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Rethinking Federal Circuit Jurisdiction

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ARTICLES

Rethinking Federal Circuit Jurisdiction

PAUL R. GUGLIUZZA*

Thirty years ago, Congress created the Federal Circuit for the overriding purpose of bringing uniformity to patent law. Yet less than half of the court's cases are patent cases. Most Federal Circuit cases involve veterans benefits, government-employment actions, government contracts, and other matters. Although existing literature purports to study the Federal Circuit as an institution, these projects focus largely on the court's patent cases. This Article, by contrast, considers whether the court's nonpatent docket might affect the development of patent law and whether the court's specialization in patent law has consequences for how it decides nonpatent cases.

These inquiries result in two primary contributions. First, drawing on institutional-choice theory, this Article suggests that certain litigants—particularly military veterans but also government employees and government contractors—should not be forced to litigate appeals in a specialized court in Washington, D.C. Second, the Article offers a structural remedy that might help cure a frequently discussed problem with Federal Circuit patent law: that it is not sufficiently sensitive to innovation policy. By replacing some of the court's current nonpatent docket with a variety of commercial disputes (over which the Federal Circuit would not have exclusive jurisdiction), the court might better understand the role that patents play in stimulating (or impeding) innovation in different industries.

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INTRODUCTION

The Federal Circuit is increasingly in the headlines for its cutting-edge decisions on patent law. Patents on human genes, methods of doing business, and blockbuster pharmaceuticals have pushed the decisions of this relatively specialized federal court to the fore of public consciousness.¹ But few stories mention that patent cases comprise less than half of the Federal Circuit's caseload. Almost sixty percent of the court's cases involve matters such as veterans benefits, government-employment disputes, and government contracts.² Patent law scholars have also largely overlooked this significant component of the Federal Circuit's work.³ Despite recent efforts to examine the Federal Circuit as an institution, commentators have not considered how these nonpatent cases affect Federal Circuit patent law or, conversely, how the centralization of patent appeals has affected nonpatent litigants in the Federal Circuit.⁴

This Article explores these issues and provides a transsubstantive analysis of Federal Circuit jurisdiction. Yet it is situated within intellectual property literature tying critiques of Federal Circuit patent law to the court's jurisdictional structure. One important criticism of the Federal Circuit is that judicially crafted patent law is not sufficiently responsive to the philosophy of the Patent Act, to national competition policy, and to the needs of researchers and technology

1. See, e.g., *Bristol, Sanofi Win Plavix Ruling*, L.A. TIMES, Dec. 9, 2006, <http://articles.latimes.com/2006/dec/09/business/fi-plavix9>; Charles Lane, *A Powerful Voice in Patent Disputes*, WASH. POST, Nov. 6, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/05/AR2006110501171.html>; Andrew Pollack, *Despite Gene Patent Victory, Myriad Genetics Faces Challenges*, N.Y. TIMES, Aug. 24, 2011, <http://www.nytimes.com/2011/08/25/business/despite-gene-patent-victory-myriad-genetics-faces-challenges.html>; Andrew Pollack, *Ruling Upholds Gene Patent in Cancer Test*, N.Y. TIMES, July 29, 2011, <http://www.nytimes.com/2011/07/30/business/gene-patent-in-cancer-test-upheld-by-appeals-panel.html>; John Russell, *Lilly Gets Win with Ruling on Evista*, INDIANAPOLIS STAR, Sept. 2, 2010, <http://www.indystar.com/article/20100902/BUSINESS03/9020422/Lilly-gets-win-ruling-Evista>; John Schwartz, *Justices Take Broad View of Business Method Patents*, N.Y. TIMES, June 28, 2010, <http://www.nytimes.com/2010/06/29/business/29patent.html>; see also *Sanofi-Aventis v. Apotex Inc.*, 659 F.3d 1171 (Fed. Cir. 2011) (Plavix); *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 653 F.3d 1329 (Fed. Cir. 2011) (gene patents), *vacated sub nom. Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 132 S. Ct. 1794 (2012); *Eli Lilly & Co. v. Teva Pharm. USA, Inc.*, 619 F.3d 1329 (Fed. Cir. 2010) (Evista); *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) (en banc) (business-method patents), *aff'd sub nom. Bilski v. Kappos*, 130 S. Ct. 3218 (2010); *Sanofi-Synthelabo v. Apotex, Inc.*, 550 F.3d 1075 (Fed. Cir. 2008) (Plavix); *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368 (Fed. Cir. 2006) (same).

