

**NOTE****SPECIALIZE THE JUDGE, NOT THE COURT: A LESSON FROM THE GERMAN CONSTITUTIONAL COURT**

*Sarang Vijay Damle\**

## INTRODUCTION

AT least since the time of Adam Smith's pin manufacturer it has been assumed that the division and specialization of labor lead to greater efficiency.<sup>1</sup> But in one field—judging—this concept has been slow to catch on. While we have mostly accepted Adam Smith's theory in the fields of medicine, business, and the law as practiced, we have tended to cling to the notion that our judges (especially our federal appellate judges) should be generalists.<sup>2</sup> Throughout much of its history, the American legal system was able to function effectively despite this inefficiency. In recent decades, however, the judicial system has come into crisis. As has been widely noted, judicial caseloads are rising at an exponential rate.<sup>3</sup> At the same time, the law has been increasing in complexity as it expands into areas far beyond the traditional common law. As Judge Henry Friendly noted shortly after leaving the practice of law to join the bench:

---

\* J.D., University of Virginia School of Law, May 2005. I would like to thank Professors Paul Stephan and Herbert Hausmaninger for the stimulating seminar that sparked this idea and for guidance throughout my writing process, and Professor Michael Klarman for taking the time to offer his comments. I also would like to thank Brendan Gibbon for helpful suggestions, and Yael Berger for her unfailing support and patience.

<sup>1</sup> See 1 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 4–11 (J.M. Dent & Sons, Ltd. 1933) (1776) (“The greatest improvement in the productive powers of labour, and the greater part of the skill, dexterity, and judgment with which it is anywhere directed, or applied, seem to have been the effects of the division of labour.”).

<sup>2</sup> See 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, 776 (1983) [hereinafter Posner, *Will the Federal Courts of Appeals Survive?*] (noting that “to become a federal judge is to go from being a specialist to being a generalist”).

<sup>3</sup> See, e.g., Richard A. Posner, *The Federal Courts: Crisis and Reform* 59–77 (1985) [hereinafter Posner, *Crisis and Reform*].

[W]hereas it was not unreasonable to expect a judge to be truly learned in a body of law that Blackstone compressed into 2400 pages, it is altogether absurd to expect any single judge to vie with an assemblage of law professors in the gamut of subjects, ranging from accounting, administrative law and admiralty to water rights, wills and world law, that may come before his court.<sup>4</sup>

These trends risk serious harm to the quality of justice in the federal courts. There seems to be good reason, then, for economically-minded observers of the federal courts to turn to the old notion of division of labor to extricate the courts from this predicament.<sup>5</sup>

The United States Court of Appeals for the Federal Circuit might be a sign of things to come. Established in 1982, the Federal Circuit has exclusive appellate jurisdiction over a limited class of cases, most notably patent appeals.<sup>6</sup> Commentators have been advocating the use of such a model in other fields, including a court of criminal appeals, a court of tax appeals, and a court of administrative appeals. Proposals for more specialized courts like the Federal Circuit take a singular form—appellate courts with limited, exclusive jurisdiction over a subject matter or set of subject matters (what I will call “specialized courts”). These proposals generally argue that such specialized courts have three advantages. First, diverting a class of cases to specialized courts of appeals will take some of the burden of growing caseloads off of the shoulders of the

---

<sup>4</sup> Henry Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 *Yale L.J.* 218, 220 (1961) [hereinafter *Friendly, Reactions*].

<sup>5</sup> See Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 *Nw. U. L. Rev.* 745, 745 (1981) (“The fact that judicial resources are scarce, and cannot be expanded infinitely, presents a familiar problem: how to make the best use of a limited commodity. Economic theory provides a typical answer: division of labor through specialization of the court system.”); Posner, *Will the Federal Courts of Appeals Survive?*, *supra* note 2, at 776; see also 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, 604 (1989) [hereinafter *Meador, A Challenge to Judicial Architecture*] (likening the federal courts of appeals to a “factory built in 1809 to produce a thousand widgets annually through manual labor and steam-powered machinery” that was “expected to function effectively in producing 30,000 widgets annually in the 1980s in an age of electricity and computerized processes”).

<sup>6</sup> See Posner, *Will the Federal Courts of Appeals Survive?*, *supra* note 2, at 776–77 (“Patent infringement will become the most important area of specialized federal appellate jurisdiction we have ever had.”).

regular courts of appeals.<sup>7</sup> Second, a specialist judiciary will enhance the quality of decisions, especially in complex areas of the law. Finally, creating a single court with exclusive jurisdiction over particular areas of the law would enhance uniformity in those areas. The Federal Circuit came into existence in large part because of these arguments.<sup>8</sup>

Unfortunately, there are serious problems with increased reliance on such specialized courts, including judicial “tunnel vision,” judicial capture by special interests, and excessive judicial policy-making. Proposals for specialized courts often rely on the fact that highly specialized appellate judiciaries have operated successfully in Europe for decades. Fundamental differences between the civil law and common law, however, suggest that such specialization is a unique feature of civil-law courts, one that might not fit successfully into a common-law framework. For this reason, while comparisons might be useful, the European experience must be considered carefully.

The goal of this Note is to provide an alternative path to judicial specialization—a “rapporteur” system much like that which the German Federal Constitutional Court has used successfully. Part I of this Note will describe the typical approach to the question of specialization in U.S. courts and the problems with such an approach. Part II will describe the German Federal Constitutional Court and its rapporteur system for staffing and deciding cases. Part III will suggest how a similar system might operate in the U.S. federal courts of appeals. As this Note will argue, a rapporteur system provides the best of both worlds—it balances the benefits of generalist judges with the need for judicial expertise as law grows increasingly complex, and it provides a path towards increasing capacity in the federal appellate system. Such a system has many of the same advantages as courts of limited, exclusive subject-matter jurisdiction, while it avoids many of the corresponding pitfalls. Furthermore, since the proposed model is borrowed from a *constitutional* court, rather than an ordinary civil-law court, there is good

---

<sup>7</sup> Though, importantly, such a solution does little to reduce the caseload of the federal courts as a whole, including the specialized courts.

<sup>8</sup> See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. Rev. 1, 1–2 (1989) [hereinafter Dreyfuss, *A Case Study in Specialized Courts*].

reason to believe that the model can be transplanted successfully into a common-law framework.

Before further discussion, some limiting statements are in order. This Note will focus on specialization in the *federal appellate* judiciary, although the debate over specialization at the trial court level involves many of the same issues.<sup>9</sup> Similarly, specialization in the state appellate judiciary is outside the scope of this study.<sup>10</sup> Finally, this Note will set aside the issue of administrative adjudication or specialized adjudication by Article I courts; it should be noted, however, that deference to rulings of administrative agencies during the judicial appeals process might be considered a form of specialization.<sup>11</sup>

It is also important at the outset to discuss what is meant by “judicial specialization.” As Professor Richard Revesz has noted, there is “rich diversity in the types of specialized courts.”<sup>12</sup> For example, specialization can occur through the establishment of a court of appeals of limited jurisdiction, staffed on a temporary basis by generalist judges. Historic examples of such courts include the Emergency Court of Appeals<sup>13</sup> and the Temporary Emergency

---

<sup>9</sup> Most of the commentators cited in this Note similarly limit the bulk of their discussions of judicial specialization to the context of the federal appellate judiciary. See, e.g., Posner, *Crisis and Reform*, supra note 3, at 147–60; Paul D. Carrington, *The Obsolescence of the United States Court of Appeals: Roscoe Pound’s Structural Solution*, 15 J.L. & Pol. 515 (1999) [hereinafter Carrington, *Obsolescence*]; Meador, *A Challenge to Judicial Architecture*, supra note 5.

<sup>10</sup> In any case, while there is considerable specialization at the state trial court level, specialization among the state appellate courts is all but nonexistent. Texas is the only state with two separate and completely independent appellate systems. The Texas Supreme Court handles only civil appeals and the Texas Court of Criminal Appeals handles only criminal appeals. Oklahoma is the only other state with a bifurcated appeals court system, but the Oklahoma Supreme Court has ultimate jurisdiction over all cases in the state courts. See Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court’s Patience*, N.Y. Times, Dec. 5, 2004, at A1.

<sup>11</sup> See Posner, *Crisis and Reform*, supra note 3, at 148–49 (“[A]n important method of increasing judicial specialization would be simply to reduce the scope of judicial review of agency action.”).

<sup>12</sup> Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Pa. L. Rev. 1111, 1121 (1990).

<sup>13</sup> The Emergency Court of Appeals (“ECA”) was the exclusive forum in which appeals of regulations and orders of the Emergency Price Control Act of 1942 could be heard. The ECA heard appeals from the decisions of the Administrator of the Act, and no other court could pass judgment on that Act, even in the context of a criminal prosecution for violation of a regulation. Judges of the ECA did not come in with special knowledge of price controls. Rather they were generalists (including sitting

Court of Appeals.<sup>14</sup> These were temporary courts, however, and no such court exists today. For this reason, this Note will focus on specialization of permanent appellate courts staffed with permanent judges. Within this broad outline, potential solutions to specialization can be categorized based on three criteria:<sup>15</sup> the extent to which the subject-matter jurisdiction of the court is limited, the exclusivity of jurisdiction, and the manner in which cases are staffed. The first criterion describes courts along a spectrum, from courts that can hear only one specific type of case (single subject-matter jurisdiction), through courts that can hear only some types of cases (limited jurisdiction),<sup>16</sup> to courts that can hear all types of cases (general jurisdiction).<sup>17</sup> The second criterion distinguishes courts

---

circuit and district judges) who were appointed by the Chief Justice of the U.S. Supreme Court. The ECA lasted nineteen years—through both World War II and the Korean War—and was disbanded in 1961. See Jordan, *supra* note 5, at 757–59.

<sup>14</sup>The Temporary Emergency Court of Appeals (“TECA”), much like the ECA, was established to ensure uniform administration of temporary price and wage legislation. Congress established the TECA in 1971 and gave it exclusive jurisdiction to hear appeals in cases arising under the wage and price control program of the Economic Stabilization Act of 1970. Unlike the Emergency Court of Appeals, however, the TECA heard appeals from U.S. District Courts, not directly from the Administrator of the Act. Judges of the TECA were appointed by the Chief Justice of the U.S. Supreme Court from a pool of sitting district and appellate court judges, each of whom was to serve on a part-time basis for an indefinite term. Jordan, *supra* note 5, at 759–60; Revesz, *supra* note 12, at 1132. Although the Economic Stabilization Act expired in 1974, Congress extended the operation of the TECA, over time vesting it with exclusive jurisdiction over energy price control programs under three different Acts—the Emergency Petroleum Allocation Act of 1973, the Energy Policy and Conservation Act of 1975, and the Emergency Natural Gas Act of 1977. See James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 *Duke L.J.* 113, 115–19. Congress abolished the TECA in 1992, transferring its jurisdiction to the Federal Circuit. See Pauline Newman, *The Federal Circuit—A Reminiscence*, 14 *Geo. Mason L. Rev.* 513, 522 (1992); Federal Judiciary Center, *Temporary Emergency Court of Appeals*, at [http://www.fjc.gov/history/home.nsf/page/temp\\_appeals?OpenDocument&Click=](http://www.fjc.gov/history/home.nsf/page/temp_appeals?OpenDocument&Click=) (last accessed Apr. 12, 2005).

<sup>15</sup>The first two criteria are borrowed from Professor Revesz. See Revesz, *supra* note 12, at 1121–30.

<sup>16</sup>For the sake of simplicity, this Note will refer to courts with single subject jurisdiction and courts that hear only some types of cases as courts of “limited jurisdiction.”

<sup>17</sup>See Revesz, *supra* note 12, at 1121 (describing this criteria as distinguishing between two types of courts, rather than as describing courts that lie along a spectrum). A clarification is in order. The federal courts as a whole, of course, have limited subject-matter jurisdiction. Furthermore, the existence of courts of exclusive jurisdiction means that even within the sphere of federal law, no federal court truly has general jurisdiction. There is a tendency, then, to assert that all federal courts are of “limited” jurisdiction. See Meador, *A Challenge to Judicial Architecture*, *supra* note 5, at 612–

that have exclusive jurisdiction over a set of subject matters from courts that do not have such exclusive jurisdiction.<sup>18</sup> The final criterion describes courts along another spectrum, from those courts that staff cases exclusively with specialist judges, through those that employ some mix of expert and non-expert judges, to those that assign judges without regard to specialization.<sup>19</sup>

Using this categorization, the rapporteur system proposed by this Note would result in courts of (1) general, (2) nonexclusive jurisdiction that (3) staff cases with a mix of expert and non-expert judges. As Part I will demonstrate, the scholarly debate about specialization of the federal appellate judiciary has been focused on creating new courts of (1) limited, and (2) exclusive jurisdiction—like the Court of Appeals for the Federal Circuit—with (3) minimal consideration given to the different ways in which cases might be staffed. While these specialized courts do have their advantages, they may create as many problems as they solve.

