.7.

⁸⁸ See, e.g., *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984).

⁸⁹ See, e.g., *Tetuan*, 738 P.2d at 1224-27; *Palmer*, 684 P.2d at 197-200.

⁹⁰ See CLINARD, *supra* note 86, at 105; ENGELMAYER & WAGMAN, *supra* note 86, at 194-226. A particularly embarrassing moment for Robins occurred when Roger Tuttle, a former in-house lawyer then teaching law school, testified regarding the existence of certain knowledge and documents about the shield that had not been properly shared with plaintiffs in response to valid discovery requests. See Andrew Blum, *Larger Robins Probe Under Way?: Indicted Expert Denies Charges*, *NAT'L L.J.*, Mar. 21, 1988, at 10; Charles P. Alexander, *Robins Runs for Shelter: The Drugmaker Files for Bankruptcy to Cope with Dalkon Shield Disaster*, *TIMES*, Sept. 2, 1985, at 32.

This information eventually surfaced and proved crucial in spurring the plaintiff awards that triggered the mammoth A.H. Robins bankruptcy and a special claims tribunal for Dalkon Shield victims. See Georgene M. Vairo, *Reinventing*

were gentler on plaintiffs as the generalist courts eventually percolated and cross-fertilized toward justice.⁹¹

Incidents like these are not exactly ringing endorsements of generalized courts, however. These generalist courts took more than ten years to begin to adjudicate these cases fully and fairly.⁹² In addition, episodes like these do not establish a compelling basis for doubting that specialized courts will learn from earlier mistakes. To be sure, when legal issues are dispersed among several courts with independent authority, percolation and reconsideration of error are at least partially facilitated. However, this advantage of generalist courts (especially in the far-flung federal system) is probably overstated.

Specialized courts could be established to allow for review of trial court decisions by a variety of generalist appeals courts. Indeed, theorists suggest this may be the optimal model

Civil Procedure: Will the New Procedural Regime Help Resolve Mass Torts?, 59 BROOK. L. REV. 1065 (1993); Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 FORDHAM L. REV. 617 (1992).

⁹¹ Most observers see this latter regime as the correct one. The earlier, wrong-headed approach to the Dalkon litigation, which was credulous of A.H. Robins and ineffective in enforcing discovery rights but simultaneously harsh on plaintiff privacy and prejudice rights, probably also resulted from judicial insensitivity that abated because of scholarly and popular criticism, as well as increasing social awareness of women's issues. But whatever one's view, there is no denying the judicial shift.

⁹² I realize I am mixing apples and oranges by analogizing from tort law. Most suggestions favorable to specialization advocate it for contract, corporate or commercial disputes and often expressly reject specialization for more value-laden or less objectively quantifiable subjects such as torts, products liability, civil rights or constitutional law. See *supra* text accompanying notes 59-61. Furthermore, the Dalkon Shield litigation may not be the most apt illustration, both because it is controversial and because the switch in adjudication did not involve substantive legal doctrine so much as procedural doctrine, and all courts must have a set of procedural rules or norms. But to some extent that is my point: whatever wisdom comes from cross-fertilization and percolation will be essentially as likely to descend upon specialized tribunals as upon the generalist courts.

By way of other examples of percolation-prompted shifts in the law, see William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant With the Economic and Psychological Dynamics of the Home Sale and Loan Transactions*, 70 VA. L. REV. 1083 (1984). See also JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW §§ 4.6-4.7, 4.10(d), at 150-54, 166-87 (4th ed. 1991) (discussing Supreme Court's switch regarding interpretations of the Tenth Amendment (in less than 10 years, no less!), incorporation of Bill of Rights guarantees through the Fourteenth Amendment, altered scope of legality of federal legislation based on interest commerce power, change in perspective about Article I courts); CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 102, at 752-53 (5th ed. 1994) (discussing eventual demise of the *Enelow-Ettelson* doctrine).

for specialization.⁹³ In addition, even a wrongheaded doctrine enunciated and enforced by an all-powerful specialist appeals court is subject to revisitation in subsequent cases. Prevailing theory suggests that problematic legal rules are more likely to be relitigated.⁹⁴ Furthermore, trial judges subject to wrongheaded rules—whether by generalist or specialist courts—probably will attempt to modify the worst features of the rule. They will tend to ignore, distinguish or misapply the rule, even to the point of disobedience, in order to enervate the bad rule or prompt appellate reconsideration.⁹⁵ Although percolation may be easier under a generalist structure, it is not impossible in a specialized regime.

Similarly, the cross-fertilization argument is caricatured. Simply because a judge sits on a specialized court does not mean that he or she is a narrow person with no interest in law or life generally. Just as specialist lawyers have broad professional and personal interests,⁹⁶ so do specialist judges. There is no solid basis for assuming that specialist judges are any more provincial than are judges, law professors and lawyers generally. Moreover, the practitioner and academic consensus seems to be that specialist courts (such as Bankruptcy and the Federal Circuit) improve in personnel and product when given greater stature and incentives to join the bench.⁹⁷

⁹³ See *infra* text accompanying notes 143-62.

⁹⁴ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1, 52 (1984).

⁹⁵ Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents*, 46 STAN. L. REV. 817, 820-28 (1994); Michael S. Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7-8 J.L. RELIGION 33, 85-87 (1989-90).

⁹⁶ See Nadine Brozman, *William Kunstler Makes Connections in the Course of His Television Acting Debut*, N.Y. TIMES, Oct. 18, 1994, at B26 (describing various activities of prominent civil liberties lawyer); Jan Hoffman, *People v. Hamlet: A Case of Infinite Jest*, N.Y. TIMES, Oct. 18, 1994, at B1 (describing mock trial of Hamlet where the Prince was represented by Daniel J. Kornstein, a New York litigator and author of *Kill All the Lawyers? Shakespeare's Legal Appeal* (1994) and numerous other law and literature works).

After the presentation and discussion of Prof. Dreyfuss's Pomerantz Lecture, I encountered several judges of specialized courts at a post-program reception. Even in brief conversation, they reflected substantial breadth of professional knowledge and interest outside their courts' own fields of specialty.

⁹⁷ See Gibbons, *supra* note 39, at 47.

C. Interest Group Capture

Perhaps the most serious charge against specialized courts, besides the quality problem, is that they are more prone to interest group dominance or even "capture." The argument assumes that placing all of a substantive legal area's "eggs" in the "basket" of a specialized tribunal will make the court so attractive that special interest groups will devote greater resources to influencing its composition and operation. This argument, which builds on public choice scholarship of the past three decades,⁹⁸ assumes that these interest group resources will succeed in gaining influence and that dominant groups will fail to reflect public sentiment generally or the public interest.⁹⁹

Prevailing theory on specialized courts posits that they frequently are targeted by interest group activity and are more likely than are generalist courts to be "captured" by powerful interest groups¹⁰⁰ and become indirectly politicized. Although Dreyfuss suggests that the Chancery Court has not encountered this particular problem, recent news reports in Delaware suggest that at least the perception of interest group politicking surrounds the Delaware courts.¹⁰¹ Generalist courts

⁹⁸ Particularly, JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1964); Mancur Olsen, *THE LOGIC OF COLLECTIVE ACTION* (1965), and their progeny. To some extent the entire public-choice movement can be seen as offspring of JAMES BUCHANAN ET AL., *A THEORY OF SOCIAL CHOICE* (1957).

⁹⁹ Of course, some public choice theorists would argue that the notion of a public interest is merely romantic nostalgia mixed with eighth-grade civics, but the general view across the political spectrum is that fair observers can often distinguish between private-regarding and public-regarding legislation and adjudication. See generally Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

¹⁰⁰ See *infra* text accompanying notes 108-11.

¹⁰¹ Earlier this year, for example, former Delaware Supreme Court Justice Andrew G.T. Moore II, a 12-year veteran of the Court, was "ousted by the state's judicial nominating commission," which declined to renominate him for a 12-year term. *Ex-Judge Joins Wasserstein*, WALL ST. J., Aug. 18, 1994, at B5.

Mr. Moore was viewed by members of the corporate-takeover bar and institutional-investor groups as a critic of hostile takeovers and as relatively sympathetic to shareholder interests. Both groups lobbied strongly against his removal, which sparked allegations that people connected to the New York law firm Skadden, Arps, Slate, Meagher & Flom influenced the outcome. Skadden Arps often has represented acquirors in hostile bids.

Mr. Moore's successor, Carolyn Berger, a judge on the Delaware

Court of Chancery, was among the founding lawyers when Skadden opened its Delaware office in 1979, and several Skadden partners in Delaware have been influential in advising Governor Thomas Carper on matters involving courts and judges. Governor Carper and Skadden Arps have strongly denied that the law firm influenced the change in the court.

Id.; accord Diana B. Henriques, *Top Court Under Fire: Critics Say Politics Is Hurting Delaware Judiciary*, N.Y. TIMES, May 23, 1995, at B1.

Just as I am urging restraint in judging specialized tribunals, I would not make too much of this episode in particular. I emphasize that no newspaper account of the Moore-Berger switch has presented any evidence of any impropriety. As Dreyfuss noted in her paper, "minimal evidence of capture at the appointment stage exists," and the litigants equal footing in terms of financing and representation protects against capture while on the bench. Dreyfuss, *supra* note 5, at 22.