2. See *infra* notes 20, 133 and accompanying text.

3. But cf. David L. Schwartz & Lee Petherbridge, *Legal Scholarship and the United States Court of Appeals for the Federal Circuit: An Empirical Study of a National Circuit*, 26 BERKELEY TECH. L.J. (forthcoming 2012) (manuscript at 32 n.71, 39), available at <http://ssrn.com/abstract=1725543> (noting that the Federal Circuit cites legal scholarship more frequently in patent cases than other types of cases, raising questions about whether this disparity is normatively desirable).

4. See, e.g., Symposium, *The Federal Circuit as an Institution*, 43 LOY. L.A. L. REV. 749 (2010) (featuring twelve articles, all focusing on patent law).

users.⁵ Critiquing the judicial methodology that has led patent law to this point, John Thomas has chronicled the Federal Circuit's penchant for "adjudicative rule formalism," favoring bright-line rules over malleable standards that would allow lower courts to tailor patent law to the diverse industries that interact with the patent system.⁶ As for Federal Circuit judges themselves, they take pride in their disinterest in patent policy.⁷ Yet this rule-driven approach is troubling, for the key provisions of the Patent Act are relatively sparse and suitable for an instrumentalist interpretation.⁸

In this debate over "crystals and mud" in patent law,⁹ perhaps we should not be surprised to see a centralized court for patent appeals criticized for preferring bright-line rules over policy-oriented standards. Preference for complex rule

5. See, e.g., JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 227–31 (2008); Christina Bohannon & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 926–70 (2010); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1579 (2003); see also Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 796 (2008) [hereinafter Dreyfuss, *Institutional Identity*] (using the term "accuracy" to capture the extent to which patent law attunes with innovation and competition policy); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 14 (1989) [hereinafter Dreyfuss, *Case Study*] (same).

6. See John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 794 (2003).

7. See, e.g., Alan D. Lourie, *A View from the Court*, 75 PAT., TRADEMARK & COPYRIGHT J. (BNA) 22 (2007) ("[N]ot once have we had a discussion as to what direction the law should take That is because we are not a policy-making body. We have just applied precedent as best we could determine it to the cases that have come before us."); Paul Michel, *Judicial Constellations: Guiding Principles as Navigational Aids*, 54 CASE W. RES. L. REV. 757, 764–65 (2004) (rejecting the notion that the court should have a "discussion of philosophy"); S. Jay Plager & Lynne E. Pettigrew, *Rethinking Patent Law's Uniformity Principle: A Response to Nard and Duffy*, 101 NW. U. L. REV. 1735, 1737–38 (2007) (arguing that "the [Federal Circuit's] function is not . . . to determine how well-tuned the [patent] statute is to . . . market conditions"); S. Jay Plager, *The Federal Circuit as an Institution: On Uncertainty and Policy Levers*, 43 LOY. L.A. L. REV. 749, 763–72 (2010) (similar); see also ISAAC UNAH, THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY-MAKING app. A4 (1998) (discussing international trade policy and quoting the following from correspondence with Judge Giles S. Rich: "I suggest . . . that where 'policy formation' is concerned, the attitude in the CAFC as I know it is that policy is none of our business . . ."). The judges' boasting, in my view, misses the point. As Dan Burk and Mark Lemley have explained, those who call for more attention to patent policy are not asking the court to subvert the text of the Patent Act. Rather, they want the court to appreciate the discretion built into the relatively sparse statute and to use that discretion to tailor patent law to the different needs of different innovating industries. See Burk & Lemley, *supra* note 5, at 1674.

8. See Peter S. Menell, *The Mixed Heritage of Federal Intellectual Property Law and Ramifications for Statutory Interpretation*, in INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyam Baganesh ed., forthcoming 2012) (manuscript at 28), available at <http://ssrn.com/abstract=1895784>; Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. REV. 51, 53 (2010). At least one commentator has challenged the characterization of Federal Circuit law as "formalistic," arguing that the court merely uses formalist rhetoric to mask indeterminism. See Tun-Jen Chiang, *Formalism, Realism, and Patent Scope*, 1 IP THEORY 88, 89 (2010).

9. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 610 (1988) (noting that the "endless[]" debate over rules versus standards in property law arises because of "the different social didactics" and "the different modes of conversation and interaction implicit in the two rhetorical styles").

systems has been theorized to be a trait of specialized tribunals.¹⁰ Nevertheless, Federal Circuit formalism has caught the ire of many. For example, the Supreme Court, after paying little attention to patent cases for the first twenty years of the Federal Circuit's existence,¹¹ has in the past decade repeatedly rebuked the Federal Circuit on issues of patent law.¹² Almost invariably, the Court has intervened to reject a bright-line rule adopted by the Federal Circuit in favor of a more holistic standard.¹³

If patent law's problems can be traced in significant part to the Federal Circuit, the natural question for patent scholars is: what has caused this disconnect between the court's patent jurisprudence and the needs of innovators? Many scholars have attributed the problem to the court's status as the practically exclusive appellate forum for patent cases.¹⁴ Supreme Court Justices have

10. See PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 168 (1976); see also David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 848 (1999) (“[I]t may be that formalism and expertise go hand-in-hand . . .”).