### I. SPECIALIZATION IN THE U.S. FEDERAL APPELLATE JUDICIARY

Article III of the Constitution vests judicial power in a “supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>20</sup> The First Congress created two tiers

---

13 (“No federal court is a court of general jurisdiction in the common law sense or in the state court sense.”). This is true only superficially. First, limitations of subject-matter jurisdiction discussed here operate within the broader subject-matter jurisdiction limitations in the Constitution and federal jurisdictional statutes. Second, it is fairly easy to draw some sort of distinction between courts of “residual” jurisdiction—those courts that have all other jurisdiction except that which is explicitly withheld from them—and those courts that have truly “limited” jurisdiction. See Revesz, *supra* note 12, at 1121.

<sup>18</sup> See Revesz, *supra* note 12, at 1121. (“Exclusivity distinguishes between courts that hear every case of a certain type (courts of exclusive jurisdiction) and courts that do not hear every case of a certain type (courts of nonexclusive jurisdiction).”).

<sup>19</sup> Although Professor Revesz mentions “staffing of courts of limited jurisdiction” as one of his criteria, this does not turn on how the cases are staffed within a circuit, but whether the judges only sit on the specialized court or whether they would regularly sit on some other court of general jurisdiction. *Id.* at 1130. The sort of staffing proposal discussed in this Note has received little scholarly attention. But see Paul D. Carrington et al., *Justice on Appeal 174–84* (1976) [hereinafter Carrington et al., *Justice on Appeal*] (describing a solution that would rotate appellate court judges through a number of different subject matter dockets).

<sup>20</sup> U.S. Const. art. III, § 1.

of courts in the Judiciary Act of 1789<sup>21</sup>—lower trial courts (district courts) and intermediate courts with mixed trial and appellate jurisdiction (circuit courts). At the time, the circuit courts had no judges of their own—they were staffed with district court judges and Supreme Court justices riding circuit.<sup>22</sup> In 1891, the Evarts Act created a circuit court of appeals consisting of three judges for each of the nine geographically-divided circuits, and vested those circuit courts with exclusive appellate jurisdiction.<sup>23</sup>

This organization has remained basically unchanged to the present day, even as the population of the country has grown from some three million in 1789 to nearly 300 million today. The number of cases filed in federal district courts per year has grown from 33,376 in 1904 (the first year for which such statistics are available) to 89,112 in 1960, and to 323,604 in 2003.<sup>24</sup> Most importantly, the scope of federal power, and hence the jurisdiction of the federal courts, has expanded far beyond the scope of that power in 1789, or even in 1891. It is no surprise, then, that many have come to believe that the current design of the federal appellate courts has outlived its usefulness.<sup>25</sup> Commentators and government panels have proposed many alternative structures for the courts of appeals, including the creation of a unitary “national court of appeals” that would hear appeals from the geographic courts of appeals, thus lifting the burden of maintaining uniform federal law from the shoul-

---

<sup>21</sup> Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

<sup>22</sup> See Meador, *A Challenge to Judicial Architecture*, supra note 5, at 603.

<sup>23</sup> Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; Richard H. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 36–38 (5th ed. 2003).

<sup>24</sup> Posner, *Crisis and Reform*, supra note 3, at 59; Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* (2003), at <http://www.uscourts.gov/judbus2003/contents.html> (providing statistics regarding both civil and criminal cases filed in federal court in 2003) (last accessed Apr. 12, 2005); see also Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, reprinted in 166 F.R.D. 49, 70 (1995) [hereinafter, *Long Range Plan*] (“[S]ince 1904 annual cases commenced in the federal appeals courts have increased more than 3,800%. While it took 20 years for the level of appeals to double its 1904 level, and 38 years (1962) to double again, it took seven (1969), ten (1979) and eleven (1990) years for each of the next three doublings.”).

<sup>25</sup> See Carrington, *Obsolescence*, supra note 9, at 516–19 (arguing that the original role of the circuit courts of appeal as “protect[ors] of procedural or institutional values” is “transitory” and “largely illusory”); Martha J. Dragich, *Once A Century: Time For A Structural Overhaul of the Federal Courts*, 1996 *Wis. L. Rev.* 11.

ders of the Supreme Court.<sup>26</sup> The bulk of proposals, however, involve the creation of specialized courts of appeals with limited, exclusive jurisdiction over particular subject matters.<sup>27</sup> More drastically, some commentators have even supported the complete unification of the existing courts of appeals and redivision along subject matter lines.<sup>28</sup> But the less radical proposal, the mere diversion of a class of cases to a specialized court of appeals, is by far the most common.<sup>29</sup>

---

<sup>26</sup> This was the basic proposal of the Hruska Commission, which was established by Congress to study the “structure and internal procedures of the Federal courts of appeal system . . . .” Comm’n on Revision of the Fed. Court Appellate Sys., *Structure & Internal Procedures: Recommendations for Change*, reprinted in 67 F.R.D. 195, 199, 207–08 (1975) [hereinafter Hruska Commission Report]; see also Report, Study Group on the Case Load of the Supreme Court, Federal Judicial Center, reprinted in 57 F.R.D. 573, 584–95 (1972) (describing proposals for a constitutional court and various types of national courts of appeals, and eventually recommending a national court of appeals that would “screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits”).

<sup>27</sup> One of the earliest (and perhaps the first) suggestions for a specialized court of appeals came in 1944. See Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 Harv. L. Rev. 1153 (1944). Professor Griswold’s proposal was to create a separate Court of Tax Appeals that would “have exclusive appellate jurisdiction to review all civil decisions in federal tax cases made by any court”—including district courts, the Tax Court, and the Court of Claims. *Id.* at 1164.

<sup>28</sup> See, e.g., Dragich, *supra* note 25, at 63–66; Meador, *A Challenge to Judicial Architecture*, *supra* note 5, at 628–30; Maurice Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 Cornell L. Rev. 576, 591–95 (1974); Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 St. Louis U. L.J. 455 (1995).

<sup>29</sup> See Henry J. Friendly, *Federal Jurisdiction: A General View* 161–68 (1973); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 75–80 (1975); Griswold, *supra* note 27; Jordan, *supra* note 5, at 746, 765–67; Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 Wm. & Mary L. Rev. 535, 620–23, 645–49 (1996) [hereinafter Williams, *Federal Criminal Courts*]; see also Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts of the Twenty-First Century*, 6 Kan. J.L. & Pub. Pol’y 1, 2 (1996) (proposing specialized courts of limited, exclusive jurisdiction or, alternatively, a single “unitary court of appeals”); Revesz, *supra* note 12 (assessing the desirability of vesting review of administrative actions in specialized courts and the merits of different designs for such courts).



2005]

*Specialize the Judge, Not the Court*

1275

*A. Specialized Courts with Limited, Exclusive Jurisdiction*

The specialization of the judiciary through the use of courts with limited, exclusive jurisdiction is seen as solving three basic problems. First is the “caseload crisis,” a term that refers to the ever-accelerating growth in the volume of cases coming before the federal courts.<sup>30</sup> Since most people today acknowledge that it is unrealistic to “avert the flood by lessening the flow,”<sup>31</sup> commentators have generally suggested three other ways to handle exploding caseloads: “diverting cases to specialized tribunals, fashioning new procedures for the rapid disposition of large numbers of cases, or creating additional judgeships.”<sup>32</sup> For the most part, Congress and the courts have adopted the latter two approaches.<sup>33</sup> Unfortunately, both are little more than stopgap measures. At some point, the benefits of more efficient case disposition will come at too high a cost to the quality of decisionmaking. Even the efficiency measures that are in place today, such as curtailment of oral argument, eliminating conferences, and deciding cases without producing a written opinion, are arguably detrimental to the quality of appellate judging.<sup>34</sup> Furthermore, simply adding more judges to over-

---

<sup>30</sup> The “caseload crisis” has been widely recognized by judges, commentators, and politicians. See, e.g., Long Range Plan, *supra* note 24, at 69–77; Posner, *Crisis and Reform*, *supra* note 3, at 59–77; Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 *Harv. L. Rev.* 542, 543–49 (1969); Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 *B.Y.U. L. Rev.* 617, 617–20; William H. Rehnquist, *Address, Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 *Wis. L. Rev.* 1, 2–4; J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 *Emory L.J.* 1147, 1157–59 (1994).

<sup>31</sup> This is Judge Friendly’s apt phrase describing how one can solve the caseload crisis by simply reducing the number of cases that can be brought into the federal courts. Henry Friendly, *Averting the Flood by Lessening the Flow*, 59 *Cornell L. Rev.* 634 (1974).

<sup>32</sup> Hruska Commission Report, *supra* note 26, at 263.

<sup>33</sup> See Hruska Commission Report, *supra* note 26, at 205 (noting that the federal judiciary has managed to handle the increased workload through “fundamental changes in the process of adjudication” including “widespread curtailment of oral argument, frequent elimination of the judges’ conference from the decision-making process, and, in hundreds of cases, decision without any indication of the reasoning impelling the result”); Posner, *Crisis and Reform*, *supra* note 3, at 353–60 (detailing the explosion in the number of federal judgeships); Wilkinson, *supra* note 30, at 1161–64 (same).

<sup>34</sup> See Carrington et al., *Justice on Appeal*, *supra* note 19, at 41 (declaring that such measures, though “commendable,” nonetheless “sacrifice the imperatives [of appellate justice]”).

loaded circuits will inevitably result in incoherent intracircuit doctrine. As the number of judges in a circuit increases, the possible number of unique three-judge panels increases exponentially.<sup>35</sup> The sheer mathematics is compelling. For the First Circuit, which has nine judges (including those on senior status), there are only 84 possible three-judge panels. But for the Ninth Circuit, which currently has 47 judges, there are 16,125 possible three-judge panels.<sup>36</sup> Circuits could resolve the inevitable intracircuit conflicts by deciding cases en banc, but for extremely large circuits, a full en banc hearing is impossible.<sup>37</sup> The Ninth Circuit, for instance, uses a “limited” en banc procedure, in which cases are decided by an eleven-judge panel, consisting of the chief judge and ten circuit judges chosen at random. This method allows as few as six judges to resolve the law, regardless of the views of the other 41 judges on the circuit.<sup>38</sup> Increasing the number of circuits is no answer either; doing so would lead to even more fractious interpretations of federal law, and the Supreme Court would be unable to resolve all of the inevitable conflicts.<sup>39</sup> Given these problems with the traditional solutions, commentators have increasingly looked to the diversion of cases to specialized tribunals to ease the burden on the generalist judiciaries.<sup>40</sup>

---

<sup>35</sup> See Meador, *A Challenge to Judicial Architecture*, supra note 5, at 606 (“Periodic increases in the number of appellate judgeships in the existing regional framework continually magnify the Tower of Babel effect; both intra- and intercircuit inconsistencies increase.”); see also Posner, *Crisis and Reform*, supra note 3, at 99–100; Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70; Wilkinson, supra note 30, at 1174–76.

<sup>36</sup> Others have made basically the same argument. See Tjoflat, supra note 35, at 72; Wilkinson, supra note 30, at 1175. The formula for determining the number of possible unique combination of  $k$  objects from a set of  $n$  objects is  $n!/k!(n-k)!.$

<sup>37</sup> See Carrington et al., *Justice on Appeal*, supra note 19, at 162 (“At some point, the judges on a court become so numerous that the en banc procedure becomes ineffective; it is then wasteful and even counter-productive.”); Posner, *Crisis and Reform*, supra note 3, at 100–02.

<sup>38</sup> See Richard A. Posner, *Is The Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 *J. Legal Stud.* 711, 712 (2000) (“Because of the random assignment of a fraction of judges to the en banc panel, a three-judge panel that decides to defy circuit precedent or otherwise go out on a thin limb has a reasonable prospect of getting away with it.”).

<sup>39</sup> See infra notes 47–50 and accompanying text.