Nonetheless, it was the first time in approximately six decades that a sitting Delaware Supreme Court Justice was not reappointed. See Richard B. Schmitt, *New Judge on Delaware Top Court Is Viewed as Friend of Shareholders*, WALL ST. J., July 7, 1994, at B2. Furthermore, as Dreyfuss also notes in her paper, even an unfounded perception of unfairness can do substantial damage. Dreyfuss, *supra* note 5, at 15 (describing episode where existence of International Trade Commission was deemed a violation of the General Agreement on Tariffs and Trade merely because its procedures, although meeting American due process standards, were different from those of other courts). According to one report, the "reasons reportedly given by the nominating panel—that [Justice Moore] was prone to injudicious outbursts at attorneys and others from the bench—struck many as odd," Schmitt, *supra*, at B2 (quoting Columbia Professor John Coffee: "if plaintiffs' attorneys were making the choice, they would be somewhat happier with Carolyn Berger than Andrew Moore"), and perhaps indicate the acidic nature of rumor and suspicion at work. However, Justice Berger has been characterized as at least as pro-shareholder as was Justice Moore, even though they held opposite views on some corporate law issues where Chancery and the supreme court differed. *Id.* (citing *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993), *rev'g*, No. CIV.A.9041, 1991 WL 194725 (Del. Ch. Sept. 26, 1991) and *Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985), *rev'g*, No. CIV.A.7997, 1985 WL 44691 (Del. Ch. May 13, 1985) as examples of supreme court majorities included Justice Moore and which reversed Chancery opinions written by then-Chancellor Berger).

Whatever the "real" story of the Moore-Berger switch, if nothing else, former-justice Moore will be financially rewarded for his public pain. After leaving the bench he joined the investment banking firm of Wasserstein Perella Group Inc. as a senior managing director where he will likely be on both sides of takeover battles and better compensated than he was as a jurist. See *Ex-Judge Joins Wasserstein*, *supra*. This raises red flags for scholars of specialized courts. If the appointment decisions were politically motivated, it suggests that the interest group fear of court organization theory is something more than mere academic paranoia. Justice Moore was sacked from an arguably generalist court and replaced with a judge from a specialist court. This semi-specialization may explain not only why the Moore-Berger switch was of such concern to the Wilmington corporate bar but also suggests that vesting a court with general jurisdiction status does not magically make it any more immune from politics than a specialized court. Perhaps interest group influence, if it really is a problem at all, is a case-specific problem unrelated to the architectural structure of the judiciary (or, for

are at least as susceptible to political influence as specialist courts, even though in theory specialist courts are more vulnerable.

Critics of specialization would argue, however, that Delaware provides an atypical example since Chancery is not narrowly specialized, and the Delaware Supreme Court is unlike the sort of broadly generalized court as are the New York Court of Appeals or the California Supreme Court, for example. Delaware is a small state (both in size and population)¹⁰² whose business quite literally is business. Thus, much of the Delaware Supreme Court's task involves reviewing the decisions of the Chancery Court.¹⁰³ Consequently, the Supreme Court has itself become semi-specialized through spending so much of its time and energy reviewing appeals from Chancery.

This view is deficient in several respects. First, it assumes that generalist courts are completely or largely free of similar influences—a demonstrably false assumption. Much federal political tension during the past quarter-century has involved struggles to influence judicial appointments. Although this tension is most pronounced at the Supreme Court level,¹⁰⁴ it has on occasion occurred in battles over circuit court appointments.¹⁰⁵

that matter, the legislature).

¹⁰² Dreyfuss, *supra* note 5, at 29-31.

¹⁰³ According to a rough-hewn LEXIS search I conducted for this Article, it appears that the supreme court has only reversed about 200 Chancery decisions since 1951.

¹⁰⁴ Compare MICHAEL PERTSCHUK & WENDY SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989) with ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990), for two dramatically different perspectives on Robert Bork's unsuccessful nomination to fill the seat of retiring Justice Lewis Powell. See also Michael S. Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994) (referring to ideological and political considerations in Reagan Administration decision to nominate Bork rather than Senator Orrin Hatch (R-Utah) to the seat).

¹⁰⁵ Seventh Circuit Judge Daniel Manion, Third Circuit Judge H. Lee Sarokin, and Eleventh Circuit Judge Rosemary Barkett being prominent examples. See Ernie Freday, *Washington in Brief*, ATLANTA CONST., April 15, 1994, at C2 (Barkett challenged on the basis of her criticisms of application of the death penalty but confirmed by vote of 61-37); William Grady, *After Trial by Fire, Judge Acquits Himself Well*, CHI. TRIB., Aug. 21, 1992, at 1 (Judge Manion challenged on grounds of competence and excessive conservatism); Stephen Labaton, *President's Judicial Appointments: Diverse, But Well in the Mainstream*, N.Y. TIMES, Oct. 17, 1994, at A15 (Sarokin confirmed but put to floor vote and "criticized for being soft on crime").

Interest group pressure undoubtedly has a constant but silent impact on generalist judicial appointments. For example, one observer, a long-time federal circuit judge, found evidence of the substantial influence by interest groups in the fact that the Clinton Administration primarily has appointed centrist judges.¹⁰⁶ It remains uncertain, however, whether this situation will be any worse when the subject is a specialized court opening rather than a generalist position.

In general, we do not yet know enough about interest

¹⁰⁶ Stephen Labaton, *Clinton Judicial Choices Mostly In Mainstream*, PATRIOT LEDGER, Oct. 22, 1994, at 6.

Reagan and Bush really changed the philosophy of the courts, and not for the better. Clinton had the opportunity to do the same, and he blew it. There seems to be this sense that they don't want to do anything to offend [Sen. Orrin] Hatch [R-Utah] or [Sen. Alan] Simpson [R-Wyo.]. You can't conceive of Bush or Reagan thinking, "let's not do anything that could offend Kennedy".

Id. (quoting Ninth Circuit Judge Stephen Reinhardt). Of course, the Clinton administration's refusal to make judicial appointments with the intent of counter-acting conservative appointments can be readily defended on the ground of doing the right thing rather than attempting a liberal counter-offensive against the Reagan-Bush appointments. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT ANNUAL REPORT: 1994, at 1 (1995) (liberal interest group concluding that Clinton "appointments to the bench . . . have been outstanding in both quality and diversity" with Clinton appointing "a higher percentage of well-qualified nominees (as rated by the American Bar Association) than either Presidents Reagan or Bush. In addition, he had named an unprecedented number of women and minorities to the courts."). However, the Alliance Report also notes that Clinton is under some pressure to make more conservative appointments to avoid confirmation battles in the now Republican-controlled Senate. *Id.* at 1, 10.

I suspect that something other than good manners or naivetè prompted Clinton to avoid possibly controversial liberal nominees to the bench. I also acknowledge the obvious possibility that the Clinton Administration might also have consciously decided to lower the temperature of the judicial battles that have plagued Washington and turned the name Bork into a verb (as in "borking" a nominee). I generally applaud his depoliticization of the bench if that was his conscious objective, even though I partially agree with Judge Reinhardt that some restoration of balance is in order. Nonetheless, even if Clinton has had higher motives in choosing centrists, there is no doubt that interest group politics remains a large part of the generalist judicial selection process. Senators Hatch and Simpson have the power to make life difficult for Clinton nominees not only because of their positions on the Senate Judiciary Committee but also because they represent and have the support of strong conservative political interests willing to mobilize against judicial nominees perceived as too liberal. These groups can muster campaign contributions, attacks on candidates and legislators by talk radio hosts, votes, letters, phone calls, faxes and (in some cases of pro-choice nominees) even attacks from the pulpit. Without doubt, much of contemporary judicial selection and confirmation activity is not a pretty sight. See generally STEPHEN CARTER, THE CONFIRMATION MESS (1994).

group influence on different systems. However, nominations to the bankruptcy court and the Federal Circuit have been no more marred than generalist judicial selection by the self-interested participation of academics, the patent bar, the debtor bar, the creditor bar, banks, other lenders, manufacturers and ideologues generally. Just as market-based public choice theory counsels caution, it also suggests that when a number of interests organize in opposition to one another, they tend to prevent complete domination by any one faction. If nothing else, the losing interest groups can reduce the possibility of capture by turning judicial selection into a public process monitored by the press. While "going public" to expose interest group shenanigans may appear effective in theory for dealing with higher visibility generalist courts, which the public recognizes, understands and cares about, it fails in the real world of judicial politics.¹⁰⁷

The standard public choice arguments about the dangers of judicial specialization tend to overlook or minimize the power of the interest group during the formation of a specialized tribunal. In general, public choice theory applies economic concepts to predict or explain political behavior. The interest group prong of public choice theory¹⁰⁸ essentially argues that legislators respond rationally to political stimuli in seeking to maximize their "utility" of retaining office and power. Consequently, the average politician will attempt to accommodate wealthy, powerful and organized political forces rather than to vindicate a personal ideology or to further social policy or gen-

¹⁰⁷ The recent Delaware experience of Chancellor Berger's elevation to the Supreme Court at Justice Moore's expense attracted substantial press coverage. See *supra* note 101. Although this attention may have resulted from the supreme court's generalist stature, its tone reveals that the personnel change was newsworthy because of the Delaware courts' role as specialized corporate law courts. Perhaps other important specialized courts would have been viewed as too obscure for press coverage under similar circumstances. Furthermore, the press coverage did not change the *fait accompli* of replacing Justice Moore with Chancellor Berger. Ultimately, this episode may just be an example of regrettable interest group influence.