11. See Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 387 (noting that the Federal Circuit had “become the de facto supreme court of patents”).

12. See *Bilski v. Kappos*, 130 S. Ct. 3218, 3225–26 (2010); *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 621 (2008); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441–42, 459 (2007); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 427–28 (2007); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006); *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 741–42 (2002); see also Rochelle Cooper Dreyfuss, *Lecture, What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787, 792 (2010) (noting that the Supreme Court “has recently begun to intervene regularly” in matters of patent law and that “it has reversed, vacated, or questioned nearly every” Federal Circuit decision reviewed); John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 559 (2010) (noting that the language of recent Supreme Court opinions has been “disdainful” and “harsh” (quoting Gretchen S. Sween, *Who's Your Daddy? A Psychoanalytic Exegesis of the Supreme Court's Recent Patent Jurisprudence*, 7 NW. J. TECH. & INTELL. PROP. 204, 204–05 (2009); Debra D. Peterson, *Can This Brokered Marriage Be Saved? The Changing Relationship Between the Supreme Court and Federal Circuit in Patent Law Jurisprudence*, 2 J. MARSHALL REV. INTELL. PROP. L. 201, 245 (2003)) (internal quotation marks omitted)). The Supreme Court affirmed all three Federal Circuit patent cases it considered during the 2010 Term. See *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252–53 (2011); *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2192, 2199 (2011); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2072 (2011); see also Ronald Mann, *Commentary, Tide Turns for Federal Circuit in Patent Cases*, SCOTUSBLOG (July 6, 2011, 8:34 AM), <http://www.scotusblog.com/2011/07/ronald-mann-reviews-the-patent-cases-of-ot2010> (noting the “surprising resurgence of the Federal Circuit” in the 2010 Term, given that “the [Supreme] Court has been on an apparent campaign to reign in ‘patent exceptionalism’”). But the trend of reversals resumed with the first Federal Circuit case of the Supreme Court's 2011 Term, a unanimous reversal in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012), an important case holding unpatentable certain methods of medical diagnosis.

13. See Gregory A. Castanias et al., *2010 Patent Law Decisions of the Federal Circuit: The Advent of “The Rader Court”*, 60 AM. U. L. REV. 845, 857 (2011); Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 46 (2010).

14. See, e.g., BESSEN & MEURER, *supra* note 5, at 227–31; Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1622 (2007); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1122–27 (2003); see also ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS:*

likewise suggested that appellate specialization in patent law is problematic.¹⁵ A common argument is that the Federal Circuit's exclusive jurisdiction leads to poor percolation of legal ideas, less experimentation with legal principles, and, ultimately, a patent law that, although uniform, is insular and severed from economic reality.¹⁶ As a structural remedy, these scholars and jurists call for more "generalist" input into patent appeals. Specific suggestions include: en banc review of the Federal Circuit by generalist judges,¹⁷ redirecting some patent cases to the regional circuits,¹⁸ and encouraging the Supreme Court to percolate patent law in areas where Federal Circuit law needs reform.¹⁹

Yet the Federal Circuit's exclusive patent jurisdiction cannot be the whole story. Patent cases are but one component of the Federal Circuit's docket.²⁰ This Article offers an additional theory: that the court's nonpatent docket might affect the development of patent law. The Federal Circuit's nonpatent docket includes many fields governed by complex and technical regulations and statutes, and the court's frequent exposure to those areas might help explain its preference for bright-line rules in patent cases. To this end, I note interesting parallels between critiques of Federal Circuit patent jurisprudence and critiques of Federal Circuit law in other areas, such as recent Supreme Court decisions overturning bright-line rules adopted by the Federal Circuit in veterans cases.

HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT 2, 96–126 (2004) (arguing that the creation of the Federal Circuit led to a broadening of patent-holders' rights, which in turn has led to "waste and uncertainty that hinders and threatens the innovative process").

15. See *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 138 (2006) (Breyer, J., joined by Stevens & Souter, JJ., dissenting) ("[A] decision from this generalist Court could contribute to the important ongoing debate, among both specialists and generalists, as to whether the patent system, as currently administered and enforced, adequately reflects the 'careful balance' that 'the federal patent laws . . . embod[y].'" (alterations in original) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989))); *Holmes Grp.*, 535 U.S. at 839 (Stevens, J., concurring in part and concurring in the judgment) ("[O]ccasional decisions [on issues of patent law] by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias.").