<sup>40</sup> See, e.g., Revesz, supra note 12, at 1120.

2005]

*Specialize the Judge, Not the Court*

1277

Second, specialized courts of limited and exclusive jurisdiction are seen as fulfilling a growing need for expertise in increasingly complex areas of the law.<sup>41</sup> Using an expert judiciary when the law itself is complex (as in tax law) or when the facts of the case are difficult for non-specialists to grasp (as in patent law) improves the quality of judging and, the theory goes, the quality of the law.<sup>42</sup> Because generalist judges must handle all areas of the law, they generally are unable to develop expertise in any one area. Thus, when faced with a case involving tax law, the generalist must either decide the case based on a superficial understanding of tax law or take the time to learn it. When faced with a patent dispute involving microprocessor technologies, the generalist is in even more trouble. It is one thing for a lawyer to learn a new area of the law, but it is quite a different thing to expect a lawyer to understand microprocessor technology, chemical engineering, or molecular biology. Giving a specialized court jurisdiction over a complex body of law helps alleviate this problem; the judge can pull from stores of deep knowledge about a particular subject matter to decide cases.<sup>43</sup> Even Judge Henry Friendly, who questioned whether regular notions about the specialization of labor carry over into the field of judging,<sup>44</sup> suggested that “in areas where a separate language is required,” such as tax or patent law, the use of exclusive specialized courts might be acceptable.<sup>45</sup>

Third and finally, proponents of specialized courts often point to the fact that such courts will eliminate nonuniformity in particular

---

<sup>41</sup> Not all commentators, however, see the goals of their own proposals as introducing “expertise” into the judging process. See Meador, *A Challenge to Judicial Architecture*, supra note 5, at 611–15 (“The primary purpose of a nationwide subject matter jurisdiction, as distinguished from a regional appellate organization, is not to create a court of experts or specialists, but to maximize coherence and predictability in federal law through continuity and stability of decision makers.”). Yet even Professor Meador admits that “one could structure subject matter jurisdiction so as to fit” the label of specialized or expert court. *Id.* at 611.

<sup>42</sup> See, e.g., Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 *Iowa L. Rev.* 1297, 1388–90 (1986).

<sup>43</sup> See Jordan, supra note 5, at 747–48.

<sup>44</sup> See Friendly, *Reactions*, supra note 4, at 219–25; see also Posner, *Crisis and Reform*, supra note 3, at 151.

<sup>45</sup> Friendly, *Reactions*, supra note 4, at 222.

areas of federal law.<sup>46</sup> Exploding caseloads and increasing complexity in certain areas of the law work together to exacerbate such nonuniformity, especially since the Supreme Court is in the sole position to maintain uniform national law.<sup>47</sup> To the extent that maintaining uniform national law is actually a desirable goal, there is good evidence that the Supreme Court is not up to the task.<sup>48</sup> With the Courts of Appeals dealing with so many more cases than they have before, we might expect a rise in the incidence of inter-circuit conflicts. But, since the size of the Supreme Court is fixed, there is an upper limit to how many cases the Court can hear.<sup>49</sup> Once this limit is reached, any additional inter-circuit conflicts will not be resolved.<sup>50</sup> It is for this reason that some commentators have

---

<sup>46</sup> See, e.g., Jordan, *supra* note 5, at 747 (“Delay, uncertainty, and inconsistent decisions on difficult points of law in these areas represent real costs to society.”); Revesz, *supra* note 12, at 1116 (“Supporters of judicial specialization maintain, first, that specialized courts will enhance the uniformity of decisions by eliminating review in multiple circuits under a legal regime in which there is no inter-circuit stare decisis.”).

<sup>47</sup> See Meador, *A Challenge to Judicial Architecture*, *supra* note 5, at 604 (noting that despite the incredible rise in the caseload of the federal courts of appeals, “the Supreme Court remains the only institutional means through which this vastly increased outpouring of decisions can be harmonized and made uniform throughout the nation”).

<sup>48</sup> The Hruska Commission in 1977 pointed to evidence that nearly five percent of the total cases that were denied certiorari by the Supreme Court involved direct conflicts—“those in which the decisions deal with the same explicit point and reach contradictory results . . . .” Hruska Commission Report, *supra* note 26, at 221–22 (internal citations omitted); see also *id.* at 221–27 (discussing briefly the evidence of unresolved inter-circuit conflicts); *id.* at 301–24 (reprinting a study on conflicts in federal law by Professor Floyd Feeney).

<sup>49</sup> There is ample evidence that this limit has already been reached. Consider the following statement from Justice Byron White:

[T]he decisions of the courts of appeals are for all practical purposes final in an increasingly large percentage of the cases decided by those courts. This follows from the fact that the Supreme Court has a limited appellate capacity and hence has heard and decided a constantly decreasing percentage not only of the larger and larger number of judgments rendered by the courts of appeals but also of those judgments sought to be reviewed in the Supreme Court.

Byron R. White, *A Salute to the Circuits*, 28 *Loy. L. Rev.* 669, 669–70 (1982).

<sup>50</sup> There are, however, good arguments that (at least temporary) nonuniformity is not all that bad—having different courts come to different conclusions on a question of law might be beneficial because it allows conversation among the circuits, and thus draws out the best possible arguments.

argued that specialized courts should have exclusive jurisdiction in addition to limited jurisdiction over a particular area of the law.<sup>51</sup>

The most prominent modern example of a specialized court is the Court of Appeals for the Federal Circuit. The Federal Circuit was created in 1982 as a “sustained experiment in specialization,” with exclusive jurisdiction to hear appeals from the district courts in patent cases, and appeals from the Court of Federal Claims, the Court of International Trade, the United States International Trade Commission, and the Merit Systems Protection Board.<sup>52</sup> It was created by merging the Court of Customs and Patent Appeals, which had limited, *nonexclusive* jurisdiction over certain patent and customs claims,<sup>53</sup> with the Court of Claims. Much of the driving force behind the creation of the Federal Circuit was provided by Professor Daniel Meador, as the head of the Office of Improvements in the Administration of Justice.<sup>54</sup> Professor Meador insists that “[t]he Federal Circuit is not a ‘specialized’ court in any meaningful sense of the word” because it handles “a wide array of case types and legal issues.”<sup>55</sup> Indeed, the Federal Circuit hears cases that touch on a number of substantive areas. But, particularly in

---

<sup>51</sup> An alternative approach that might not solve the problem of uniformity is to create specialized appeals courts in each of the geographic circuits, such as a Court of Tax Appeals for the First Circuit, Second Circuit, etc. See Revesz, *supra* note 12, at 1123–25 (describing courts of limited, nonexclusive jurisdiction).

<sup>52</sup> See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 127(a), 165, 96 Stat. 25, 37–38 (codified as amended at 28 U.S.C. § 1295 (2000)); S. Rep. No. 97-275, at 18–22 (1981); Dreyfuss, *A Case Study in Specialized Courts*, *supra* note 8, at 3. The Federal Circuit was not the first such experiment. One of the earliest experiments with a specialized court of appeals was the United States Commerce Court. This court was set up in 1910 to review decisions of the Interstate Commerce Commission, enhance uniformity, and speed up the process of judicial review; the court lasted only three years. See Jordan, *supra* note 5, at 762–63. The Emergency Court of Appeals and Temporary Emergency Court of Appeals were also courts of limited and exclusive jurisdiction, and many commentators have pointed to these courts as early examples of specialized courts. *Id.* at 757–62; Revesz, *supra* note 12, at 1112, 1132.

<sup>53</sup> See Federal Judicial History, U.S. Court of Customs and Patent Appeals (successor to the Court of Customs Appeals), 1910–1982, at [http://www.fjc.gov/history/home.nsf/page/patent\\_bdy](http://www.fjc.gov/history/home.nsf/page/patent_bdy) (last accessed Apr. 13, 2005).

<sup>54</sup> For an interesting narrative on the formation of the Federal Circuit, see Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 *Am. U. L. Rev.* 581 (1992) [hereinafter, Meador, *Origin of the Federal Circuit*]. See also Charles R. Haworth & Daniel J. Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 *U. Mich. J.L. Reform* 201 (1979) (describing the proposal that would eventually become the Federal Circuit).

<sup>55</sup> Meador, *A Challenge to Judicial Architecture*, *supra* note 5, at 613.

the area of patent law, the Federal Circuit has operated as a typical “specialized court” and has faced many of the problems that are inherent in specialized courts.<sup>56</sup>

The apparent success of the Federal Circuit, particularly in creating uniform and sensible patent law,<sup>57</sup> has invigorated proposals for other specialized appellate courts. The proposal for a court of tax appeals is still alive and well, five decades after it was first proposed by Professor Erwin Griswold.<sup>58</sup> There have been numerous proposals for a court of administrative appeals.<sup>59</sup> Other proposals include specialized courts of criminal appeals,<sup>60</sup> immigration appeals,<sup>61</sup> environmental appeals,<sup>62</sup> and commercial appeals.<sup>63</sup> All of these proposed courts take the same basic form as the Federal Cir-

---

<sup>56</sup> See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 *Case W. Res. L. Rev.* 769, 770 (2004) [hereinafter Dreyfuss, *A Continuing Experiment*] (noting that although “[t]he Federal Circuit is not specialized in the traditional sense” since “[i]ts docket includes areas outside the field of patent law,” in the area of patent law “both the benefits and detriments of specialization” have made themselves clear).

<sup>57</sup> See Dreyfuss, *A Case Study in Specialized Courts*, *supra* note 8, at 74 (“On the whole, the CAFC experiment has worked well for patent law, which is now more uniform, easier to apply, and more responsive to national interests.”).

<sup>58</sup> See Erwin N. Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 *Cath. U. L. Rev.* 787, 806–07 (1983); see also Carrington, *Obsolescence*, *supra* note 9, at 515. Indeed the original proposals for the Federal Circuit were to give that court exclusive jurisdiction over civil tax cases. See Meador, *Origin of the Federal Circuit*, *supra* note 54, at 592. Much to the chagrin of Professor Meador, in the face of harsh opposition from the head of the Tax Division of the DOJ, the Treasury Department, and the INS, the Federal Circuit was not given tax jurisdiction. See *id.* at 602–04.

<sup>59</sup> See Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 *Admin. L. Rev.* 329, 359–66 (1991); Currie & Goodman, *supra* note 29, at 75–76; Jordan, *supra* note 5, at 765–67; Revesz, *supra* note 12, at 1123. The Court of Appeals for the District of Columbia already has exclusive jurisdiction over some appeals from administrative agencies. See Currie & Goodman, *supra* note 29, at 75. This has led some commentators to describe the D.C. Circuit as a semi-specialized court of appeals, since it has otherwise full jurisdiction over appeals from the Federal District Court for the District of Columbia, but has exclusive jurisdiction in a few areas. See Revesz, *supra* note 12, at 1123.

<sup>60</sup> See Williams, *Federal Criminal Courts*, *supra* note 29, at 665–67.

<sup>61</sup> See Legomsky, *supra* note 42, at 1386–96.

<sup>62</sup> See Dreyfuss, *A Case Study in Specialized Courts*, *supra* note 8, at 72–73.

<sup>63</sup> See Victor Williams, *Punitive Damages in Arbitration: Mastrobuono and the Need for Creation of a National Court of Commercial Appeals*, 100 *Com. L.J.* 281, 311–18 (1995) [hereinafter, Williams, *Commercial Appeals*].

cuit—a court with limited, exclusive jurisdiction over a subject matter or set of subject matters.

Unfortunately, there are a host of problems associated with a move towards a subject-matter-oriented appellate judiciary. First is the concern that a specialized judiciary will develop “tunnel vision” as a result of a too-narrow focus on particular areas of the law.<sup>64</sup> If both judges and advocates focus on just one area of the law, that area of the law could become increasingly arcane. By contrast, forcing specialist advocates to argue before generalist judges helps keep the law intelligible. A related problem is a lack of “cross-pollination” of ideas in the common law when relying on specialized judiciaries. Common-law judges benefit from their broad exposure to legal problems in a variety of fields because insights from one area of the law can be used in other areas of the law.<sup>65</sup> For instance, new developments in contract law might be used to influence international trade law or patent law.

The creators of the Federal Circuit were cognizant of this potential problem,<sup>66</sup> and thus designed the court to take on a broad range of subject matters, including patent, international trade, and claims

---

<sup>64</sup> One of the earliest critiques in this vein is in Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425 (1951). This concise, two-page critique of the specialized judiciary influenced the debate over specialized courts for decades to come. See Hruska Commission Report, *supra* note 26, at 234–35.