¹⁰⁸ Public choice theory also has an "Arrow's Theorem" prong, which argues based on the famous voting paradoxes found by Kenneth Arrow that electoral outcomes often do not accurately represent aggregate preferences in an electorate, including electorates of elites such as legislatures. See Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI-KENT L. REV. 123, 126 (1989).

eral public sentiment.¹⁰⁹ This tendency is especially pernicious where a significant interest group is currying favor on a matter of low visibility to the public, making it unlikely that the legislator who embraces the interest group will receive negative press coverage or rebuke from the voters at large.¹¹⁰ Lower profile judicial appointments may thus be particularly vulnerable to interest group pressure and efficacy unless competing interest groups (e.g., tort plaintiff counsel versus insurance defense counsel) cancel out one another and permit legislators to follow broad public sentiment or vote their own consciences. Judge Posner and other critics have suggested that due to their reduced visibility and the acute scrutiny of special interests, specialized court appointments are a legislative activity with greater vulnerability to interest group pressure than are more broad-based and visible judicial appointments.

According to the public choice criticism, if specialized courts are essentially booty ripe for plunder, the interest groups who stand to benefit will work to establish such courts. If these groups have sufficient clout to prompt legislatures to create special courts, they undoubtedly must have great influence over the selection of generalist judges. While establishing a special court may consolidate these groups' power or move its exercise out of the public eye, any interest powerful enough to create a new court is probably influential enough to get the judges it wants on the existing generalist courts.¹¹¹

To be sure, interest groups can invoke public-regarding rationales to hoodwink legislators and the public into establishing special courts. Such rationales may even be accurate and merely of incidental benefit to the interest group's agenda. However, interest groups can use these same tactics to promote a favored generalist appointee or to thwart a

¹⁰⁹ See, e.g., MICHAEL HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF THE POLITICAL PROCESS* (1981); THEODORE LOWI, *THE END OF LIBERALISM* (2d ed. 1979); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d ed. 1971); Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

¹¹⁰ See KAY SCHOLZMAN & JAMES TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

¹¹¹ Once again, the Moore-Berger switch in Delaware, if it was in any way a negative event, was an event affecting the composition of the more generalist court rather than the specialized court.

disfavored nominee. In 1990s Washington, for example, special interests have used issues such as payment of taxes for child care providers, past marijuana use or marital problems to stop generalist judicial nominations before resorting to ideological attack. This environment, which is replicated at least to some degree in state systems, illustrates how exaggerated claims are about specialized courts' greater vulnerability.¹¹²

Another variant of the public-choice attack on specialized courts focuses on strong or irreconcilable divisions among even the established elite of the profession rather than on specialized courts as an institution. Judge Posner provides an obvious example of this point by suggesting that a constitutional law specialized court would be a disaster because of inherent political divisions in the field today, finding such a specialized bench unthinkable because "[i]t would be like asking specialists in political science to govern us."¹¹³ According to Posner:

A "camp" is more likely to gain the upper hand in a specialized court than in the entire federal court system or even in one circuit. This is not only because appointments to the specialized court would inevitably be made from the camps, but also because experts are more sensitive to the swings in professional opinion than an outsider, a generalist, would be. . . . A turn of the political wheel would bring another of the warring camps into temporary command. There would be rapid vacillation between extremes, rather than the glacial shifts characteristic of policy change in the federal courts of appeals . . .¹¹⁴

Posner's thesis, though beguiling, is overstated and perhaps even incorrect. The "warring camp" or "polarization" problems affect generalist benches as well. For example D.C. Circuit Judge Lawrence Silberman allegedly threatened former judge (and current White House counsel) Abner Mikva with

¹¹² The essential absence of state data on judicial selection politics is but another example of the tendency of this debate to proceed based on argument and thought experiments rather than field research and empirical information. However, my own experience working in and lobbying before a state legislature (Minnesota), suggest that state interest group politics largely mimic the federal scene.

¹¹³ Posner, *Essay on Delegation*, *supra* note 42, at 780. Judge Posner also makes this point in imagining an antitrust court split between three warring camps of jurists from the "noneconomic school," the Harvard economic school (which is more "prone to find monopolistic practices") and the Chicago School ("which believes the same practices to be for the most part procompetitive"). *Id.* at 781.

¹¹⁴ Posner, *Essay on Delegation*, *supra* note 42, at 781-82.

fisticuffs.¹¹⁵ Moreover, while generalist judges may not be complete captives of their own ideology, certainly it correlates with general decisional patterns.¹¹⁶ For example, Democratic appointees generally are more inclined to side with labor unions, consumers, minorities, civil plaintiffs and criminal defendants, while Republican appointees generally favor management, businesses, civil defendants and government prosecutors.¹¹⁷ Consequently, the ideological battles between interest groups will not differ dramatically in the generalist arena from the more honed battles over specialized tribunals.

Furthermore, it remains unclear whether Posner correctly describes the tendency of specialists to succumb to intellectual fads. A generalist seems more likely to be influenced by trends and fads since she has less expertise to apply in examining a trend. The real hard-core expert is unlikely to change his or her stripes upon the onset of a popular new view. For example, no matter how popular liberal economics may become, Posner is unlikely to make the next edition of *Economic Analysis of Law* sound like the work of liberal economist John Kenneth Galbraith¹¹⁸ or Judge Guido Calabresi.¹¹⁹

If anything, an expert who has invested years of education, expenditure, professional effort and personal pride in adopting and promoting a particular perspective on a specialty seems less likely to alter his or her views than does a learned but less committed lawyer. The latter are more likely to hop on the next intellectual train because they are less grounded in a different view than are experts.¹²⁰

¹¹⁵ See Neil A. Lewis, *Presiding as Ideals Clash in Capital Appeals Court*, N.Y. TIMES, Feb. 1, 1991, at B4.

¹¹⁶ See Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298 (1993).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., JOHN K. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973); JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* (1958).

¹¹⁹ See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

¹²⁰ A closer look strictly at Posner's examples of antitrust and constitutional law casts even greater doubt on his assumption about the malleability of judges' opinions. Clearly, liberal, "noneconomic" antitrust scholars such as Robert Pitovsky and Eleanor Fox have not drifted rightward with the body politic or academic fashion. See Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window* 61 N.Y.U. L. REV. 554 (1986); Robert Pitovsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979). I do not mean to

Special courts might, in fact, resist change if they are populated by experts frozen in the paradigm that dominated their subject matter one or more generations ago (for instance, when they attended law school, made partner or wrote their tenure pieces). This problem may be less severe than the malleability posited by Posner because it is more susceptible to legislative correction.

Thus, specialists are probably not more volatile than generalists. Posner also suggests that specialists are more polarized and that shifting appointments will bring shifting doctrine. Again, I raise the comparative question. Looking, for example, at the current supreme court one can see no shortage of polarization among these generalists. Ultimately, the accuracy of the Posnerian perspective on interest group dangers arising from court specialization may depend upon the subject matter jurisdiction of the specialized courts. Wise selection of the topics committed to specialized courts remains the best means of avoiding or minimizing the danger of interest group dominance.¹²¹

D. Independence

Some scholars have concluded that specialized courts reflect the views of current agencies and legislatures rather than those of the legislatures that established the statutes at issue.¹²² This argument may describe agencies' actions fairly

suggest that scholars like Pitovsky and Fox are oblivious to economic analysis nor opposed to it. Rather, they are two authorities largely identified as opposed to the Chicago School and apart from the purported Harvard School identified by Posner, which tend to see antitrust policy as implicating more than merely market prices. Since Posner's article does not footnote his assertions on this topic, however, I am left to speculate somewhat on which scholars belong in which camps. Similarly, Chicago School antitrust theorists like Posner and his colleague Frank Easterbrook are unlikely to join the Pitovsky-Fox camp if more liberal analysis counseling government intervention comes into vogue. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). Finally, Philip Areeda and other Harvard School adherents are not expected to blow with the fashions of politics and academia. See, e.g., Philip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 699 (1975).

¹²¹ See *supra* notes 98-112 and accompanying text. A proposed blueprint for further experimentation with specialized courts is presented *infra* part IV.

¹²² See, e.g., Revesz, *supra* note 2, at 1144-47.

accurately since they tend to follow the policy of the incumbent administration or legislature.¹²³ It does not follow that specialized courts are subject to the same weakness in the face of political pressure, however. If given the same job security, support and status of generalist judges, specialist judges can display equivalent independence, even in the face of powerful political forces.