16. See BESSEN & MEURER, *supra* note 5, at 229–30; Nard & Duffy, *supra* note 14, at 1619–22. *But cf.* Lee Petherbridge, *Patent Law Uniformity?*, 22 HARV. J.L. & TECH. 421, 427–28 (2009) (empirically studying Federal Circuit decisions on the doctrine of equivalents and suggesting that Federal Circuit case law is relatively heterogeneous).

17. See Rai, *supra* note 14, at 1124–25.

18. See Nard & Duffy, *supra* note 14, at 1623–24; see also BESSEN & MEURER, *supra* note 5 (arguing that appellate review by multiple appellate courts would enhance the notice function of patent claims).

19. See John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 662 (2009) ("The Court's primary role in [patent law] should be to combat undesirable ossification of legal doctrine. Consequently, the Court should generally confine its review of substantive patent law to situations where there is a substantial risk that Federal Circuit precedent has frozen legal doctrine either too quickly or for too long. Further, the Court's decisions in this area should typically be modest, seeking to spur, rather than foreclose, subsequent legal development.").

20. See *Appeals Filed, by Category: FY 2011*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (2011), http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_category_2011.pdf [hereinafter *2011 Federal Circuit Appeals*].

This Article also directly considers whether the court's nonpatent appeals should be centralized in one court, focusing in detail on veterans-benefits cases, government contracts cases, and, to a lesser extent, government-personnel cases. I focus on these areas because they comprise the three largest components of the Federal Circuit's nonpatent docket (over forty percent of the court's entire caseload²¹) and because these areas exemplify potential problems in the court's institutional structure. I argue that, as a matter of institutional choice theory, there is little persuasive justification for veterans-benefits cases and government-personnel disputes to be appealed to a national appellate court. Although appellate centralization produces doctrinal uniformity, uniformity is a small benefit in these fields, outweighed by, among other things, the marginalizing effect of requiring individual, one-time litigants to face the federal government in a semi-specialized court in Washington, D.C. Moreover, these cases seem to have little generalizing influence on Federal Circuit patent law, as they involve no commercial- or competition-related issues that would inform a patent jurisprudence sensitive to innovation needs.

I also raise important questions about appellate centralization in government-contracts cases. On one hand, there is a significant uniformity justification for centralizing adjudication of government-contracts disputes, as those contracts are highly specialized and can be nationwide (or even worldwide) in scope. Any benefit, however, may be outweighed by the significant and possibly unwarranted advantages that the Federal Circuit has granted to the federal government in the contract area. Moreover, the *sui generis* nature of government contracts arguably provides the court with little insight into the operations of competitive markets, to the potential detriment of patent law.²²

A project reimagining the jurisdiction of the Federal Circuit is of singular importance. The Federal Circuit is the only court of appeals with nationwide jurisdiction, so Congress frequently proposes adding new areas to the court's docket²³ or otherwise altering the court's jurisdiction.²⁴ Moreover, countries

21. *Id.* Of course, the raw number of veterans-benefits, government-contracts, and government-personnel cases probably does not perfectly correlate with the amount of time the court spends on those cases, to the extent those cases are easier for the court to decide. As discussed in detail below, the scope of issues that may be reviewed in veterans cases is limited by law, a generally deferential standard of review applies in personnel cases, and many nonpatent cases lack the factual complexity of patent litigation. See *infra* section III.C. Still, these cases are a significant component of the court's nonpatent work, and the interaction between these nonpatent cases and patent law, if any, has been largely unexplored.

22. See Cameron W. Ellis, *Toward a Nuanced Plain Language Approach in Federal Contract Interpretation: What Do Bell BCI, States Roofing, and LAI Services Imply?*, 39 PUB. CONT. L.J. 821, 822 (2010) (noting that, unlike under the Uniform Commercial Code, the Federal Circuit's government-contracts law requires the judge to "discern the meaning of a contract term without outside reference" and that "[t]his difference often results in decisions that are untethered from the realities of the marketplace").

23. See, e.g., Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 102, 106 Stat. 4506, 4506-07 (codified at 15 U.S.C. § 3416(c) (2006) and 28 U.S.C. § 1295(a) (2006 & Supp. IV 2010)) (granting the Federal Circuit exclusive jurisdiction over appeals in wage- and price-control cases

throughout the world have created or are considering creating appellate patent courts.²⁵ This Article will inform any future proposals. Also, I hope this Article will spur further jurisdictional work by scholars in each of the Federal Circuit's subject-matter areas and encourage a dialogue between those divergent fields. This comparative, cross-jurisdictional analysis is needed but lacking in the current literature.²⁶

This Article proceeds in four parts. Part I explores the theoretical debate over courts whose jurisdiction is defined not by geography, but by the subject matter of cases. It also traces the historical use of subject-matter appellate courts in the U.S. federal court system, a use that has been limited by the American conception of the judge as a generalist and by hostility towards judicial expertise.