<sup>65</sup> These critiques were summarized eloquently by Judge Rifkind:

Once you complete the circle of specialization by having a specialized court as well as a specialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the seclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priestcraft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.

Rifkind, *supra* note 64, at 425–26; see also Hruska Commission Report, *supra* note 26, at 234–36; Posner, *Crisis and Reform*, *supra* note 3, at 157; Dreyfuss, *A Continuing Experiment*, *supra* note 56, at 778 (stating in the context of a study of the Federal Circuit that a “problem with channeling a particular set of cases to a specialized tribunal is that the law in the chosen area may fall out of step with general jurisprudential developments”).

<sup>66</sup> Haworth & Meador, *supra* note 54, at 227 (“Specialization is a major pitfall to be avoided.”).

against the government (which in itself can include many different subject matters). Despite this design, judges on the Federal Circuit undoubtedly lack exposure to the same “rich docket” with a “wide variety of legal problems” as judges on the other courts of appeals.<sup>67</sup> The Federal Circuit has struggled with this problem. Professor Dreyfuss notes that the Federal Circuit is somewhat detached from the jurisprudential conversation among the other circuits, partly evidenced by the fact that other circuits rarely cite to the Federal Circuit’s opinions.<sup>68</sup>

The Federal Circuit had set itself up to adjudicate more non-patent issues through an interpretation of its jurisdictional grant that allowed it to hear an appeal so long as a patent claim appeared on any one of the litigant’s pleadings. Through this broad interpretation of its jurisdictional grant, the Federal Circuit would have had a greater opportunity to see patent law in the broader context of federal law.<sup>69</sup> Unfortunately, the Supreme Court ended this practice when it decided unanimously in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*<sup>70</sup> that the grant of jurisdiction to the Federal Circuit under 28 U.S.C. § 1295 had to be interpreted the same way as “arising under” jurisdiction in 28 U.S.C. § 1331—that is, that the patent dispute had to appear on the face of a well-pleaded complaint. As one commentator has noted, *Holmes* might have the unfortunate consequence of “undermining opportunities for percolation and cross-pollination” of legal ideas,<sup>71</sup> resulting in

---

<sup>67</sup> Id. at 229.

<sup>68</sup> Dreyfuss, A Continuing Experiment, supra note 56, at 778–79.

<sup>69</sup> Id. at 786–87 (noting that this practice presented opportunities for “intercircuit dialogue”).

<sup>70</sup> 535 U.S. 826 (2002).

<sup>71</sup> Dreyfuss, A Continuing Experiment, supra note 56, at 787. But note that the *Holmes* decision has the effect of allowing other circuits to hear patent cases when the patent issue is not on the face of a well-pleaded complaint:

[O]ther circuits will have some role to play in the development of [patent] law. An occasional conflict in decisions may be useful in identifying questions that merit this Court’s attention. Moreover, occasional decisions by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias.

*Holmes*, 535 U.S. at 839 (Stevens, J., concurring in part and concurring in the judgment); see also Dreyfuss, A Continuing Experiment, supra note 56, at 788 (discussing Justice Stevens’s arguments). Stevens is arguing that the *Holmes* rule actually counteracts two of the problems with giving a specialized court limited and exclusive jurisdiction over patent law—that the specialized court will not gain the benefit of other



2005]

*Specialize the Judge, Not the Court*

1283

even further isolation of the specialized Federal Circuit from the rest of the federal appellate judiciary.

Another criticism of specialized courts is that they are more vulnerable to capture by special-interest groups than are generalist courts. Some commentators believe that if judges hear only cases that are very important to an organized interest, representatives of those interests will ensure the appointment of favorably disposed judges. The Hruska Commission rejected a proposal to create specialized appellate courts partly due to these concerns: “[B]ecause the entire appointment process would operate at a low level of visibility, particular seats or indeed the court as a whole may be ‘captured’ by special interest groups.”<sup>72</sup> But “[s]uch dangers are attenuated . . . when the judge hears cases affecting many opposing groups,” as is the case when the judge is on a generalist court.<sup>73</sup> The range of cases heard by the Federal Circuit alleviates this concern somewhat, but its jurisdiction is still limited enough that a small group of special interests might be able to exert influence over appointments to that court.

Furthermore, while the expertise that courts of limited jurisdiction provide is undoubtedly valuable, the flip side is that specialist judges might have too much familiarity with a particular area of the law. Judges who are experts in welfare law, for example, are much more likely to have particular views about the proper operation of welfare law and hence are much more likely than generalist judges to impose their own views of policy.<sup>74</sup> This problem is exacerbated by vesting a specialist court with *exclusive* jurisdiction because it “might reduce the incentive, now fostered by the possibility that another court will pass on the same issue, to produce a thorough and persuasive opinion in articulation and support of a decision.”<sup>75</sup> This suggests that the “achievement” of the Federal Circuit in cre-

---

circuits’ reasoned opinions about patent law, and that the specialized court will be tempted to engage in excessive judicial policymaking. See *infra* notes 74–78 and accompanying text.

<sup>72</sup> Hruska Commission Report, *supra* note 26, at 235; see also Jordan, *supra* note 5, at 748.

<sup>73</sup> Jordan, *supra* note 5, at 748.

<sup>74</sup> Hruska Commission Report, *supra* note 26, at 235 (expressing concern that specialist judges may “impose their own views of policy even where the scope of review under the applicable law is supposed to be more limited”).

<sup>75</sup> *Id.*

ating uniform patent law,<sup>76</sup> or indeed the very goal of creating uniform national law at all, is not as desirable as one might initially believe. Combining limited and exclusive jurisdiction over a subject matter prevents what Judge Posner calls “yardstick competition.”<sup>77</sup> Without the “clash of views” created by such competition, judges might more often rely on sloppy reasoning.<sup>78</sup> A related critique is that the division of the circuit courts into regions may well enhance the federalist nature of our system of government; on this view, courts of exclusive national jurisdiction work against federalism. As the Hruska Commission argued, “[o]ur nation is not yet so homogeneous that the diversity of our peoples cannot be reflected to some advantage in the decisions of the regional courts.”<sup>79</sup>

Another problem with specialized courts is the difficulty in neatly classifying cases by subject matter. There are very few cases today that deal exclusively with laws in one area. Since most cases deal with a variety of fields, how does one deal with a case that cuts across the lines drawn by specialist courts? There are two options, neither of which is particularly desirable. A specialist court could deal with the entire case, and hence be *underspecialized* with regard to those aspects of the case which it does not customarily handle. Alternatively, the case could be divided among courts, with the appropriate parts going to the appropriate courts. Such a solution, however, would squander any gains in judicial efficiency that the specialist court provides.<sup>80</sup>

Yet another problem stems from the fact that it is difficult to reliably predict the volume of cases different areas of the law will generate in the future. As the Hruska Commission noted: “The demands of federal programs to protect the environment were hardly foreseen a brief decade ago; the dimensions of new pro-

---

<sup>76</sup> See supra note 57. It is difficult to characterize uniformity as an “achievement” of the Federal Circuit because that court is the final arbiter of patent law in the vast majority of cases; it is better to characterize this uniformity as a “natural result.”

<sup>77</sup> Posner, *Crisis and Reform*, supra note 3, at 156.

<sup>78</sup> *Id.*; see also Jordan, supra note 5, at 748 (“[A]lthough uniformity may be a desirable goal, the supporters of generalist courts see a virtue in the more thorough airing an issue may receive if it is considered by several different courts.”).

<sup>79</sup> Hruska Commission Report, supra note 26, at 235.

<sup>80</sup> See Posner, *Crisis and Reform*, supra note 3, at 157; see also Jordan, supra note 5, at 748 n.7 (citing Roscoe Pound, *Organization of Courts* 273–94 (1940), which discusses extensively the advantages of generalist courts in this regard).

grams developed to meet needs relating to consumer protection, energy, or the economy, and the judicial business to be anticipated from them, can only be dimly perceived at this juncture.”<sup>81</sup> Given this unpredictability, designing specialized courts with the flexibility to adjust to variations in issues that come before the federal appellate judiciary—and particularly determining the right size of those courts—is a daunting task. A potential solution would be to increase or decrease the number of judges on a specialist court to meet changing demand, but this too seems unrealistic given the guarantees of life tenure under Article III. Another option would be for Congress to modify the jurisdiction of specialist courts to match ebbs and flows in the number of cases in particular areas of the law. For obvious reasons, however, this would all but negate any advantage derived from specialized courts. Generalist courts adapt more readily to changes in the types of cases they see because, while the volume of cases generated by individual areas of the law may greatly fluctuate from year to year, the volume of cases overall tends to change gradually.<sup>82</sup> Again, the broader jurisdiction of the Federal Circuit mitigates this problem somewhat, but the Federal Circuit is clearly not as flexible in this regard as the generalist courts of appeals.

Finally, several commentators have pointed to the potential difficulty of attracting highly qualified individuals to the federal bench if those judgeships only dealt with a few areas of the law. To put the argument somewhat crudely, the job of a federal judge is at its most prestigious when the judgeship has the most power. The power to decide cases that cut across the legal spectrum, especially in an age where Supreme Court review is rare, is great indeed. As one commentator has noted:

---

<sup>81</sup> Hruska Commission Report, *supra* note 26, at 263.

<sup>82</sup> Judge Posner highlights this point with the following example:

An unexpected increase in the number of social security appeals in one year does not subject the courts of appeals to unbearable strain, because the other components of its caseload are increasing more slowly, and some are actually decreasing. But if there were a separate social security court of appeals, a sudden big increase in the number of social security appeals could put a big strain on that court because there would be no compensating decreases, while a sudden big decrease could leave its judges underemployed.

Posner, *Crisis and Reform*, *supra* note 3, at 158.

[C]ourts which exercise less than the widest jurisdiction have been viewed by the bar and the public as “inferior,” regardless of their place on a judicial organization chart. Positions on such courts have not been perceived as attractive career opportunities for the most able lawyers; thus the quality of decisions in these areas may suffer.<sup>83</sup>

Furthermore, as Judge Posner has noted, the job of an appellate judge can be monotonous as it is, and dealing with limited subject matters only makes the job more so.<sup>84</sup> These concerns, however, should not be overstated; it is not entirely clear that the Federal Circuit has been unable to attract the most qualified individuals into its ranks.

*B. Using the Example of Specialization in European Judicial Systems*

Despite the numerous problems created by specializing courts of appeals and providing for limited and exclusive jurisdiction, many proponents still favor this approach. They often turn to the models of European judicial systems, noting the successes of European countries in creating extremely specialized court systems.<sup>85</sup> Professor Meador, for example, praises the design of the German court system:

The German courts . . . are not organized into a single judicial system. Rather, there are five distinct systems. These are spoken of as “the five jurisdictions,” and each is nationwide in scope. These jurisdictions are not territorial; they are erected along subject matter lines. . . . The five jurisdictions are, in English translation, the ordinary, the administrative, the financial, the social, and the labor.<sup>86</sup>

---

<sup>83</sup> Jordan, *supra* note 5, at 748.

<sup>84</sup> Posner, *Crisis and Reform*, *supra* note 3, at 150.

<sup>85</sup> See, e.g., Williams, *Federal Criminal Courts*, *supra* note 29, at 598–614.

<sup>86</sup> Daniel J. Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 *Hastings Int'l & Comp. L. Rev.* 27, 31 (1981) [hereinafter Meador, *German Design*]. Professor Meador provides a useful summary of the types of cases heard by each of the five jurisdictions of the German judicial system. *Id.* at 31–41.

2005]

*Specialize the Judge, Not the Court*

1287

Professor Meador describes the German appellate system as “one of the best-functioning appellate systems embodying a subject matter design” and suggests that a subject matter organization like that used in Germany is “a promising solution” to the “dilemma” of exploding caseloads in the federal appellate courts.<sup>87</sup>

Judge Posner has expressed “serious reservations . . . about trying to graft one branch of [the Continental] system, namely the specialized judiciary, onto an alien trunk.”<sup>88</sup> Indeed, as Judge Posner intuits, there may be problems with transplanting a solution used among civil-law courts to our American common-law system. There are fundamental differences between civil-law courts and common-law courts, and therefore looking to Europe for ideas about how to run a judiciary may be an apples-and-oranges exercise. In fact, the very role of the civil-law judiciary in European governance is quite different from the role of the common-law judiciary in the American system of government.