The available evidence suggests that specialization does not undermine judicial independence. As Dreyfuss illustrates, Delaware Chancery, although widely praised as being sensitive to business realities, is neither a legislative puppet nor an interest group foil. Similarly the federal bankruptcy courts, although not given full Article III protections, are as indepen-

¹²³ In contrast to the independence of specialized courts, I should emphasize that I do not consider administrative law tribunals to constitute specialized courts. No matter how competent, these judges remain largely glorified administrative hearing officers. See KENNETH C. DAVIS, 3 ADMINISTRATIVE LAW TREATISE §§ 17.11-17.17 (2d ed. 1978) (describing organization of administrative law judge corps). They are not a separate judicial entity so much as an adjudicatory arm of the executive branch. We should not be surprised then, if administrative law judges show less independence than courts. The "nonacquiescence" controversy surrounding denials of social security disability benefits during the Reagan Administration serves to illustrate the agency-court distinction. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (defending Administration practice as means of seeking valid national policy objectives). Most of the Social Security Agency positions disapproved by the federal courts had been accepted by the administrative law judges assigned to review disability claims.

The Social Security Nonacquiescence Affair of the 1980s also serves to remind us that agency adjudicators have something of a credibility problem in that the public is quick to perceive unfairness from unpopular agency decisions and to give more independent courts the benefit of the doubt. As Dreyfuss and others remind us, my posited truth, even if correct today (most of the time), is hardly universal. For example, the Commerce Court was criticized and eventually abandoned in part because it restrained the popular Interstate Commerce Commission ("ICC"). See Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 335 (1991); George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEG. HIST. 238 (1964). But part of the Commerce Court's problem was frequent reversal by the Supreme Court. See Dreyfuss, *supra* note 4, at 12. Had the Commerce Court not been trumped by another respected court, it might have been able to weather its disagreements with the ICC. During the height of the nonacquiescence controversy, the bulk of press coverage expressly or implicitly praised the courts and painted the Administration as both stingy and unprincipled. See, e.g., Robert J. Axelrod, Comment, *The Politics of Non-Acquiescence—The Legacy of Steiberger v. Sullivan*, 60 BROOK. L. REV. 765 (1994) (advocating special Article III court for Social Security claims); Ann Reubens, Note, *Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity*, 52 BROOK. L. REV. 85 (1986).

dent of the President and Congress as are the district and circuit courts.¹²⁴ Although some have argued that the Federal Circuit's tax jurisprudence favors the government,¹²⁵ there is no hard evidence to sustain this claim.¹²⁶ In addition, the Federal Circuit is not particularly specialized in the tax area since so much tax jurisprudence also emanates from the other circuit courts. Clearly, simply because the Federal Circuit differs from the Sixth Circuit for example, this itself does not indicate error or lack of independence by the Federal Circuit, even if the government tends to win more cases in the forum.

E. *Public Acceptance and Perceptions of Fairness*

As Professor Dreyfuss reminds us, tribunals must be perceived as fair in order to adjudicate effectively and even to survive. To be accepted as courts, tribunals—whether specialized or generalist—must look and act like courts. That means they need indicia of independence such as separate status from agencies or particular programs, job security, adequate support and respect from the other branches, open proceedings, established procedure, and the attention to detail and commitment to adjudicatory values traditionally found in full-fledged courts. As Dreyfuss notes, even the most established and sensible procedures risk being perceived as unfair when they differ from the “normal” procedures used in the generalist tribunals.¹²⁷

F. *Geographic Diversity*

Much of the literature assumes that specialized courts would be designed like the Federal Circuit and its components and would be located largely in one city or at least have less geographic diversity than the generalist courts. As Judge Gibbons reminds us, however, the federal bankruptcy courts provide an example of effective specialized courts that are dispersed widely throughout the nation.¹²⁸ Proponents of special-

¹²⁴ See Gibbons, *supra* note 39, at 47.

¹²⁵ See, e.g., Bruff, *supra* note 123, at 336-37 (citing authorities).

¹²⁶ See Bruff, *supra* note 124, at 336-37.

¹²⁷ See Dreyfuss, *supra* note 4, at 15.

¹²⁸ See Gibbons, *supra* note 39, at 47.

ized courts often point out the possibility of decentralized location and even endorse some "circuit riding" to those areas that do not generate enough litigation to warrant a permanent court.¹²⁹ Consequently, this criticism of specialized courts may be unwarranted. As Dreyfuss points out, geographic decentralization also may be unnecessary and wasteful for courts whose subject matter involves parties who easily can afford travel expenses. Obviously, since specialized courts devoted to small stakes matters affecting the general populace would be untenable if located only in Washington, New York or Los Angeles, this sort of court can efficiently have chambers throughout the country.

G. *Boundary Disputes*

The border disputes posited by critics of specialized courts pose more genuine and less tractable problems for specialization. Here, again, Dreyfuss's work is instructive and tends to buttress the criticism. Delaware Chancery is successful in part because it is fairly clear what matters lie within its jurisdiction. The equitable notion of the "clean-up doctrine,"¹³⁰ which allows the court to adjudicate the entirety of a case brought before it, permits Chancery to resolve the entire case with finality and clarity.¹³¹ In contrast, Dreyfuss's major criticism of the Federal Circuit is that it lacks exclusive jurisdiction over patents as well as power to resolve competition disputes between patent litigants.¹³²

Solving the boundary disputes of the Federal Circuit or of a hypothetical commercial court will not be particularly easy. Although one can argue that bright lines may provide the certainty needed to prevent forum shopping and inefficient adjudication, this seems too facile an answer. A bright line rule may create problems of arbitrariness and surely will be manipulated by clever litigants. In addition, the natural inclination

¹²⁹ See, e.g., Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989).

¹³⁰ See CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 92 (5th ed. 1994) (describing equity practice of adjudicating the entire dispute once a portion of it had been presented to the equity court for determination).

¹³¹ See Dreyfuss, *supra* note 5, at 6-8.

¹³² See Dreyfuss, *supra* note 4, at 34.

when trying to solve questions of jurisdictional boundaries is to opt for wider boundaries, as Dreyfuss does in suggesting changes in the Federal Circuit.¹³³ But this approach, even if the correct one, is more likely to create problems of both application and politics. A specialist court with a wide swath of authority is more likely to come into conflict with generalist authority. In addition, wide specialist authority will engender political opposition not only from those ordinarily leery of specialization, but also from interests that consider the specialized forum a disadvantage for their disputes.

These sorts of problems, however significant, are not deadly to the concept of specialization. The American federal system has created tensions between federal and state court authority for more than 200 years¹³⁴ but these tensions have been adequately managed. The body politic implicitly has concluded that the benefits of the federal-state division of labor outweigh its costs. Although boundary fixing and enforcement present a challenge, they do not make generalist courts inevitable.

H. *Judicial Flexibility for the Future*

The remaining major objection to specialization is that it freezes the allocation of judicial resources, making it difficult to adapt to changes in the system's caseload and needs. This criticism unrealistically conceives of specialized courts as a cadre of Article III judges with narrow and exclusive jurisdiction that can never be altered no matter how slow the trickle of future cases.

Such a construct would not last forever. Even Article III judges eventually retire, die or even leave the bench to avoid boredom. Realistically, the hypothetical grave mistake would have worked itself out of the system by now. Furthermore, in the real world, there are limits to the mistakes even our occasionally befuddled political system may make. By the time the forces of status quo inertia have been overcome and a specialized court established, it is likely that the need for adjudicat-

¹³³ Dreyfuss, *supra* note 4, at 37.

¹³⁴ See generally MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* (1980).

ing the cases assigned to the specialized court is real, largely permanent and widely accepted.¹³⁵

Specialized courts can be structured to remain flexible while still retaining their status. For example, the long tenure (ten years in the case of bankruptcy judges) and salary protection Article I judges enjoy, although not the security provided in Article III, is a far cry from at-will employment. Furthermore, the specialist judge becomes an expert not only in judging and critical thinking, but also acquires substantive knowledge and refined technical expertise. Thus, a bankruptcy judge who is denied reappointment through the efforts of the creditors' bar would have the skills and expertise that private firms and other branches of government would value. The system thus achieves a respectable quantum of independence but avoids a lifetime commitment to the judge should the caseload decline.

Other variants of specialization have yet to be explored. For example, specialized courts could offer "specialized tenure" for judges.¹³⁶ The "catch" in the institution's grant of tenure

¹³⁵ One example of this process is the bankruptcy imbroglio occasioned by the *Northern Pipeline* decision. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding portion of Bankruptcy Act of 1978 unconstitutional insofar as it permitted Article I bankruptcy judges to enter final determinations of state law claims heard in connection with the bankruptcy). The controversy concerned whether to cure the constitutionality of the Bankruptcy Act by making bankruptcy judges Article III judges.

The decision to preserve Article I status for the bankruptcy judges and to have their determinations on non-core bankruptcy matters function as mere reports and recommendations to the district court was motivated by the fear that a large group of bankruptcy judges might become underemployed if bankruptcy filings decreased markedly in the future. Although the decision to opt for continued Article I treatment may have been correct, the number of bankruptcy filings has not diminished and appears unlikely to do so in the foreseeable future. Bankruptcy, like breached contracts, personal injury and employment litigation, appears to be a perennial part of the American legal landscape.