Part II provides background on the Federal Circuit by recasting the traditional tale of the Federal Circuit's formation. According to the conventional wisdom, Congress was worried that disuniformity in patent law was adversely affecting innovation, so Congress created a national patent court to harmonize the law. Then, to overcome skepticism of expert courts, Congress gave the Federal Circuit jurisdiction over a wide range of tribunals that hear nonpatent cases. In

formerly heard by the Temporary Emergency Court of Appeals); Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4120-21 (1988) (codified as amended at 38 U.S.C. §§ 7251-7299 (2006 & Supp. IV 2010)) (granting the Federal Circuit exclusive jurisdiction over appeals from the U.S. Court of Veterans Appeals, later renamed the U.S. Court of Appeals for Veterans Claims); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 707(b)(1) (2006) (calling for the U.S. Government Accountability Office to investigate the possibility of consolidating all appeals in immigration cases "into an existing circuit court, such as the United States Court of Appeals for the Federal Circuit"); Securing America's Borders Act, S. 2454, 109th Cong. § 501 (2006) (providing for exclusive Federal Circuit jurisdiction over immigration appeals); *see also* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 73-74 (1998) [hereinafter WHITE COMMISSION REPORT] (making "no specific recommendations as to additional categories of cases that might usefully be placed within the Federal Circuit's jurisdiction" but highlighting tax and Social Security appeals as "two types of cases that have been frequently discussed as potential candidates for the Federal Circuit's jurisdiction"); 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, 621-24 (1989) (suggesting appellate centralization in the areas of tax, communications, labor, and immigration law).

24. For example, in 2011, the House Committee on Veterans Affairs considered a bill that would have created a commission to review the system of judicial review for veterans-benefits claims. *See* H.R. 1484, 112th Cong. § 3 (2011) (as introduced in House, Apr. 12, 2011). While the version of the bill that passed the House did not include the commission provision, *see* H.R. 1484, 112th Cong. (2011) (as passed by House, May 31, 2011), the judges of the Court of Appeals for Veterans Claims (the Article I court whose decisions are reviewed by the Federal Circuit) seem to support the establishment of a commission and would like Congress to consider whether Federal Circuit review causes too much delay. *See Legislative Hearing on H.R. 811, H.R. 1407, H.R. 1441, H.R. 1484, H.R. 1627, H.R. 1647, and H. Con. Res. 12: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 112th Cong. 19-20 (2011) [hereinafter *House Hearing on H.R. 1484*] (statement of Hon. Bruce E. Kasold, Chief Judge, U.S. Court of Appeals for Veterans Claims). Under an alternative model, the Veterans Court's decisions would be directly reviewable in the Supreme Court by certiorari. *See id.* at 50-51.

25. *See* Paul R. Michel, *Afterword, Past, Present, and Future in the Life of the U.S. Court of Appeals for the Federal Circuit*, 59 AM. U. L. REV. 1199, 1210 (2010).

26. *See* Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 AM. U. L. REV. 1201, 1261 (2011).

retelling this history, I focus on two aspects that commentators have not fully appreciated. First, I highlight the important role that business interests played in obtaining a national patent court. And, second, I show how the overriding desire for a uniform patent law preempted consideration of two crucial questions of institutional structure: (1) whether the Federal Circuit's nonpatent cases would affect the court's patent jurisprudence and (2) whether any theory of institutional design supported centralization in the nonpatent cases assigned exclusively to the Federal Circuit.

Part III addresses the questions overlooked by the architects of the Federal Circuit. Among other things, it identifies an unnoticed paradox in the court's jurisdiction: the court's nonpatent jurisdiction over mostly noncommercial areas may be too narrow to expose the court to economic concerns that, in the view of intellectual property scholars, are not sufficiently addressed by the court's patent law. At the same time, the court's nonpatent jurisdiction may also be too broad: the court hears cases on such a wide range of subjects that it may not become "expert" in all of those areas, thus defeating an important purpose of appellate centralization.

Part IV outlines normative possibilities. Unlike prior proposals, which have focused on the court's exclusive patent jurisdiction,²⁷ I posit that reimagining the court's nonpatent jurisdiction could push patent law to better account for innovation concerns. I suggest narrowing the Federal Circuit's exclusive jurisdiction by removing from its docket veterans-benefits cases, government-personnel disputes, and, possibly, appeals from the Court of Federal Claims and boards of contract appeals. In place of these cases, I propose assigning to the court a cross-section of cases—including commercial cases—that are currently appealed to the regional circuits. The Federal Circuit would not have exclusive jurisdiction over these cases, but it would retain its exclusive jurisdiction over patent cases. By exposing Federal Circuit judges to the gamut of issues faced by federal appellate judges, rather than the relatively narrow and specialized issues they consider under the current jurisdictional framework, the Federal Circuit might create a patent law that is more conducive to innovation but still uniform.