The common-law judge is typically a person of high stature for whom “[a]ppointment or election to the bench comes as a kind of crowning achievement relatively late in life” and to whom we grant very broad powers of statutory construction and constitutional review.<sup>89</sup> The typical civil-law judge in Europe, however, is generally little more than a bureaucrat. Civil-law judges are trained through a course of study separate from attorneys, and they take their offices soon after completing school. They advance through the ranks of judges much like any bureaucratic employee, based on a regularized system of experience and merit. Given their relatively modest stature in the legal system, it is not surprising, then, that the civil-law judges in Europe are assigned the fairly “mechanical” role of “operat[ing] . . . a machine designed and built by legislators.”<sup>90</sup>

The reason for the administrative role of the civil-law judge is that civil-law jurisdictions have historically adhered to the doctrines (or, some might say, “dogma”<sup>91</sup>) of legislative supremacy and

---

<sup>87</sup> Id. at 28–29.

<sup>88</sup> Posner, *Will the Federal Courts of Appeals Survive?*, supra note 2, at 778.

<sup>89</sup> John Henry Merryman, *The Civil Law Tradition* 34 (2d ed. 1985).

<sup>90</sup> Id. at 34–36; see also James G. Apple & Robert P. Deyling, *A Primer on the Civil-Law System* 38 (1995); Arthur Taylor von Mehren & James Russell Gordley, *The Civil Law System* 1146–49 (2d ed. 1977).

<sup>91</sup> Merryman, supra note 89, at 36.

strict separation of powers that arose out of the French Revolution.<sup>92</sup> To those adopting the traditional civil-law mindset, the legislature, as the sole agent of the people, is the only legitimate source of law. Judges, by contrast, are seen as tools of the crown, and for this reason there is little taste in civil-law countries for anything that might be described as “judge-made” law.<sup>93</sup> Civil-law thinkers even reject *stare decisis* as a principle, because to allow judges to create binding opinions is, in a way, an acknowledgement that judges can create law.<sup>94</sup> The result of these doctrines is that judges are considered to be relatively weak players in the civil-law landscape, at least as compared to judges in the United States.

Another telling difference between civil-law and common-law jurisdictions is that, in the main, the primary source of law in modern civil-law countries is the civil code, a set of legislative enactments, rather than the common law. The civil codes were first developed in the early nineteenth century and were products of the Age of Enlightenment and Enlightenment thinkers’ faith in human rationality and the scientific method.<sup>95</sup> As Professor Schlesinger notes, “[t]he very idea of codification rests on the sanguine 18th century belief in the ability of the human mind by its reason to project the solution of future controversies, and to do so in a systematic and comprehensive manner.”<sup>96</sup> As a theoretical matter, then, to the civil-law thinker, the code is seen as exhaustive, providing all the answers to legal problems.<sup>97</sup> This, in turn, reduces the art of judging to routine—the judge becomes little more than an “expert clerk” with a ready legislative response to any legal issue.<sup>98</sup> When presented with a particular fact situation the judge’s function is “merely to find the right legislative provision, couple it with the

---

<sup>92</sup> See also Rudolph B. Schlesinger et al., *Comparative Law* 298 n.14 (5th ed. 1988) (noting that “Napoleon’s armies carried much of the spirit of the French Revolution across vast stretches of the continent”).

<sup>93</sup> *Id.* at 296–98 (describing the history of Continental courts and their relationship to the legislature).

<sup>94</sup> See Merryman, *supra* note 89, at 36–38.

<sup>95</sup> See Schlesinger, *supra* note 92, at 278, 298–99.

<sup>96</sup> *Id.* at 299.

<sup>97</sup> *Id.* at 288.

<sup>98</sup> Merryman, *supra* note 89, at 36.

fact situation, and bless the solution that is more or less automatically produced from the union.”<sup>99</sup>

Of course, in reality, the differences between the civil law and the common law are more hazy. The notion that a civil code is coherent and complete is a fantasy; inevitably a civil code contains gaps and ambiguities. As Professor Merryman notes, the civil-law judge “is not, in practice, relieved by clear, complete, coherent, prescient legislation from the necessity of interpreting and applying statutes.”<sup>100</sup> In this capacity, civil judges in fact exercise some creativity. Nonetheless, the “important distinction between the civil-law and the common-law judicial processes does not lie in what courts in fact do, but in what the dominant folklore tells them they do.”<sup>101</sup> And in any case, at least as a comparative matter, civil-law judges view their own role as more mechanical than common-law judges.<sup>102</sup>

Adherence to this folklore has practical effects. One is that judicial opinions in some civil-law jurisdictions (especially Germany and France) tend to be quite concise, especially when compared to the typically ponderous opinions generated by American courts. Civil-law opinions generally encompass little more than a description of the facts, a citation to the applicable code provision, and the outcome demanded by that provision.<sup>103</sup> Another practical effect, particularly in Germany, is that civil-law courts are highly specialized.<sup>104</sup> There are two reasons why specialization makes sense given

---

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 43.

<sup>101</sup> *Id.* at 47; see also Schlesinger, *supra* note 92, at 298 n.15 (noting that “historically conditioned attitudes are very real forces in a society” with “important practical effects, of which the relatively modest social standing and the low rate of compensation of judges . . . may be mentioned as examples”).

<sup>102</sup> See Apple & Deyling, *supra* note 90, at 37 (“Judges in the civil-law systems view themselves less as being in the business of creating law than as mere appliers of the law (i.e., a more technical, less active role in the development of the law than their common-law counterparts’.”); see also von Mehren & Gordley, *supra* note 90, at 1131–38, 1145 (discussing the tension between the reality of the nonmechanical nature of judicial decisionmaking and the manner in which the courts conceive of their own role).

<sup>103</sup> See Apple & Deyling, *supra* note 90, at 36–37; von Mehren & Gordley, *supra* note 90, at 1139–41. But see Schlesinger, *supra* note 92, at 448 (“Regarding length and style of judicial opinions, there is no uniformity in the civil-law world.”).

<sup>104</sup> See Nigel G. Foster, *German Legal System & Laws* 38 (2d ed. 1996) (noting that the principles under which the German court system was organized—“specialization”

the civil-law folklore. First, there is little gain to be had from maintaining generalist judiciaries in a civil-law jurisdiction. Consider a civil-law judge confronted with a tax law case. Since, in theory, the code provides all legal answers, the judge's only job is to search for the applicable provision in the tax code and apply it to the facts of the case. Under the civil-law theory, then, very little benefit inures to the legal system if the hypothetical tax judge were to also hear cases involving labor law, environmental law, or any other kind of law. As proof, consider that within the German system, the "five jurisdictions" operate completely independently of each other. Each jurisdiction is headed by its own supreme court, and while there is a mechanism for harmonizing the law among the jurisdictions at the supreme court level, it is infrequently utilized.<sup>105</sup> It is possible that this means that German law is uniquely coherent, but the more likely view is that the Germans have a high tolerance for doctrinal tensions that do not rise to direct conflicts.<sup>106</sup> Whatever the case, the lack of formal communication between the five jurisdictions likely reflects a view that each jurisdiction has little to learn from the others.

Second, there are potentially great benefits to having a specialist judiciary in civil-law jurisdiction. There are the obvious benefits—better-reasoned and more efficient judging.<sup>107</sup> But also consider that the civil code, and interpretation of that civil code, tends to be quite complex; this might be expected given that the code is expected to resolve all legal problems. Having expert judges versed in the intricacies of a particular part of the code works to the benefit of the legal system. Thus, within the civil-law world, it makes sense to compartmentalize the judicial function into various subject matter areas; while there is little to be gained from having generalist judges, creating a specialized judiciary might have great benefit.

This argument suggests that the highly specialized courts in Germany and other civil-law jurisdictions might work well only in the context of the civil-law system of judging, with its strict separa-

---

and "decentralization"—"evolved due to the federal nature of Germany and the historical development and codification of German law").

<sup>105</sup> See Meador, *German Design*, *supra* note 86, at 55.

<sup>106</sup> See von Mehren & Gordley, *supra* note 90, at 134–35 (suggesting that "an apparent lack of uniformity would merely reflect different policy requirements").

<sup>107</sup> See Foster, *supra* note 104, at 40, 47.



2005]

*Specialize the Judge, Not the Court*

1291

tion of powers and the relatively mechanical role of judges. One should carefully consider whether the success of such courts provides any support for adopting specialized courts in the common-law landscape. Unlike civil-law judges, common-law judges are considered legitimate lawmakers and have greater creative leeway. As lawmakers, common-law judges benefit greatly from broad exposure to the full scope of law. Indeed, the typical judicial opinion by a federal appellate court is hardly an exercise in mechanical judging. These opinions are wide ranging, pulling in a host of legal and non-legal ideas to resolve a particular case. As suggested above, while cross-pollination of legal ideas is an important feature of the common law, it is less vital to the civil-law system. But we need not abandon Europe. As the next Part demonstrates, we simply need to look at the *right* court for a lesson in specialization.

## II. SPECIALIZATION IN THE FEDERAL CONSTITUTIONAL COURT OF GERMANY

The example of the Federal Constitutional Court of Germany provides some interesting ideas about how to introduce a level of specialization into an appellate judiciary without having to create specialized courts with limited and exclusive jurisdiction.<sup>108</sup> Of course, for the reasons described above, looking at civil-law courts for lessons on specialization may not make much sense. Why would looking at a constitutional court in a civil-law jurisdiction be any different? Stated most simply: the typical constitutional court is a legitimate lawmaker; it has greater powers to review statutes and create law than does the typical civil-law court. Indeed, the German Constitutional Court, like other constitutional courts, might be properly understood as a graft of the U.S. system of judging onto the alien trunk of the civil law.<sup>109</sup> As a result, transplanting the

---

<sup>108</sup> Of course, as discussed below, the constitutional court itself is an example of a court of limited and exclusive jurisdiction. However, while it is true that the constitutional court is specialized in that it only handles constitutional questions, by their very nature “constitutional” questions cut across all areas of the law. Hence, constitutional courts are not specialized in the same sense as a court of tax appeals or a court of social security appeals would be.

<sup>109</sup> Cf. Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 3–4 (2d ed. 1997) [hereinafter Kommers, *Constitutional Jurisprudence*] (describing why, in Germany, the powers of review exercised by the U.S. Supreme Court were placed in a special Constitutional Court).

judicial specialization used by the German Constitutional Court to American appellate courts is a somewhat more “apples-to-apples” exercise. This Part therefore provides a short description of constitutional courts and their role in civil-law jurisdictions and demonstrates the similarities between constitutional courts and American appellate courts. Thereafter, it moves to a description of the Federal Constitutional Court of Germany and its unique mode of specialization.

*A. Constitutional Courts and Judicial Lawmaking in Europe*

In the early history (from about the fifteenth to the eighteenth century) of government in the European nation-state, the prevalent conception of division of power within government was legislative supremacy. The concept of a rigid constitution, which bound a legislature to a set of difficult-to-change fundamental norms, and under which some other governmental body (like the judiciary) could strike down legislative enactments, was alien. Instead, older European constitutions tended to be ‘flexible’ in that ordinary legislative enactments could prevail over a conflicting constitutional provision.<sup>110</sup> The early constitutions of Germany also were focused primarily on protecting the rights of the various organs of government in conflicts among themselves.<sup>111</sup> For example, the *Staatsgerichtshof* of the Weimar Republic, a precursor to the German Constitutional Court, sat infrequently and had a very narrow jurisdiction focused on resolving “constitutional conflicts within and among the separate states as well as between states and the Reich.”<sup>112</sup>

However, the end of World War II saw the spread of American-style constitutionalism throughout Europe and, with it, the need for some manner of constitutional review of governmental actions.

---

<sup>110</sup> For example, in the Weimar Republic, while basic human rights were catalogued in a written constitution, the legislature could get around these provisions simply by passing legislation with a two-thirds majority. Foster, *supra* note 104, at 26. This allowed the rise of parties like the Nazi party, whose main purpose was the overthrow of the constitutional order. See *id.*

<sup>111</sup> See Kommers, *Constitutional Jurisprudence*, *supra* note 109, at 4–5; see also Foster, *supra* note 104, at 47.

<sup>112</sup> Kommers, *Constitutional Jurisprudence*, *supra* note 109, at 5; see also Foster, *supra* note 104, at 48.