¹³⁶ This would be much like the specialized tenure provided in law schools to faculty affiliated with certain programs, usually particular clinical or lawyering skills/legal writing offerings, which can theoretically be eliminated through curriculum change. In the real world (if law schools can be so deemed), this seldom happens. One reason, of course, is the typical human tendency to want to retain valued colleagues no matter what the vagaries of fate. Law schools typically would find something meaningful for talented specialized tenure faculty rather than potentially end a career. But the more prominent reason these arrangements usually work out is that most clinical/lawyering/legal writing programs endure in substantially consistent form through the years.

to these faculty members is the possibility that the position would dissolve if the program is eradicated. Since the specialized court is likely to endure once established, such tenure would offer a degree of certainty.

Frequently, the specialized court is created and maintained because a long-standing body of cases simply has been carved out of the generalist case load. In addition, as previously noted, the specialized courts of the real world tend to be semi-specialized courts.¹³⁷ Consequently, they are not at the mercy of any single legal or demographic trend. For example, the Federal Circuit may experience an increase in government litigation, even if the number of patent cases declines. In short, the concerns about a lack of flexibility seem overstated. A less drastic solution would be to appoint Article III specialist judges with the express understanding that they can be assigned different cases as needed in the interests of justice. New specialized judges even could be required to relocate chambers or refine their caseloads to avoid obsolescence.

In sum, then, those who have opposed specialization have protested too much. The question remains, however, whether despite those overstatements there remain unscalable barriers to establishing specialized commercial courts in the future. We must question whether a particular model of specialization is most likely to be successful for commercial disputes or other subsets of the litigation caseload.

IV. A MODEL FOR LIMITED SPECIALIZATION: SUBJECTING SPECIALIST TRIAL COURTS TO GENERALIST JUDICIAL REVIEW—TRYING TO FIND A FORMULA

Despite the controversy surrounding specialization, the legal community remains receptive to further experiments in specialized courts in limited circumstances. Reviewing the body of commentary about specialized courts, including the new and important contribution Professor Dreyfuss makes in this Symposium, suggests some specific guidelines for future experiments with a division of labor among courts. Any reform proposal that resembles a hard-and-fast formula for specialization, however, is of questionable value. The history of judicial re-

¹³⁷ See *supra* notes 34-38 and accompanying text.

form demonstrates that formulaic approaches generally are inappropriate.

The substantial body of work contributed by Dreyfuss presents a more balanced and nuanced approach which suggests that targeted and partial specialization efforts indeed may provide useful judicial reform.¹³⁸ Her work similarly cautions against faddish, feverish or shoot-from-the-hip specialization. Her contribution to this Symposium, for example, is convincing in its views that the Pennsylvania initiatives she discusses are not likely to prove fruitful,¹³⁹ and that wholesale specialization of commercial matters generally is unwise.¹⁴⁰ All told, however, Dreyfuss's scholarship suggests that specialization—or at least the semi-specialization of courts like the Federal Circuit and Delaware Chancery—generally has succeeded and certainly has not been the disaster its critics predicted.¹⁴¹ In addition, Dreyfuss and others have chronicled the increasing attractiveness of specialization as a possible solution to the pressures of ever-increasing caseloads. In short, her work suggests that some form of specialization is indeed here to stay both because it can work and because it has politico-social support. If specialization actually has arrived, the justice system must make the most effective use of it with a number of caveats.

A. *Specialize at the Trial Level*

Specialization has the potential to offer greater speed and efficiency, as well as greater predictability and uniformity of decisions. Specialization can best accomplish these goals at the

¹³⁸ See generally Dreyfuss, *supra* note 4; Dreyfuss, *supra* note 5; Dreyfuss, *supra* note 11.

¹³⁹ See Dreyfuss, *supra* note 5, at 24-31 (noting particular problems in proposed legislation, problems of the Pennsylvania judiciary, and historical advantages of Delaware not possessed by Pennsylvania).

¹⁴⁰ See Dreyfuss, *supra* note 5, at 33 (suggesting that specialized commercial courts may result in decisions less favorable to consumers and may not yield posited operating efficiencies).

¹⁴¹ I want to be clear that I am persuaded that Dreyfuss's work suggests that semi-specialization (multiple subject matter responsibilities) may make courts more effective but that this does not support what I consider incomplete specialization (incomplete doctrinal control over the specialty area), which Dreyfuss's work suggests undermines the specialization experiment. See *infra* text accompanying notes 4-11 for a further discussion of the distinction and my assessment.

trial court level. Despite the large increase in appeals during the past thirty years (particularly in the federal system), most adjudication in America takes place in pre-trial proceedings and at the trial court level. This is where litigants and lawyers invest the most resources, and where cases lie longest awaiting disposition.¹⁴² If specialization is to have a significant impact, it logically should be applied at the trial stage before being imposed upon the appellate process.

Specialist judges are most likely to be able to achieve some of the efficiencies of specialization at the trial level. Although the shift toward managerial judging has been and remains a topic of considerable debate, trial level adjudication now entails a good deal of case management.¹⁴³ Specialist judges may be better, more efficient managers and may offer case processing decisions that intrude less upon litigants' substantive rights. Case management involves setting and enforcing pretrial preparation deadlines, supervising disclosure and discovery, ruling on summary judgment and other dispositive motions, and brokering settlement. A trial judge with specialized expertise would have more of an intrinsic "feel" for performing these tasks correctly, and would need less fresh research and reflection than would a generalist. Consequently, a specialist judge might well preside over case processing that is faster, less costly (in both judicial and attorney time), and more frequently correct.

Furthermore, many of a trial judge's decisions are invariably (and perhaps unavoidably) made extemporaneously, with comparatively little time for research, consultation, reflection and written articulation. Trial judges have frequent face-to-face interaction with lawyers, litigants, jurors and the public. Often they must rule orally, largely on the basis of their accumulated knowledge and judgment, rather than after painstaking study of briefs, case law or policy considerations. More than appellate judges, then, trial judges employ specialized expertise when setting deadlines, ruling on whether a witness

¹⁴² See ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* 624 (3d ed. 1994) (most litigation in society is pretrial litigation since comparatively few disputes are prosecuted completely through full trial adjudication and review).

¹⁴³ See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 *BROOK. L. REV.* 659, 730-37 (1993).

must answer at deposition or trial, or determining whether to berate a lawyer for an inappropriate settlement position. Appellate courts simply have less need for specialized expertise and less opportunity to use it since most appellate judges will have time to "go to the books" in deciding such matters.

Perhaps most valuable will be the specialist trial judge's deep familiarity with a range of disputes involving the specialty topic. Although specialist judges possibly will become jaded or close-minded, the fact that the topic is familiar means the specialist trial judge will be able to grasp immediately the legal concept at issue as well as the nature of the factual controversy. The specialist trial judge will be superior to the generalists in her ability to focus more quickly on the important factual issues and to apply the law with sensitivity in light of the court's institutional memory. Finally, the specialist bench will recognize quickly how a single case disposition fits in with the fabric of the substantive area.

Successful experiments in specialization require a focus on the trial court level, as well as other important factors discussed below. For example, the judge must have been screened and selected for competence, she must have adequate job security, the court must have adequate facilities and resources, and the bar must not be demonstrably lower in quality than the bar at large. If these support, infrastructure and prestige factors are held relatively constant, specialized trial courts discharging their responsibilities are likely to achieve economies of scale in case disposition. For example, specialists would be better equipped to efficiently give jury instructions, rule on recurring matters, and write expeditious findings of fact and conclusions of law or opinions on motions, to address common issues in the specialized court.¹⁴⁴

B. *Provide Generalist Review*

Ironically, another advantage of focusing specialization efforts on the trial court level is that appellate review can

¹⁴⁴ I note that in virtually all cases of the Delaware Supreme Court reversing the Chancery Court, the reviewing court took no issue with the trial court's fact-finding.

correct or minimize any errors they make. As a check on the possible detriments of specialization, however, the reviewing courts should be comprised of generalist judges. This serves several purposes.

First, it acts as a pragmatic compromise to permit specialization while retaining the generalist control that can defuse critics and make continued specialization efforts politically palatable. Second, generalist review operates as a combined attempt at portfolio diversification and quality control. If, as specialization's critics contend (erroneously in my view), specialist judges will intrinsically have lower prestige, less interesting work, and hence lower caliber judging skills, the more prestigious generalist appellate bench would rescue the legal system from the predicted substandard work of the specialist bench. Furthermore, appellate review by generalists maintains efficiency while also permitting the type of percolation, cross-fertilization and broader perspective that critics feel may be missing from specialized adjudication.

As noted above, the appellate process also provides more time for the court to derive expertise from the efforts of the trial court, counsel and the litigants by digesting appellate briefs, researching the issues in the comparative comfort of chambers, exchanging impressions with colleagues, and taking the time to think through issues before rendering decisions. Even though appellate courts may be asked to rule quickly on emergency matters, trial courts face at least as many emergency matters. During such times, the streamlined decisionmaking ability of specialist judges would seem most valuable at the trial court level. Consequently, the best way for the legal system to hedge is through trial court specialization supervised by generalist appellate review.