The intradocket decision-making effects that I theorize in this Article are, naturally, difficult to quantify definitively. I therefore conclude by noting that future research—particularly empirical research—may help better define the optimal jurisdiction for the Federal Circuit and complement the theoretical contribution of this Article.

I. SPECIALIZED ADJUDICATION

A project redesigning the jurisdiction of the Federal Circuit must understand the theory and history of "specialized" adjudication, a term that generally, but imperfectly, refers to adjudication by a court with jurisdiction defined by the

27. See Nard & Duffy, *supra* note 14, at 1623–25; Rai, *supra* note 14, at 1124–25.

subject matter of the cases it decides and not by geographic boundaries.²⁸ In this Part, I first review the academic debate over so-called specialized courts. Then, as background for the discussion of the Federal Circuit's creation and jurisdiction in Part II, I summarize the limited historical use of specialized appellate courts in the U.S. federal system.

A. SPECIALIZED COURTS: THE THEORETICAL DEBATE

The paradigmatic American judge, especially a federal judge, is a generalist.²⁹ A federal district judge is expected to sentence a criminal in the morning, try an employment-discrimination case in the afternoon, and draft an antitrust opinion in between. In the regional circuit courts of appeals, a panel of judges might hear an immigration case, a copyright case, and a securities-fraud case, all before lunch.³⁰ Although the judge-as-generalist archetype is ingrained in the American legal culture, the archetype is merely a creature of tradition.³¹ Nothing in the U.S. Constitution forbids Congress from assigning certain types of

28. See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 526–27 (2008) (discussing the controversy over using the term “specialized” to refer to any court whose jurisdiction is defined by case subject matter). Like Professor Cheng, I use the term “specialized” to denote courts whose jurisdiction is limited to certain subject matters. I use the term “centralized,” by contrast, to refer to a court that hears all cases of a particular subject matter within a sovereign jurisdiction. See Meador, *supra* note 23, at 613–14; Nard & Duffy, *supra* note 14, at 1642 (also using the term “concentrated”). Under this terminology, the Federal Circuit is both a “specialized” court because its jurisdiction is defined by subject matter and not geography, and a “centralized” court for appeals that are within its exclusive jurisdiction. See Nard & Duffy, *supra* note 14, at 1642–45.

29. See, e.g., Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1667 (2009); Diane P. Wood, Speech, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1755–56 (1997).

30. See generally FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 3–13 (1994) (colorfully describing a day in an appellate courtroom). Of course, even the generalist judges of the regional circuits are specialists in the sense that certain circuits hear particular types of cases more frequently than others. For example, the Second Circuit frequently encounters securities law, the Fifth Circuit frequently encounters immigration law, and the D.C. Circuit frequently encounters administrative law. See Eric Hansford, Note, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1146 (2011). And particular judges on generalist courts may specialize in certain areas of the law by writing more opinions in those areas. See Cheng, *supra* note 28, at 540.

31. See Deanell Reece Tacha, *Refocusing the Twenty-First-Century Law School*, 57 SMU L. REV. 1543, 1545 (2004) (“At its best, legal writing is about . . . making your case succinctly so that your garden-variety judge, who in the American tradition is still a generalist, can grasp the intricacies of ERISA or the complex factual scenarios that permeate virtually every case before our court.”); Wood, *supra* note 29, at 1756–57 (“What were the earliest federal judges doing, at the dawn of the Republic under the 1789 Constitution? To an astonishing degree, the answer is ‘the same thing they are doing today.’”). For one example of the judge-as-generalist archetype in American popular culture, consider Judge Roy Snyder of the long-running animated series, *The Simpsons*. In his twenty-plus years on the bench, Judge Snyder has presided over matters as varied as Homer’s false-advertising suit against the Frying Dutchman restaurant for failing to provide *all* the seafood he could eat, *The Simpsons: New Kid on the Block* (Fox television broadcast Nov. 12, 1992), a criminal prosecution against Marge for shoplifting a bottle of Colonel Kwik-E-Mart’s Kentucky Bourbon, *The Simpsons: Marge in Chains* (Fox television broadcast May 6, 1993), and a juvenile-delinquency proceeding against Bart and Milhouse for joyriding in Police Chief Wiggum’s squad car, *The Simpsons: The Parent Rap* (Fox television broadcast Nov. 11, 2001), among many others. See Roy Snyder, SIMPSONS WIKI, http://simpsons.wikia.com/wiki/Judge_Roy_Snyder (last visited Mar. 29, 2012).