The German Constitutional Court is a typical example of a European constitutional court, and one can see the clear American influence on this structure of the government and judiciary. After the war and under the supervision of the Allies, the Germans created a constitution (the “Basic Law”) on the bedrock foundations of “democracy, federalism, and fundamental rights.”<sup>113</sup> The Allied governors emphasized reorganization of the judiciary and made it clear that “judicial review was implicit in their understanding of an independent judiciary.”<sup>114</sup>

The very idea of fundamental law expressed in a rigid constitution led necessarily to some manner of review. Yet *judicial* review was not easily accepted in Germany or anywhere else in Europe. The idea of allowing the judiciary to decide the constitutionality of legislative enactments was still anathema to many civil-law thinkers. After all, to the civil-law mind, “the power to hold statutes illegal is a form of lawmaking” which, under the doctrine of strict separation of powers, was something a judge simply could not do.<sup>115</sup> Furthermore, “the insistence that ordinary judges not be lawmakers in any sense led to a rejection of the idea that prior judicial decisions should control future judicial action . . . .”<sup>116</sup> These beliefs were serious roadblocks in the creation of courts capable of exercising the power of judicial review. The solution adopted by Germany (and, thereafter, many other civil-law countries) was the creation of a constitutional court that existed separate from and independent of the normal court system.<sup>117</sup>

While there are significant differences among various constitutional courts, some commonalities do exist. Constitutional courts do not hear normal cases involving application of law to facts. They

---

<sup>113</sup> David P. Currie, *The Constitution of the Federal Republic of Germany* 8–10 (1994) [hereinafter Currie, *Constitution*].

<sup>114</sup> Kommers, *Constitutional Jurisprudence*, supra note 109, at 7.

<sup>115</sup> Merryman, supra note 89, at 38.

<sup>116</sup> *Id.* at 133.

<sup>117</sup> See *id.* at 137–40. In Germany, the framers of the Basic Law considered the idea of making the constitutional court part of the ordinary judiciary. In the end, the framers decided to create a constitutional court separate from and independent of other public-law courts. Kommers, *Constitutional Jurisprudence*, supra note 109, at 8–10. The French approach is quite different. In France, the “Constitutional Council”—a body made up of former Presidents of France plus other appointed members—determines whether laws passed by the legislature are unconstitutional. See Merryman, supra note 89, at 137.

instead have exclusive jurisdiction over constitutional questions that may arise in ordinary litigation, such as a claim that a particular statute or practice violates the fundamental norms in the constitution. Constitutional courts, unlike the U.S. Supreme Court, are typically not the last stage of appeal in a sequence of courts; rather, when a constitutional question arises, it is referred to the constitutional court. When the constitutional court has disposed of the constitutional issue in the case, it refrains from actually deciding the outcome; rather it will remand the case back to the regular court for final disposition. Many constitutional courts also can hear direct attacks on the constitutionality of statutes, in contrast to the U.S. federal courts, which only allow constitutional review in the context of a specific case or controversy.<sup>118</sup>

Some constitutional courts, and in particular the German Federal Constitutional Court, have experimented with judicial specialization. The advantage of drawing lessons about specialization from the experiences of constitutional courts rather than from ordinary civil-law courts is that there is far less concern that such experiences are peculiar to the context in which they are found. Indeed, constitutional courts are more like our own system of appellate judging than the ordinary civil-law system. Obviously, there are some important differences. American courts (including the Supreme Court) have “plenary jurisdiction” over all of the issues in a particular case or controversy, constitutional or otherwise; civil-law courts set aside questions on the constitutionality of laws and refer them to the constitutional court. In the United States, every court, from the lowest trial court to the Supreme Court, has the ability to rule on the constitutionality of laws; in contrast, constitutional courts have a monopoly on such questions. Most American courts have general, nonexclusive jurisdiction, while constitutional courts have limited, exclusive jurisdiction over constitutional questions.

Nevertheless, in the ways that matter in the context of judicial specialization, the constitutional courts are quite similar to American appellate courts. Unlike civil-law judges, judges on constitutional courts are not simply mechanically applying the law on the

---

<sup>118</sup> See generally Currie, *Constitution*, supra note 113, at 27; Merryman, supra note 89, at 139–40.

books to the facts before them. Like federal appellate judges, these judges are seen, however reluctantly, as lawmakers. As evidence, consider that the decisions of the German Federal Constitutional Court are not simply binding as to the parties in the case, but are formally binding on everybody, from individuals to government authorities to states and constitutional organs of the Federal Government. This binding effect applies not just to the particular holding of a case, but to the “essential reasoning upon which the judgment is based” as well.<sup>119</sup> Furthermore, constitutional courts are expected to engage in some amount of creativity and have much wider power to review statutes and craft the law. They do not shy away from heated “social, political, moral, and religious” disputes, and have indeed, like the American courts, “decided that it is their duty to search in the penumbræ of the constitutions for value judgments and guide-lines about such issues.”<sup>120</sup> Constitutional courts, like Article III courts, enjoy a high status, and great deal of independence from the other branches of government.<sup>121</sup> Furthermore, judges on constitutional courts tend to be more experienced legal thinkers than their ordinary civil-law counterparts, and therefore can be expected to take a broader view of the law when deciding cases.<sup>122</sup> This suggests that a method of specialization used by a constitutional court could find a hospitable environment in the U.S. appellate court system.

Having described why the German Constitutional Court’s experience with specialization might be more fruitful for our inquiry than that of the ordinary German civil-law courts, we turn to a brief description of the German system of government and the role

---

<sup>119</sup> See Alfred Rincken, *The Federal Constitutional Court and the German Political System*, in *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* 55, 71 (Ralf Rogowski & Thomas Gawron eds., 2002) (noting also that the decisions of the Federal Constitutional Court are “published in the same way as Acts of Parliament”).

<sup>120</sup> Mauro Cappelletti, *The Judicial Process in Comparative Perspective* 161–63 (1989).

<sup>121</sup> See Donald P. Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* 86 (1976) [hereinafter Kommers, *Judicial Politics*] (“It is fair to conclude that no other judicial tribunal in German history has achieved the status or measure of independence that the Federal Constitutional Court currently enjoys.”).

<sup>122</sup> See Kommers, *Constitutional Jurisprudence*, *supra* note 109, at 20 (discussing the formal requirements for selection to the Federal Constitutional Court).

of the German Constitutional Court in that system. The Constitutional Court has experimented with two layers of specialization, and evaluating these can provide us with lessons for our own experiments with specialization.

### B. *The Federal Constitutional Court of Germany*

Like the United States, Germany is a federal republic made up of several states (*Länder*), and the federal government, which consists of three branches. The constitution (“*Grundgesetz*,” or Basic Law) was adopted in 1949 and, like our own constitution, sets the basic structure of government as well as fundamental norms to which the government must adhere.<sup>123</sup> The legislative branch is divided into the Federal Assembly, or *Bundestag*, which is roughly the equivalent of the U.S. House of Representatives, and the Federal Council, or *Bundesrat*, which is roughly the equivalent of the U.S. Senate. While technically the President is the head of state, the position is mostly ceremonial; it is the Chancellor, an officer elected by the *Bundestag* and generally representing the majority party, who holds real executive authority.<sup>124</sup> The judiciary consists of the Federal Constitutional Court, the five hierarchies of federal courts dealing with different subject matter areas, and the *Länder* courts (including *Länder* constitutional courts).<sup>125</sup>

Articles 92–94 of the Basic Law create the Federal Constitutional Court (“*Bundesverfassungsgericht*”) and outline the jurisdiction and composition of that Court.<sup>126</sup> The Federal Constitutional Court is a typical constitutional court—it exists independently of and separately from the rest of the judiciary, and its only function is to interpret and apply the Basic Law.<sup>127</sup> The Court has its own administration and budget and is not in any way connected to the

---

<sup>123</sup> See Grundgesetz [GG] [Constitution], translated at [http://www.bundestag.de/htdocs\\_e/info/030gg.pdf](http://www.bundestag.de/htdocs_e/info/030gg.pdf) (last accessed Apr. 15, 2005). The website for the *Bundestag*, the German national parliament (<http://www.bundestag.de/>), contains an English translation of the most recent version of the German Basic Law. See also Currie, Constitution, *supra* note 113, at 8–10 (describing briefly the events leading up to the adoption of the Basic Law).

<sup>124</sup> See generally Currie, Constitution, *supra* note 113, at 26.

<sup>125</sup> GG arts. 92, 95; see also Currie, Constitution, *supra* note 113, at 74–77.

<sup>126</sup> GG arts. 92–94; Currie, Constitution, *supra* note 113, at 150.

<sup>127</sup> See Currie, Constitution, *supra* note 113, at 27.

other entities of the Federal Government;<sup>128</sup> it has broad jurisdiction over a prescribed set of cases touching on interpretation of the Basic Law.<sup>129</sup> The Court is composed of sixteen justices, half of whom are appointed by the *Bundestag* and half by the *Bundesrat*.<sup>130</sup> The Basic Law states that members of the Court are to be “federal judges and other members,” assuring that the Court will not only be staffed with federal judges from the ordinary judiciary but also from people outside the judiciary altogether (such as law professors or politicians).<sup>131</sup> Supplementing the rather thin provisions of the Basic Law is the Federal Constitutional Court Act or “FCCA” (*Bundesverfassungsgerichtsgesetz*), which fleshes out the Court’s powers, organization and procedures.<sup>132</sup>

The first type of specialization used by the Federal Constitutional Court is the two-panel senate system. The Court is divided into two “Senates,” each of which has eight justices. Each Senate has responsibility for an exclusive subset of those subject matters that may come before the Court. The *Plenum*—the two Senates sitting together—comes together occasionally to resolve jurisdictional conflicts and decide questions of judicial administration. A justice is selected directly for either the First or Second Senate, and remains on that Senate for his or her entire term.<sup>133</sup>

As originally designed, the jurisdictions of the two Senates had very different characteristics. The Second Senate was meant to operate much like the Weimar *Staatsgerichtshof* in that it would only decide political disputes—such as disputes between the branches of the government, or between the federal government and the *Länder*, and disputes involving contested elections, the constitutionality of political parties, or abstract questions of constitutional law.

---

<sup>128</sup> See Kommers, *Judicial Politics*, supra note 121, at 83–86, 91.

<sup>129</sup> See GG art. 93; cf. U.S. Const. art. III, § 2 (setting out the jurisdiction of the U.S. federal courts over federal questions, diversity suits, and suits involving disputes over different branches of government).

<sup>130</sup> See GG art. 94.

<sup>131</sup> *Id.*

<sup>132</sup> Gesetz über das Bundesverfassungsgericht (Bundesverfassungsgerichtsgesetz) [Federal Constitutional Court Act], v. 11.8.1993 (BGBl. I S. 1474), available as amended at <http://dejure.org/gesetze/BVerfGG> (last accessed July 6, 2005), translated at <http://www.iuscomp.org/gla/statutes/BVerfGG.htm> (last accessed July 6, 2005) [hereinafter FCCA].

<sup>133</sup> See FCCA, supra note 132, at art. 2, 14, BGBl. I S. 1474, 1474, 1476; Kommers, *Constitutional Jurisprudence*, supra note 109, at 16–18.

The First Senate would be responsible for reviewing the constitutionality of federal or *Lander* law and resolving concrete constitutional questions. The dual-Senate system is akin then to creating two constitutional courts of limited and exclusive jurisdiction. However, the problems with this system soon became apparent—the Second Senate was deciding only a handful of cases, while the First Senate was flooded with work.<sup>134</sup> This problem with the rigid senate system used by the Federal Constitutional Court is analogous to one of the problems with specialized courts in the U.S. federal appellate system—the problem that such courts are unresponsive to changes in the mix of cases brought before the federal courts as a whole.<sup>135</sup> In response to this imbalance between the Senates, the federal parliament amended the FCCA to redistribute work and allow the Plenum to reallocate subject-matter jurisdiction between the Senates at the start of each term. These changes have largely alleviated the problems of the two-senate system, but only by undermining the rationale that led to its adoption.<sup>136</sup>

When a case comes up to the Court, it is first assigned to the appropriate Senate. Within each Senate, the FCCA authorizes “chambers” of three or more judges to filter out frivolous complaints. These chambers are empowered to rule on the merits of a constitutional complaint, if the case can be answered by reference to clearly established standards laid down in prior cases and if the case does not involve striking down a statute as unconstitutional. If a case gets beyond this stage, it passes through to the full Senate for consideration.<sup>137</sup> Here, we come across a second, and for our purposes, more important, layer of specialization. Before the start of each business year, each Justice is assigned to serve as the “rapporteur” (*Berichterstatter*) in cases related to some subset of the subject areas that her Senate handles. This assignment takes place on the basis of the particular interests or expertise of the justices. New justices without an expertise are expected to develop one. Thus, for each substantive area that comes before the Senate a designated “expert judge” can spearhead the case. For example, the Second Senate typically has someone with a background in interna-

---

<sup>134</sup> See generally Kommers, *Constitutional Jurisprudence*, supra note 109, at 16–18.