1. Reservations About Rotation as a Form of Specialization

The proposal for generalist courts to operate in rotating panels also bears on judicial recruitment and performance. It also potentially poses problems of politicization of the bench. Professor Daniel Meador has championed the rotating panel concept for more than a decade.¹⁴⁵ Under this proposal, pat-

¹⁴⁵ Meador, *supra* note 129; Daniel J. Meador, *An Appellate Court Dilemma and*

tered after the assignment system prevailing in the Federal Republic of Germany,¹⁴⁶ appellate courts would sit in fixed panels with particular jurisdictional assignments but judges would rotate gradually through the various panels.¹⁴⁷ The theory of the rotation is to permit judges to develop an advanced and efficient "learning curve" through sustained focus on a particular mix of cases while alleviating boredom and isolation by eventually rotating judges into a different mix of cases. Each panel would have a restricted field of jurisdiction but would not be highly specialized.¹⁴⁸ For example, one division would hear one-third of the general civil docket as well as immigration appeals, bankruptcy appeals and Tax Court appeals, while another division would hear civil rights cases in which the U.S. government is a party.¹⁴⁹

Although Meador's proposal has a good deal of merit, it is not as attractive as more targeted specialization at the trial level. First, the rotating panel forces at least temporary specialization even in situations where there is no basis to believe it would be helpful since matters may be obtaining acceptable processing under a generalist system. Simultaneously, the rotating judges are precluded from reaping the full benefits of specialization since they cannot remain focused on the area they most prefer and cannot continue to apply their expertise beyond the five-year rotations suggested by Meador.¹⁵⁰ Furthermore, the Meador proposal seems to lack a well-designed subplan regarding the use of senior circuit judges. Currently, senior judges provide valuable judicial aid by sitting on "regular" generalist panels with great frequency. Under a rotation

a Solution Through Subject Matter Organization, 16 U. MICH. J.L. REF. 471 (1983) [hereinafter Meador, *Appellate Court Dilemma*]; Daniel J. Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981) [hereinafter Meador, *German Design*]; Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617 [hereinafter Meador, *Federal Judiciary*]. Meador is not alone. See, e.g., Stuart S. Nagel, *Systematic Assignment of Judges: A Proposal*, 70 JUDICATURE 73 (1986).

¹⁴⁶ Meador, *German Design*, *supra* note 145, at 31-41.

¹⁴⁷ Meador, *Appellate Court Dilemma*, *supra* note 145, at 475.

¹⁴⁸ For example, Meador's proposal for the Ninth Circuit suggested five divisions, each with at least two areas of specialty. Meador, *Appellate Court Dilemma*, *supra* note 145, at 477-78.

¹⁴⁹ Meador, *Appellate Dilemma*, *supra* note 145, at 489-90.

¹⁵⁰ See Meador, *Appellate Dilemma*, *supra* note 145, at 483-85.

system, it is unclear whether senior judges could be broadly involved in the bulk of circuit court cases. Finally, the rotation system fails to account for the primacy effect and ideological differences separating the court's judges over particular issues. The primacy effect refers to the tendency of the first court decisions to establish lasting rules of law and approaches toward particular cases. As any participant in committee work or joint authorship is aware, the first draft tends to shape the ultimate disposition of the matter, absent anything short of a complete shredding by subsequent participants in the process.¹⁵¹ In other words, the first statement on any issue tends to be influential and determinative.¹⁵²

Thus, the first of Meador's suggested rotating judicial panels would have inordinate influence over the shape of the law upon which it adjudicates. Although the proposed rotating divisions would of course come after one hundred years of a generalist regime, and would presumably accent the precedential work of the generalist panels, judges will become more influential as they are given concentrated decisionmaking powers on specific areas of law.¹⁵³ For instance, the first rotation division, being specialized, may obtain both the normal "first drafter's influence" as well as an aura of expertise. Thus, in a judicial version of Arrow's Theorem, it may set the parameters for any future debate.

This influence may not be particularly problematic in many areas of law since, notwithstanding the collapse of much law's academic consensus, most cases will have the same outcome irrespective of the adjudicator. In addition, Meador's proposal would still preserve regional circuit courts. Thus, an

¹⁵¹ This shredding occurs only if these participants violently disagree with the primary author and can either (a) articulate objectively persuasive support for their position or (b) muster overwhelming subjective opposition to the primary author's position within the organization.

¹⁵² See POSNER, *OVERCOMING LAW*, *supra* note 42, at 68 ("the writer of the first draft usually controls to a great extent the final product").

¹⁵³ Even in generalist courts, precedent often is overturned or marginalized eventually. For example, when created in 1981, the Eleventh Circuit adopted the sensible approach of using applicable Fifth Circuit precedent as its starting point for analysis. Within a decade, distinctive differences had emerged between the two circuit courts. Compare *Thomas v. Capital Sec. Serv.*, 836 F.2d 866, 877 (5th Cir. 1988) (*en banc*) (Rule 11 sanctions should be determined according to "least severe sanction" approach) with *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991) (implicitly rejecting least severe sanction approach).

odd primacy effect in one circuit would likely be counteracted by the results in other circuits. Over time, the more persuasive view would probably win out either through Supreme Court *certiorari* review or by changes in subsequent rotation panels in the circuits of the weaker jurisprudence. In the meantime, of course, certain litigants would suffer (no matter how carefully crafted the ultimate rules of retroactivity and prospectivity), as inevitably they suffer from mistakes made under the current system.

Of greater concern is the possibility that the initial rotation panels or circuit court divisions might sculpt a particular area of law that is problematic but unlikely to be rectified easily or quickly because of the inherent ideological divergence of judges over the issue. Civil rights cases, which would fall under one rotation panel in the Meador system, are a particularly likely candidate for such controversy, division and potential unfairness.¹⁵⁴ The range of receptivity and opposition judges exhibit to such cases usually correlates with their own social and political views. Judges will adjudicate such claims differently, even in the appellate mode of reviewing another tribunal's assessment of factual disputes, causation, damages and the like. If the first rotation panel randomly contains a strong and cohesive group of liberals or conservatives, however, it will have substantial power to make enduring civil rights law, especially when interpreting a newly enacted or amended statute. Subsequent panel judges may disagree, but the combination of five years' precedent and the aura of specialized expertise is likely to make the early rotation panel precedents particularly difficult to dislodge.

Of course, judicial variance is omnipresent and undermines many aspects of the legal system.¹⁵⁵ Domination by a

¹⁵⁴ Although Meador does not specify, he allocates cases to his proposed divisions according to the Administrative Office of the U.S. Courts data, which treats employment discrimination cases as part of the civil rights docket. See Meador, *Federal Judiciary*, *supra* note 145, at 645-47. Like constitutional and general civil rights issues, employment discrimination issues are often fractious and value-laden in the legal community. Consequently, a general civil rotation panel ruling on these sorts of cases would present the same dangers I foresee for civil rights rotation panels.

¹⁵⁵ Let me illustrate this by discussing a circuit outside the situs of this Symposium. Imagine that the Seventh Circuit adopts Meador's system and that the first rotation panel assigned to civil rights cases includes Judges Richard Coffey, Frank

particular political viewpoint already occurs today in generalist courts.¹⁵⁶ It is plausible, however, that specialization may exacerbate the strength of certain ideological legal perspectives irrespective of their support in the profession at large. No wonder many commentators, including Judge Posner and Prof. Dreyfuss, have argued that the more ideologically infused areas of law (such as constitutional law) should remain subject to a generalized system of appellate review.¹⁵⁷ According to Posner, “[i]t is a fact, perhaps an unhappy fact, that many areas of our law—I venture to suggest most of them—have a strong ideological cast.”¹⁵⁸ For example, he sees antitrust theorists “divided today into three warring camps”: socio-political; Harvard economic, which is more likely to deem certain practices in violation of the law; and Chicago economic, which is

Easterbrook, Daniel Manion, Harlington Wood and (of course) Chief Judge Richard Posner. (Assume that, notwithstanding his opposition to specialized adjudication, Posner does not resign from the bench.) This panel would encompass a distinctly conservative subgroup of the court, particularly on employment discrimination and civil rights matters. See Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673 (1994) (reviewing reported opinions of judges and sampling lawyer impressions of the judges). In five years, notwithstanding annual one-member rotations, it would likely produce a body of law that was distinctly pro-employer, pro-government and pro-defendant. Other judges of the courts—such as liberals Richard Cudahy and Illana Diamond Rovner, as well as moderates like Kenneth Ripple—might differ with the precedents but probably would be ineffective at reversing the tide.

¹⁵⁶ For example, the Seventh Circuit is generally regarded as more conservative today than 15 years ago and much of the credit (or blame) is assigned to Posner and Easterbrook due to their intellectual force and high volume of quickly written, influential opinions.

¹⁵⁷ See Dreyfuss, *supra* note 11, at 414-18.

¹⁵⁸ Posner, *Essay on Delegation*, *supra* note 42, at 780. Judge Posner continued: To say, for example, that Laurence Tribe or John Ely is a “specialist” in constitutional law has rather a special meaning. They are specialists in the sense that they know constitutional law much better than most scholars or practitioners. But very few people, even among those who take seriously the idea of dividing the Supreme Court into a constitutional and a nonconstitutional branch, would also want to fill the constitutional branch with people like Tribe and Ely *because* they are specialists in constitutional law. It would be like asking specialists in political science to govern us. We think of a specialist not just as someone who knows a lot about a subject, but as someone to whom we are willing to entrust important decisions about it that affect us. This willingness depends on a belief that the specialist is objective, in the sense that his judgment is independent of personal values that we may not share, and that is not a sense that most people have about experts in constitutional law.