cases to certain judges or courts,³² and appellate judicial specialization is not unusual in other Western countries.³³

Scholars, moreover, have long maintained that there are potential benefits to defining jurisdiction by case subject matter. While this literature is vast,³⁴ three fundamental arguments frequently recur in support of specialized courts.³⁵ First, specialized courts can promote institutional efficiency. Judges who sit on courts with narrow subject-matter jurisdiction are, in theory, able to develop expertise in that narrow field. This, in turn, leads to quicker adjudications. Moreover, by absorbing jurisdiction over a particular subset of cases, the specialized court can alleviate caseload pressure on overburdened courts of general jurisdiction. This relieving effect can be magnified if the cases redirected to the specialized court are particularly complex or time-consuming, as patent cases, for example, tend to be.³⁶

Second, specialized courts can enhance legal accuracy. “Accuracy” is, no doubt, a slippery word with many potential meanings. Drawing on the work of Rochelle Cooper Dreyfuss, this Article uses “accuracy” to refer specifically to the consistency of a legal rule with the policy underlying the legal regime and the needs and expectations of those who frequently interact with that regime.³⁷

32. See *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (affirming the Article III status of the Emergency Court of Appeals); see also *Glidden Co. v. Zdanok*, 370 U.S. 530, 584–85 (1962) (affirming the Article III status of two specialized courts: the Court of Customs and Patent Appeals and the Court of Claims).

33. See Meador, *supra* note 23, at 609–10 (citing German and English examples and asserting “a world-wide familiarity with subject matter organization of appellate courts”); Daniel J. Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT’L & COMP. L. REV. 27, 28 (1981) (arguing that “one of the best-functioning appellate systems embodying a subject matter design is in Germany”); Wood, *supra* note 29, at 1761–62 (providing examples from Germany, France, and the United Kingdom).

34. Important discussions of the theorized costs and benefits of judicial specialization include LAWRENCE BAUM, *SPECIALIZING THE COURTS* (2011); CARRINGTON ET AL., *supra* note 10, at 138–84; FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 146–86 (1927); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 153–96 (1973); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 244–72 (1996); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377; Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990); and Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425 (1951). Beyond this rich literature focusing on institutional design in the judicial branch, there is a broad literature in the field of public choice applying economic analysis to issues of government structure and decisionmaking. See, e.g., DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003); MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* (2009). To restrain the scope of this Article, I engage this public-choice literature only briefly. See *infra* notes 107, 269. But future work might certainly use this scholarship to assess the actions of judges on a unique court like the Federal Circuit. See MUELLER, *supra*, at 401 (noting that “[t]he question of the motivation of judges in an independent judiciary remains largely an empty black box in the public choice literature”).

35. See Baum, *supra* note 29, at 1675 (listing “efficiency, expertise, and uniformity” as the three commonly cited benefits).

36. See, e.g., Dreyfuss, *supra* note 34, at 377–79; Jordan, *supra* note 34, at 747–48.

37. See Dreyfuss, *Institutional Identity*, *supra* note 5, at 796. This benefit of specialization might alternatively be termed “expertise” or “quality.” See BAUM, *supra* note 34, at 33 (noting that expertise

Of course, measuring the accuracy of a legal rule can be a difficult task, if not an impossible one.³⁸ But for present purposes, the salient point is that a judge continuously involved with a particular, narrow field can observe the consequences of prior rulings and incorporate those observations into future rulings.³⁹ The accuracy benefit of judicial specialization is, not surprisingly, thought to be especially advantageous where the law is complex, or where the facts to which the law is typically applied are technical or scientific.⁴⁰

A third and final benefit of judicial specialization is that it promotes legal uniformity.⁴¹ Uniform legal doctrine provides clearer guidance to consumers of the law and, in theory, should reduce the need for litigation.⁴² In addition, granting a single tribunal full reign over an entire area of law reduces incentives to forum shop and can eliminate difficult choice-of-law questions.⁴³

Given these theorized benefits, patent law is a natural target for specialization. Patent cases can be time-consuming, and the facts of patent cases, particularly the relevant technology, can be complex.⁴⁴ Long before the creation of the Federal Circuit, distinguished jurists such as Felix Frankfurter, Learned Hand, and Henry Friendly expressed skepticism about the ability of generalist judges to understand patent disputes.⁴⁵ Moreover, according to most commentators, patent law was significantly disuniform before the Federal Circuit's creation in 1982, leading to widespread forum shopping.⁴⁶

can help the specialized judge "interpret the law well" or "make good policy"); Dreyfuss, *Institutional Identity*, *supra* note 5, at 796 ("Accuracy, in turn, depends on *quality*—law that is cohesive in that the elements work together to further overall policies, and decisions that are explicated in a manner that makes the policy goals the court understands the law to be achieving both transparent and persuasive.").