<sup>135</sup> See supra notes 81–82 and accompanying text.

<sup>136</sup> See generally Kommers, *Constitutional Jurisprudence*, supra note 109, at 16–18.

<sup>137</sup> See *id.* at 18–20.



2005]

*Specialize the Judge, Not the Court*

1299

tional law who handles cases involving international legal issues.<sup>138</sup> Once a case has passed through to the full Senate, then, it is assigned to the appropriate rapporteur, who takes charge of the case from that point forward. This method of assigning justices to cases is not mandated by the FCCA, but is simply an internal process adopted by the Federal Constitutional Court.<sup>139</sup>

Unlike the collective consideration that takes place as soon as a case comes before a U.S. appellate court, the rapporteur takes the first cut at consideration of the case by creating a *votum*, a detailed report on all aspects of the case. One commentator describes the process of creating a *votum* as follows:

Assisted by his or her law clerks, the rapporteur prepares what amounts to a major research report. He describes the background and facts of the dispute, surveys the court's own precedents and the legal literature, presents fully documented arguments advanced on both sides of the question, and concludes with the personal view of how the case should be decided. A *votum*, which may be well over a hundred pages long, may take weeks, even months, to prepare, and often it forms the basis of the first draft of the court's final opinion.<sup>140</sup>

The rapporteur distributes the *votum* to his or her colleagues on the Senate, and at a conference of the justices the rapporteur must summarize the case and state the reasons for his recommendation. The rapporteur's statement of the issues and recommendations often prevail, although not always; the rapporteur still must convince the other justices on the Senate that his recommended decision is the desired outcome. As Professor Donald Kommers notes, "vota are not automatically accepted. There is strong feeling on the Court that a [rapporteur] must justify the support of his colleagues and *win* their consent."<sup>141</sup> Thus, even in practice this system does not operate as a mere delegation to the rapporteur the power to decide the case.

---

<sup>138</sup> See *id.* at 24.

<sup>139</sup> On the functioning of rapporteurs, see generally Kommers, *Constitutional Jurisprudence*, *supra* note 109, at 24–26 and Kommers, *Judicial Politics*, *supra* note 121, at 175–81.

<sup>140</sup> Kommers, *Constitutional Jurisprudence*, *supra* note 109, at 25.

<sup>141</sup> Kommers, *Judicial Politics*, *supra* note 121, at 192.

The rapporteur also has the task of writing the opinions, even when his or her view of the outcome of the case has not prevailed. A rapporteur who strongly disagrees with the outcome of the case can ask that another justice take responsibility for writing the opinion, but this is a rare occurrence. This is surely a remarkable feature to the American eye, but in the Federal Constitutional Court, majority opinions are unsigned and signed dissenting opinions are extremely rare. According to one estimate, over ninety percent of the Court's reported cases are unanimous. The Court places a high premium on minimizing discord on the bench and coming to broad consensus even on prickly constitutional issues.<sup>142</sup>

By all reasonable measures, the German Federal Constitutional Court's rapporteur system has been quite successful. The Federal Constitutional Court is admired for the quality of its decisionmaking, and its rapporteur system has withstood the test of time.<sup>143</sup> Given its apparent success, and the fact that the Federal Constitutional Court is similar in important ways to U.S. appellate courts, the rapporteur system offers a fascinating solution to the problem of judicial specialization in the federal appellate courts. As we will see, the great advantage of this solution is that it splits the difference between a wholly generalist court and a wholly specialist one. The next Part uses the German Federal Constitutional Court's rapporteur system as a starting point to develop a similar system for the U.S. courts of appeals, and describes the advantages of such an approach to judicial specialization.

### III. A PROPOSAL: RAPPOREURS FOR THE U.S. FEDERAL APPELLATE JUDICIARY

In short, my proposal is for each geographical court of appeals<sup>144</sup> to establish a system much like the German rapporteur system, where each three-judge panel would include a single "expert" and two non-experts. The benefits of this proposal are that it achieves nearly all of the goals of proposals for specialized courts of limited

---

<sup>142</sup> See Kommers, *Constitutional Jurisprudence*, supra note 109, at 25–26.

<sup>143</sup> See Cappelletti, supra note 120, at 161–62 (“The impact of the constitutional courts in [Germany, Italy and Austria] has been remarkable and, by general recognition, very positive.”).

<sup>144</sup> And perhaps the Federal Circuit as well, although this solution might obviate the need for it.

2005]

*Specialize the Judge, Not the Court*

1301

and exclusive jurisdiction,<sup>145</sup> while avoiding most of the concomitant problems.<sup>146</sup> Furthermore, this proposal can do all this without major modifications to the structure of the appellate court system—it would maintain the current system of geographically-divided appellate courts with general, nonexclusive jurisdiction. The only necessary changes would be to the internal administration of the courts.

Under this proposal, at the start of each term, each member of the court would select a set of subject matter areas for which he or she would be a designated rapporteur. There would not need to be a one-to-one correlation between subject matter and judge. Indeed, a many-to-many structure—where each judge selects a set of subject matters on which he or she is expert, and where each subject matter has multiple expert judges—would make much more sense, as it can help mitigate some of the difficulty in equalizing work among judges. The selection of subject matter expertise can be based on a judge's experience before being appointed to the bench, or, if the judge had no particular specialty, based on a willingness to develop an expertise. When a case came before a federal appellate court, it would be assigned to the appropriate rapporteur based on the subject matter of the case. The other two members would be assigned randomly from those judges that were not designated rapporteurs for the subject matter.

To make this proposal a little more concrete for the purposes of our discussion, consider the following example. Imagine a Fourteenth Circuit with five members—Judge Bush, Judge Halladay, Judge Chacin, Judge Towers, and Judge Lilly. At the start of the current term, these judges assigned themselves to serve as rapporteurs for the following subject matter areas:

---

<sup>145</sup> See supra notes 41–50 and accompanying text.

<sup>146</sup> See supra notes 64–84 and accompanying text.

<b>JUDGE</b>	<b>SUBJECT MATTER EXPERTISE(S)</b>
<b><i>BUSH</i></b>	<b><i>PATENT, TRADEMARK, ENVIRONMENTAL</i></b>
<b><i>HALLADAY</i></b>	<b><i>SOCIAL SECURITY, CRIMINAL</i></b>
<b><i>CHACIN</i></b>	<b><i>CRIMINAL, INTERNATIONAL</i></b>
<b><i>TOWERS</i></b>	<b><i>BANKRUPTCY, TAX</i></b>
<b><i>LILLY</i></b>	<b><i>BANKRUPTCY, CORPORATE</i></b>

Now, a criminal appeal has come before the Fourteenth Circuit, and a three-judge panel has to be assigned. The first judge—who will serve as the rapporteur—will be selected randomly out of those judges who are designated subject matter experts for criminal law: Halladay and Chacin. Once the rapporteur is assigned, the other two judges will be selected from those judges who are *not* designated experts in criminal law: Bush, Towers, and Lilly. Thus, an acceptable panel under this proposal would constitute Judges Halladay, Bush, and Towers; the panel could not constitute Judges Bush, Towers, and Lilly (because there is no expert) or Judges Halladay, Chacin, and Towers (because there are two experts in criminal law).

Where the case involves one clear area of the law the examples are fairly simple. But what happens if the case is not susceptible to such easy categorization: for example, a criminal tax fraud appeal that presents issues of both criminal law and tax law? In that case, there are essentially two possibilities. The first is to determine the predominant subject matter in the case, either in terms of the difficulty of the issues or the importance to the litigants or the law. Such a system would operate exactly as described above once the predominant subject matter had been determined. The second possibility is to assign multiple expert judges for cases touching on multiple areas of the law; for example, for the criminal tax fraud appeal, one might assign both Halladay and Towers to the panel and assign them joint rapporteur duties. The third member would be selected from among those judges with neither tax nor criminal

2005]

*Specialize the Judge, Not the Court*

1303

law as a designated expertise. The important point to note is that either possibility avoids the problems of under-specialization or loss of judicial economy discussed in Part I.<sup>147</sup>

Once the panel had been designated, the rapporteur would be required to create a votum on the case at some time prior to conference (or prior to oral argument if oral argument has been scheduled). The votum would basically be a more detailed version of the bench memorandum that judges often have their law clerks prepare for them. The votum, like that created by the rapporteurs of the German Federal Constitutional Court, would describe the particulars of the dispute, recount any relevant background legal issues, survey the court's precedents and the legal literature, present arguments on both sides of the question, and conclude with a recommendation for the disposition of the case. This votum would be distributed to the two non-expert judges on the panel, who would use it as a starting point for their own deliberations. At conference, the expert judge would run the show, answering questions about the information in the votum and leading the discussion of the case. Then, each judge would vote based on his or her own impression of the case, drawing on the information contained in the votum. The disposition recommended in the votum would be given due consideration, but the non-expert judges would come to their own conclusions about the case.

Given the usual custom of signed majority opinions in the United States, the expert judge would not be assigned the opinion if she were not in the majority, but would be perfectly free to write a dissent. If the expert judge were in the majority, it might make sense to assign her opinion-writing duties. On one hand, an expert judge will be better able to leverage her expertise to create coherent and well-reasoned opinions. On the other hand, there are potential drawbacks to assigning the expert judge opinion-writing duties in all cases. First, each judge would tend to write extensively in those areas of the law in which he or she is expert. And even though judges would sit on cases in which they were acting as the non-expert, the prospect of writing opinions only in one or two areas of the law may detract from the attractiveness of an appellate judgeship, although probably not by much. The second problem is

---

<sup>147</sup> See supra note 80 and accompanying text.

more vexing. While a rapporteur must convince at least one other judge to see things her way regarding the ultimate outcome of the case, opinion-writing offers the opportunity for an expert judge to shade and craft the law in a way that might not reflect the preferences of the majority. In this way, an expert judge could exert excessive control over an area of the law, a problem that was noted above as a pitfall of specialized courts. Of course, the problem here would not be as severe as in the case of specialized courts—the expert judge would still be prevented from exerting total control by having to attract majorities on panels, and would still have to contend with the view of experts in the same area of the law in other circuits. Still, it may make sense to have non-expert judges write opinions occasionally, even when an expert is in the majority; this could be decided on a case-by-case or circuit-by-circuit basis.

Arguably, this proposal achieves the most important goals of prior proposals for specialized courts of limited, exclusive jurisdiction. First, the rapporteur system would provide valuable expertise on matters before the court. Instead of randomly assigning judges to cases, this system pays due regard to what a particular judge brings to the table. Furthermore, over time, a particular judge might be expected to develop a deep expertise in a particular area of the law, even if she did not already have such an expertise when appointed to the bench. This assumes that when rapporteur duties are assigned at the start of each term, there would not be major realignments from the previous term. The process of reassigning judges to subject matters would mainly be used to incorporate new judges into the circuit and to handle major changes in the mix of cases that come before the court.

There remains the further question of improving the ability of the federal appellate system to handle exploding case loads, a major theme of proposals for specialized courts. It may not be readily clear why the rapporteur system would have the same beneficial impact on the caseload crisis as a specialized court. Indeed, this proposal seems to create *more* work for already overburdened appellate judges, namely the task of creating the *votum*. But the *votum* is not completely wasted; it can often form the basis of the eventual opinion (even if written by a non-expert judge), and law clerks already often write bench memoranda for their judges. Even so, the effect of this proposal on the crowded dockets of the gener-

2005]

*Specialize the Judge, Not the Court*

1305

alist courts of appeals is not as clear as in the case of a specialized court that actually removes cases from these dockets.<sup>148</sup> Admittedly, this proposal does little to lessen the number of cases that are heard by particular courts of appeals. But this proposal can *improve the effectiveness of another solution* to the caseload crisis, and by doing so, increase the capacity of the federal appellate court system.