Id.

more likely to see the same practices as pro-competitive.¹⁵⁹ In addition, some fields such as social security disability law show

a vast gulf between those who emphasize the humane and remedial objects of the law and those who are worried about fostering dependency and depleting the federal budget. These fields are divided over questions of value. Such questions cannot be answered by consulting an expert observer, neutrally deploying his value-free knowledge. That is *why* we call them questions of value rather than of fact.¹⁶⁰

Although these dangers are more pronounced for hard-core specialized courts than for the rotation panels envisioned by Meador, his proposal does not come close to eliminating the problem. The Meador proposal retains much of the inefficiency of the current system because it not only fails to reap the full purported benefits of specialization, but also increases the danger of partisanship that purportedly accompanies a specialized judiciary.

2. Remaining Independent While Retaining Flexibility

Regardless of whether the critics or proponents of specialization are correct, specialized courts will work best if they are not granted second-class status. Insofar as possible, specialized courts should have parity with the generalist bench. To fairly test the merits of specialization, the specialized court must have similar resources: adequate physical facilities; decent libraries; similar support staff, law clerks or substitute professionals; and modern equipment.

It is vital that further experiments with specialization seek judges equal in ability to the system's generalist judges. Obviously, specialist courts cannot offer a full generalist menu of cases to attract high quality specialist judges. If the criticisms of Posner and others are correct, the specialist bench will always be somewhat less attractive and consequently probably less intellectually vigorous. To minimize this distinction, specialized courts should have all the benefits available to generalist judges: life tenure or similar job security; protection against salary diminution; equivalent salary and fringe benefits; and similar opportunity for interesting changes of

¹⁵⁹ Posner, *Essay on Delegation*, *supra* note 42, at 781.

¹⁶⁰ Posner, *Essay on Delegation*, *supra* note 42, at 782.

workpace (e.g., sitting by designation on appellate panels, attendance at judicial conferences, participation in rulemaking and other policymaking efforts of the judiciary).

Insofar as it can be institutionalized, specialized courts must have comparable prestige. Policymakers creating specialized courts and appointing specialist judges should not use demeaning rhetoric that suggests the shunting off of a high volume of boring or unimportant but pesky matters. If a negative attitude to specialized courts is compounded by lower salaries, less job security and logistical disadvantages, the specialized court's second-tier status will be quickly secured. When, for example, Justice Antonin Scalia speaks or writes of the need to limit the jurisdiction of the Article III federal bench to only the most important matters facing the federal judiciary¹⁶¹ this view characterizes certain matters as lower in prestige, less challenging and largely "unworthy" of America's best legal-judicial talent.¹⁶² This view only discour-

¹⁶¹ See, e.g., Gary A. Hengstler, *Scalia Seeks Court Changes*, A.B.A. J., Apr. 1, 1987, at 20.

¹⁶² Justice Scalia has been the most vocal of those arguing for stripping federal jurisdiction of "less worthy" matter, but these views seem at least partially accepted by those who call for limits on the size of the Article III judiciary in order to preserve its "special" status. See, e.g., FEDERAL COURTS STUDY COMMITTEE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-53 (1990) (recommending elimination of some forms of federal jurisdiction, including diversity); Jon O. Newman, *1,000 Judges—the Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993) (arguing that larger size of generalist federal bench bureaucratizes elite federal bench).

The view of Federal Courts Study Committee strikes me as less pernicious for specialized tribunals in that the Committee's articulated basis for the recommendation emphasizes the proper allocation of state-federal authority and suggests that state courts are indeed amply competent to decide certain matters of importance. By comparison, Justice Scalia's comments give one the impression that he simply thinks federal judges should not have their hands sullied by the pedestrian matters of state tort law or issues affecting individuals rather than institutions. See Hengstler, *supra* note 163, at 54 (decrying alleged deterioration of "system of elite federal courts").

The call of Judge Jon Newman and others (including the Federal Courts Study Committee) for a limited generalist federal bench is related to this but different in that it fosters an unhealthy status distinction between the "real" generalist federal bench and all other courts, including specialist courts, which Judge Jon Newman implicitly dismisses as mere bureaucracies (one can almost envision the Max Weber and Franz Kafka caricatures at work, meting out inferior justice). However, the Newman position provides some support for specialization of judicial function. If Newman is correct that a limited bench is necessary for cohesiveness, coherence and quality, then perhaps both state and federal systems are

ages talented lawyers with any semblance of ego from accepting judicial positions on anything other than an Article III generalist bench. Little purpose is served by creating and fostering a climate in which specialized tribunals are regarded as inferior in general, rather than merely inferior in the technical sense of being subject to appellate review.

The question remains whether adequate stature can be bestowed upon specialized courts without making them Article III courts. For reasons set forth earlier in this Article, although a strong political resistance to the establishment of specialized Article III courts may exist, the fears of Article III specialist appointment appear overstated.¹⁶³ For example, even in the midst of a constitutional crisis in the 1980s, Congress was unwilling to convert the bankruptcy courts from Article I to Article III status.¹⁶⁴ At essentially the same time, however, Congress did create the Article III Federal Circuit.

Whatever its merits, Article III status is unlikely to arrive for specialist judges in the near future. The Federal Circuit is an appellate court of semi-specialized jurisdiction that differs from the proposed specialized trial tribunals with more exclusive and targeted jurisdictional authority. As the bankruptcy court experience suggests, however, acceptance of this political reality does not doom specialized courts to inferiority.¹⁶⁵ Similarly, the well-regarded performance of U.S. magistrate judges—Article I judges who serve eight-year terms—also suggests that Article III appointment is not vital to attracting high quality adjudication. Sufficient Article I security, stature and support appear to be capable of overcoming the status differential at least to an acceptable degree.¹⁶⁶ The bankruptcy and magistrate judge experiences suggest that future Article I federal specialized judges should be given terms of office of at least ten years and be entitled to a presumption of reappoint-

best served by an array of specialized courts of limited size rather than a larger generalist bench.

¹⁶³ See *supra* notes 52-61 and accompanying text.

¹⁶⁴ See *supra* note 52.

¹⁶⁵ See Gibbons, *supra* note 39, at 47.

¹⁶⁶ But the perception of difference in status has not been overcome entirely. Ask any lawyer which bench has more prestige and intellectual horsepower and he or she will almost certainly choose the federal district court over the bankruptcy court or magistrate judges, rightly or wrongly.

ment unless Congress finds specific fault with them.¹⁶⁷

C. *Avoiding Interest Group Influences in Selection of Judges*

Related to the status and job security issues is judicial selection. Just as greater stature and support enhance the chance for successful specialized courts, they also make it more likely that judicial selection is performed with greater care. In the American experience, the more high-prestige and high-profile judicial positions receive the greatest scrutiny. Although that scrutiny frequently focuses to excess on the trivial¹⁶⁸ or the bizarre,¹⁶⁹ at least it is scrutiny.

Nominations for less visible federal judicial appointments can range from seemingly pro forma consideration¹⁷⁰ to ex-

¹⁶⁷ It is important in decisions regarding reappointment that the specialist bar and its clientele not have an exclusive voice in the evaluation of specialist judges. If this occurs it would tend to confirm the fears to the specialization critics who argue that specialized tribunals are more vulnerable to interest group pressure. Listening too closely to those appearing before the specialist court would suggest that specialist judges who displease litigants are vulnerable when the judges' decisions favor the public interest over those of the interest group.

Although an extensive consideration of state court judicial stature and security obviously lies beyond the scope of this Article, state specialized courts should attempt to parallel the state generalist courts in terms of job security. Because even most state generalist courts lack the expansive protections accorded the Article III federal judiciary, however, there is less political resistance to giving specialist courts equivalent treatment, since comparable state generalist courts tend to enjoy a less lofty perch than the Article III federal bench. As we are reminded in this Symposium, however, the experience of Family, Housing, Estate Administration and other courts in many state systems suggests that much more than essentially equivalent status is required to ensure that specialized courts are of a quality comparable to generalist courts. See Gibbons, *supra* note 39, at 47, 50.

¹⁶⁸ See Richard L. Berke, *Question Arises on Top Pick for Court*, SAN DIEGO UNION & TRIB., June 13, 1993, at A1 (asking whether Justice Breyer should have paid social security taxes for an elderly, part-time housekeeper who, as his counsel Kenneth Feinberg perhaps inartfully put it, "putters around and bakes cookies").

¹⁶⁹ See Richard Berke, *Thomas Backers Attack Hill, Judge, Vowing He Won't Quit, Says He Is Victim of Race Stigma*, N.Y. TIMES, Oct. 13, 1991, at A1 (attempting to establish that Justice Thomas did not sexually harass Professor Anita Hill, Sen. Orrin Hatch engages in extensive colloquy over whether Prof. Hill had read the William Peter Blatty novel *The Exorcist*, which has a reference to pubic hair on a can of cola); Ruth Marcus, *Thomas Allies Step Up Counterattack*, WASH. POST, Oct. 31, 1991, at A1; Thomas: "This Plays Into the Most Bigoted, Racist Stereotypes," WASH. POST, Oct. 31, 1991, A23; .