As noted above, one solution to the problem of rising caseloads is simply to increase the number of judges in a particular circuit. Indeed, this seems to be the favored solution, in spite of the creation of the Federal Circuit over two decades ago. Recall that the problem with this solution is that it increases the probability of incoherent intracircuit law. Yet designating a small subset of circuit court judges as “experts” in a particular subject matter can mitigate this effect because the smaller group of experts will be better able to maintain the desired coherence in that area of the law. Consider even the very simple example given above—only two of the Fourteenth Circuit’s five judges are experts in tax. These two tax experts can much more easily maintain intracircuit coherence in tax law because one of them would sit on every tax case arising in that circuit.

Furthermore, by requiring one of the slots on a panel to be filled by a designated expert, the number of potential panels is greatly reduced. Imagine that the Fourteenth Circuit has thirty judges. Under the current system, assignment to panels is completely random, which means that for any given case there are 4060 possible combinations of three-judge panels. Now imagine that the Fourteenth Circuit has implemented this proposal, and that out of the thirty judges, five are designated as rapporteurs for tax cases. When a case involving tax law comes before that circuit, there are now only 1500 possible panels that can be assigned to the case (because there are only five possible combinations for the single “expert” slot and 300 possible combinations for the two non-expert slots). This simple mathematical reduction in the number of potential panels is a strong suggestion that intracircuit coherence might

---

<sup>148</sup> Though, as noted above, the effect of specialized courts on the *overall* caseload crisis is a little unclear.

be more easily attained under this proposal than under the status quo.

Finally, while this proposal enhances intracircuit coherence, it does not achieve nationwide uniformity in federal law in the same way that the Federal Circuit has for patent law. Nevertheless, the proposal is very likely to be an improvement over the status quo. First, with improved internal coherence within the law of a particular circuit, other circuits would be able to perceive more easily “the law of the circuit,” which might improve the persuasiveness of such law. Furthermore, since the number of experts in a particular subject area would be quite small even on a nationwide basis, a much narrower group of judges would closely watch decisions within those areas. This might create pressures to harmonize the law, since each expert could be sure that fellow experts in other circuits were paying attention.

This proposal not only achieves many of the goals of specialized appellate courts—it also avoids many of the problems. First, and most importantly, it avoids “tunnel vision” and maintains the cross-pollination of legal ideas. Recall that under the proposal each panel would be staffed by a single expert, who serves as rapporteur, and two non-expert judges (who are experts in other fields). In the simple criminal appeal example above, Judge Halladay is the designated expert, and Judges Bush and Towers are the non-experts. By virtue of Judge Bush and Judge Towers’s participation in the case, they may gain ideas from the criminal law that they can export for use in those areas of the law for which they are expert. The benefits flow to Judge Halladay as well—he receives the different perspective that non-experts in criminal law can bring to the table. Furthermore, because the rapporteur must attempt to convince at least one of the non-experts that his view of the case is correct, the proposal prevents a particular substantive area from becoming disconnected from the rest of the law.

Judicial capture also would be unlikely under the rapporteur system. It may become clear that a particular nominee to the federal appellate judiciary was chosen specifically for his or her expertise in a particular area of the law, but this does not necessarily mean that the nomination process will be any more susceptible to capture. Recall that under this proposal a particular judge, even if expert in a few areas, will hear cases in all subject matters in her ca-



2005]

*Specialize the Judge, Not the Court*

1307

capacity as a non-expert. Using the example above, while Judge Halladay might be the designated expert for Social Security and criminal cases, he will sit on many cases that do not involve these areas—tax law, environmental law, tort law, etc. So while particular interest groups may be highly motivated by a particular expert nomination, the other interest groups who may be affected by the “non-expert” decisions of that nominee are not going to just sit on their hands during the nomination process. Thus, dangers of capture by special interest groups are “attenuated” since “the judge [will hear] cases affecting many opposing groups.”<sup>149</sup> Capture of particular areas of the law by the judges themselves also is less likely under this proposal. Recall that a potential problem with giving courts limited and exclusive jurisdiction over a particular subject matter is the risk that such courts will “impose their own views of policy even where the scope of review under the applicable law is supposed to be more limited.”<sup>150</sup> Under this proposal, while an expert judge indeed may be tempted to impose her own views on how the law should operate even when such decisions have been assigned to the other branches of government, the fact that there are non-expert judges on the panel greatly mitigates her ability to do so. If the expert attempts to overstep her bounds, the non-experts (one would hope) would rein her in and ensure a limited scope of review. Furthermore, because no one circuit would have *exclusive* jurisdiction over a particular subject matter, “yardstick competition” between the circuits is maintained.<sup>151</sup>

A rapporteur system also would be able to deal with changes in judicial caseload much more flexibly than a system of specialized courts of limited and exclusive jurisdiction. Using the same example from above, if the Fourteenth Circuit experienced a sudden rise in the number of Social Security cases, Judge Halladay could simply take on a higher proportion of Social Security cases; if the Fourteenth Circuit experienced a sudden fall in the number of Social Security cases, Judge Halladay could reallocate his workload to take on more tax cases, or to act as the non-expert judge more frequently. As noted above, only large or long-term shifts in the

---

<sup>149</sup> Jordan, *supra* note 5, at 748.

<sup>150</sup> Hruska Commission Report, *supra* note 26, at 235.

<sup>151</sup> See *supra* notes 75–78 and accompanying text.

caseload mix would require the reassignment of judges to the various subject matters, and even then, this would occur only at the margins. Thus, if there were a significant increase in the number of tax cases, the Fourteenth Circuit might have to assign a third judge to act as occasional rapporteur for tax appeal cases.

Finally, there is no clear reason why implementation of this proposal would diminish the prestige of a federal judgeship or make the job of being a federal judge more unattractive. Under this proposal, each judge would still be a “generalist”—in their role as non-expert, each judge would hear and decide cases from across the legal spectrum. This mix of cases would ensure that a particular judge would be assigned to enough cases that do not involve her designated subject matter areas so as to prevent monotony. Moreover, concerns about being unable to attract the most accomplished individuals to the appellate judiciary may not even be valid, given that there is no evidence that the Federal Circuit has had any difficulty in attracting highly qualified individuals to serve as judges.

One critique of this solution is that equalizing work among judges could be difficult because some may have expertise in areas that generate disproportionate numbers of cases, such as bankruptcy or criminal law. But the many-to-many configuration of judges to subject matters offers a solution to this problem. For low volume areas of law, a single judge could be the expert for multiple subject matters, and for higher volume subject areas, there could be more than one judge assigned. By allocating judges to subject matters and subject matters to judges carefully, work can be allocated evenly. Also, a particular judge sits on cases for which she is expert and cases for which she is non-expert; this mix can be modified as well to maintain appropriate workloads. While these assignment determinations are complicated and inevitably involve some guesswork, they are not impossible.

One other potential difficulty is that drawing the lines between subject matter areas could be problematic. Should the various subject matters be divided like the classes in law school—contracts, criminal procedure, federal jurisdiction, etc.? Or should the granularity be finer? If one divides the law into subject matters that are too broad (for example, “constitutional law”) then specialization is meaningless; the judge will see too many different cases to gain suf-

2005]

*Specialize the Judge, Not the Court*

1309

ficient expertise in a particular area. But making the divisions too fine (for example, Takings Clause cases) creates too narrow a focus and could limit the ability to see the broader context of particular cases. Setting forth the particulars of the subject matter divisions reaches beyond the scope of this Note, but implicit in proposals for courts of limited, exclusive jurisdiction is the assumption that such divisions are possible and meaningful.

Implementing this proposal would be far easier than creating new courts of limited, exclusive jurisdiction. The changes here require no effort on the part of Congress. Each appellate court has the power to implement rules regarding court administration, including how cases are staffed.<sup>152</sup> For example, in the Federal Circuit, Court Rule 47.2(b) states: “Assignment of cases to panels will be made so as to provide each judge with a representative cross-section of the fields of law within the jurisdiction of the court.”<sup>153</sup> Similar language with respect to staffing could be put in the local court rules to enact this proposal.

## CONCLUSION

This Note takes no issue with the goal of increasing the level of specialization in the judiciary. The federal appellate system is in crisis, and it must become more efficient or risk harming the quality of judicial decisionmaking. One solution is to “avert the flood by lessening the flow” by drastically reducing the scope of federal court jurisdiction and having fewer judicially-enforceable federal laws. Realistically, there is little chance that such a solution would be implemented.<sup>154</sup> The dominant approach to this crisis has been

---

<sup>152</sup> See Fed. R. App. P. 47 (“Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice.”). It may even be the case that a rule change would not be required. Rule 47 states only that “*generally applicable direction[s] to parties or lawyers regarding practice*” need to be implemented via rule changes; other procedures presumably can be implemented via “internal operating procedure or standing order.” *Id.* (emphasis added).

<sup>153</sup> See Fed. Cir. R. 47.2(b).

<sup>154</sup> Indeed, when the Hruska Commission produced its “comprehensive” study on revising the federal appellate court structure, they specifically were prohibited from considering any solution that would restrict access to the federal courts. Several witnesses before the commission noted that this constraint was hamstringing the commission. Hruska Commission Report, *supra* note 26, at 206. Even so, the commission noted that “[b]eneficent as changes in the jurisdiction of the district courts may be, it

to add more appellate judges, to rely on methods of disposing of cases without full hearing, or to use law clerks to do more of the judge's work. These solutions cannot continue without eventually endangering the quality and coherence of appellate decisionmaking. In this context, there is a real value to heeding Adam Smith's basic lesson—specialization of labor can create great efficiencies. With specialization, perhaps the judiciary can handle the growing crisis.

While this Note generally favors specialization, it does take issue with the *mode* of specialization that has come into favor—the creation of appellate courts of limited, exclusive jurisdiction over a subject matter or a set of subject matters, as exemplified by the Federal Circuit. The problems with such a system abound—judicial “tunnel vision,” harms to cross-pollination of legal ideas, judicial capture by special interests, excessive judicial policymaking, lack of geographical diversity, lower caliber judges, and an inability to handle changing mixes in judicial caseload or cases that cut across substantive areas. To the extent that this mode of specialization is defended by reference to the European experience with highly specialized appellate judiciaries, one should be aware that the European experience may be unique to the civil-law philosophy of judging; thus that experience is one that might not translate successfully to a common-law jurisdiction.

This Note has proposed an alternative solution, borrowed from the German Federal Constitutional Court (rather than the German civil courts) and modified for the U.S. environment, of using courts of *general, nonexclusive jurisdiction* that *staff cases with a mix of expert and non-expert judges*. The solution is basically as follows: On the existing Courts of Appeals, each judge would agree to be the “expert” for a set of subject matters that come before the court. When a case involving a particular subject matter comes before one of the Courts of Appeals, one of the “experts” in that subject matter is assigned as the “rapporteur.” The other two members of the panel hearing the case would be assigned randomly from those judges that are “non-experts” in that subject matter. The task of the rapporteur would be to take charge of the case: by creating a

---

would be imprudent in light of recent history to assume that the growth in caseloads will in fact stop.” *Id.* at 263.

2005]

*Specialize the Judge, Not the Court*

1311

votum that describes the law and the issues, by recommending a disposition of the case, and by running the conference. The rapporteur, if in the eventual majority, could write the opinion, although there may be reasons to not always assign that judge opinion-writing duties.

This proposal balances the desire for generalist judges with the desire for judicial expertise as the law grows increasingly complex. It helps solve the problem of exploding caseloads by allowing the federal appellate courts to take on more judges without sacrificing intracircuit coherence of federal law. It achieves the goal of expertise by leveraging the differing abilities and interests of appeals court judges. Over time, we might expect the overall quality of judicial decisionmaking to be enhanced, as the federal appellate judges developed a deeper expertise after repeated exposure to their designated areas of the law, and as the appointment process began to focus on what judges bring to the table in order to fill gaps in the substantive expertise of a circuit. While achieving all of this, the proposal also avoids many of the problems arising from the use of specialized courts of limited, exclusive jurisdiction. Finally, because much of this plan could be made by rule change, it presents fewer hurdles to implementation than other proposals.

These changes may be traumatic at first to sitting appellate judges, who now will be expected to develop expertise in particular areas of the law, but in the long run, it is far better than the alternatives—drowning under a sea of increasing case volume and complexity or seeing the jurisdiction of the federal courts parceled out to specialists disconnected from all other areas of the law.