¹⁷⁰ This can occur even at the Supreme Court level. For example, Justice Scalia received relatively little examination at his confirmation hearings, a result probably flowing from the Senate's exhaustion from the divisive battle over Justice

tensive battles. Usually, the battles over non-Supreme Court nominees occur where ideology or interest group pressure focuses on a particular candidate. For example, the Clinton Administration nominations of H. Lee Sarokin to the Third Circuit and Rosemary Barkett to the Eleventh Circuit became controversial when certain political forces objected to their respective liberality and reservation about the death penalty.¹⁷¹

It appears that Article III nominees of higher stature (e.g., U.S. Supreme Court or U.S. Circuit Courts of Appeals) receive greater public scrutiny than do bankruptcy or magistrate judges. Specialization at the trial level rather than at the appellate level may institutionalize lower public scrutiny of the nominations. Some removal from the public and political arena may result in less partisan or emotional scrutiny of judicial appointments or (in state systems) judicial elections. To a large degree, however, close scrutiny of judicial selection—or at least the realistic possibility of close scrutiny—tends to produce a better bench despite the occasional political sideshow.

The extent to which specialized tribunals have high stature and more complete power over the subject matter of their specialization will naturally tend to increase the control over selection exercised by the political community. However, because specialized courts normally have less power and stature—especially those at the trial level—the selection process of

Rehnquist's elevation to Chief Justice. Christopher E. Smith & Thomas R. Hearsley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1118-19 (1994); Christopher E. Smith, *Justice Antonin Scalia and the Institution of American Government*, 25 WAKE FOREST L. REV. 783, 786-87 (1990).

¹⁷¹ See Marcus, *supra* note 86. Although confirmation battles that make the newspaper are rare, this hardly means that Article III appointees are not subject to scrutiny. During the Clinton Administration, for example, it appears that important senators are consulted and their views frequently prompt the Administration to refrain from certain nominations. See, e.g., Eva M. Rodriguez, *Blowin in the Wind*, LEGAL TIMES, Mar. 22, 1995, at 6; Neil A. Lewis, *New Chief of Judiciary Panel May Find an Early Test with Clinton*, N.Y. TIMES, Nov. 18, 1994, at A31 (suggesting that Sen. Hatch's opposition to Georgetown Law Professor Peter Edelman, a former Robert Kennedy aide and husband of Children's Defense Fund founder Marian Wright Edelman, prompted Clinton to drop or consider dropping the possibility of Edelman appointment to the bench, notwithstanding close personal ties between Clinton and Edelman). In addition, all Article III nominees and judicial appointments generally appear to be subject to background investigations by the FBI and other inquiry by the Administration.

specialist judges should be structured to ensure a good deal of investigation, scrutiny and debate before selection. This process should include consultation with relevant expert and interest groups, particularly bar associations. Selections should be well-publicized and should include a significant comment period prior to the finalization of any selection. Once selected, specialist judges should have job security comparable to that of generalists.

D. *The Subject Matter of Specialization Must Be Selected with Care*

To state a truism, not every aspect of the law is apt for specialized adjudication. Prevailing commentary advocates specialization in less value-laden topics for which it is possible to achieve a professional consensus. In addition, the topic should be one over which a generalist bench is unlikely to achieve sufficient expertise and efficiency under its normal caseload. The specialist bench functions better if it receives a critical enough mass of cases to enable economies of scale in the acquisition and application of knowledge and in the processing of cases. The specialized subject matter also must be one that can be isolated from other legal issues with relative ease.

Applying these criteria suggests that specialization is virtually impossible for some legal areas, including constitutional law (both the issues of constitutional structure and individual rights) and torts.¹⁷² Some possible areas for successful

¹⁷² One problematic but possible area of future specialization includes employment law. On one level, the topic is inapt for specialization because it can be so value-laden and subject to political disagreement about the rights of workers versus employers and what constitutes actual or unacceptable discrimination. See Ann C. McGinley, *Reinventing Reality: The Improper Use of After-Acquired Evidence in Title VII Cases*, 26 CONN. L. REV. 145 (1994) (noting tendency of several courts to adopt indefensibly illogical or sophistic positions on admissibility and concluding this evidences hostility to the Title VII cause of action, employee rights or the individual plaintiff rather than sound legal analysis); Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner and the Pregnancy Discrimination Act*, 46 FLA. L. REV. (forthcoming 1994) (finding Posner's resolution of pregnancy discrimination claim affected by his value structure in derogation of correct application of law). But, on the other hand, trial court adjudication of job claims (discrimination, accommodation under the Americans with Disabilities Act ("ADA"), discharge violative of public policy, enforceability of arbitration agree-

specialization include: bankruptcy; international trade and tariffs; taxation; patents; (already accomplished or at least commenced); social security and other government benefits; employee benefits (ERISA) litigation; and regulatory matters regarding natural resources, land management or insurance.

At this juncture, despite the substantial and important scholarly literature on these issues, continued caution seems vital. Each instance of proposed specialization should received case-specific scrutiny that considers the historical context of the topic as well as the current political forces impinging upon the issue.

CONCLUSION

Dreyfuss's work suggests that specialization can be both too purified and too diluted. For example, she suggests that the Federal Circuit is advantaged because its judges are exposed to a range of legal questions in addition to patent law. Simultaneously, however, she argues that one shortcoming of the Federal Circuit specialization regime is that the court does not have complete authority over all patent questions since these issues may be litigated outside the Federal Circuit.

In describing the court's "semi-specialized" nature as beneficial, I am referring to courts that have jurisdiction over more than one subject matter. Where possible, however, these semi-specialized courts should have complete authority over the specialized subject matters placed within their jurisdiction. A specialized court that shares authority over a topic with other courts is incompletely specialized (unless the incomplete au-

ments, employment-at-will and its exceptions) might provide substantially swifter and clearer adjudication in view of the significant complexities of this area of the law. For example, many trial judges frequently seem to have a shaky grasp upon the apt use of the McDonnell-Douglas burden-shifting formula for processing Title VII claims. See McGinley & Stempel, *supra*. Others have read the ADA in ways that prompt jaw-dropping. See, e.g., *Hindman v. GTE Data Servs., Inc.*, No. 93-1046-CIV-T-17C, 1994 WL 371396 (M.D. Fla. June 24, 1994), where an employee was dismissed from his job for possessing a firearm on the premises. The employee claimed that he was discriminated against because of his disability—a chemical imbalance that he alleged caused him to bring the gun to work. The court found a triable issue of fact. Some trial level expertise subject to generalist appellate review would improve and departisanize this area of the law without breaking its connection to the political and social values that inspired much of the nation's employment legislation.

thority is intended as a means of providing cross-fertilization or a check-and-balance on doctrinal development). Incomplete specialization sometimes may be inevitable due to important or immutable considerations—such as federalism, judicial independence or the adversary system.

The question remains whether incompletely specialized courts are worse than a regime of generalist adjudication. I continue to think that if the political-legal community is to attempt greater specialization, it should do so through courts that have completely specialized subject matter, regardless of whether the specialist judges exercising that control have other jurisdictional tasks (and are hence semi-specialized). Incomplete specialization is less preferable to comprehensively specialized courts and possibly even to continued generalized adjudication as well.

Although the Delaware Chancery experience generally has been viewed as successful, this may well be due to the special confluence of historical factors Dreyfuss notes and the leavening influence of the Delaware Supreme Court. Although Delaware jurisprudence emerges as successful in the Dreyfuss account, that assessment has yet to be chiseled into the history books of American law. Even if her assessment is correct, it remains unclear whether the same favorable outcome could have resulted from a generalist system in Delaware. On the whole, however, specialized corporate adjudication seems successful in Delaware, although it may not necessarily be a model for other states.

A specialized commercial court is even more problematic for the reasons set forth by Dreyfuss. The abundant contractual disputes in courts can be processed coherently by generalist judges with adequate predictability, efficiency, speed and accuracy. Moving to a specialist regime for these sorts of suits thus gains little of the posited advantages of specialized adjudication but runs non-trivial risks of interest group capture, tunnel vision or jadedness in favor of or against certain litigants. Although a specialized adjudicator may handle certain types of complex commercial disputes better than a generalist judge, these cases should have a unifying thread other than being business-related in order to justify the establishment of specialized tribunals.

Until a better environment and articulated rationale

emerges, Dreyfuss appears correct in counseling Pennsylvania to refrain from establishing any specialized commercial court of the type discussed in this Symposium. Other states similarly would be wise to heed her counsel. But Dreyfuss's successful criticism of the Pennsylvania initiative must not overshadow the bulk of her work, which foresees successful specialized adjudication of corporate governance and patent matters, as well as the possibility of successful specialization in the future.

As a society with pressing dispute resolution needs, we cannot attempt to mass produce the Chancery experience as a panacea for change. Instead, lawyers, judges, politicians and interest groups must figuratively roll up their collective sleeves and work toward institutionalizing new subsystems of dispute resolution to expedite economical case processing, while retaining the traditional American commitment to accurate and wise decisionmaking.