38. See BAUM, *supra* note 34, at 34.

39. Dreyfuss, *supra* note 34, at 378.

40. See, e.g., FRIENDLY, *supra* note 34, at 156–57; Jordan, *supra* note 34, at 747–48; Revesz, *supra* note 34, at 1117–18.

41. See, e.g., Revesz, *supra* note 34, at 1116–17.

42. Dreyfuss, *supra* note 34, at 378.

43. See *id.*

44. See FRIENDLY, *supra* note 34, at 156–57.

45. See *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 60–61 (1943) (Frankfurter, J., dissenting in part) ("It is an old observation that the training of Anglo-American judges ill fits them to discharge the duties cast upon them by patent legislation."); *Parke-Davis & Co. v. H. K. Mulford Co.*, 189 F. 95, 115 (S.D.N.Y. 1911) (Hand, J.) ("How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance."); FRIENDLY, *supra* note 34, at 157 ("I am unable to perceive why we should not insist on the same level of scientific understanding on the patent bench that clients demand of the patent bar . . .").

46. See 127 CONG. REC. 27,792 (1981) (statement of Rep. Railsback) ("[W]e heard a great deal of testimony concerning the problem of forum-shopping which presently is practiced in many different district courts around the country. For example, if you wanted to bring a lawsuit which would have the effect of attacking the validity of an existing patent, you would most likely file such a lawsuit in the [E]ighth [C]ircuit. On the other hand, if you were trying to have a patent held valid, you would try and have the suit filed in the [F]ifth [C]ircuit."); see also GLORIA K. KOENIG, *PATENT INVALIDITY: A STATISTICAL AND SUBSTANTIVE ANALYSIS* § 4.02, tbl.15 (rev. ed. 1980) (surveying the patent validity decisions of the courts of appeals from 1953 through 1977).

Yet suggestions to make greater use of expert judges confront an array of objections. Although the arguments against specialized courts, like the arguments in favor of them, are wide-ranging, three arguments frequently recur. The first is that specialized courts are too isolated. This argument posits that a court addressing only a narrow class of cases and interacting only with a specialized bar will lose touch with the social policy served by the law it administers.⁴⁷ Further, because no other peer-level courts will issue opinions in the court's area of expertise, competition to produce persuasive opinions will be reduced. With incentives and opportunities for creativity reduced, the law administered by the specialized tribunal may lapse into jargon that masks difficult policy issues.⁴⁸ In short, the concern is that judges on the specialized court will develop "tunnel vision": they will "los[e] sight of basic values at stake and instead develop[] arcane and intricate doctrine"⁴⁹

A second objection to specialized courts is that they are biased. A specialized court, the argument goes, is prime for interest-group capture.⁵⁰ When a court decides cases relevant to only one or a small number of groups, it is easy for these groups to influence the appointments process and create a bench strongly in their favor.⁵¹ And even if interest groups cannot corrupt the appointments process, there remains a danger that specialist judges, in making decisions, will identify too strongly with any entity they repeatedly encounter. Repeat litigants—and their lawyers—who know the court well, are well-positioned to exploit this familiarity, especially if they face off against one-shot litigants.⁵²

A third and final objection to specialized courts is that their judgeships are not viewed as sufficiently prestigious to attract the most capable individuals.⁵³ The salience of this concern is, in my view, debatable. A judge on a court that hears cases from the entire array of laws could certainly be viewed as exercising more "power" than a judge on a court that hears cases arising under only one law. Yet today's lawyers are already highly specialized, and, as Paul Carrington, Daniel Meador, and Maurice Rosenberg have noted, "it is at least possible that some

47. See, e.g., Rifkind, *supra* note 34, at 426.

48. See, e.g., Dreyfuss, *Case Study*, *supra* note 5, at 3.

49. Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 402 (2012). A related concern is that specialized judges might come to view themselves as "truly special"—disregarding trial court fact-finding and expert testimony. Jay P. Kesan & Gwendolyn G. Ball, *Judicial Experience and the Efficiency and Accuracy of Patent Adjudication: An Empirical Analysis of the Case for a Specialized Patent Trial Court*, 24 HARV. J.L. & TECH. 393, 406 (2011) (citing Thomas H. Case & Scott R. Miller, Note, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. CAL. L. REV. 301, 311 (1984)).

50. See, e.g., CARRINGTON ET AL., *supra* note 10, at 168.

51. See, e.g., Dreyfuss, *supra* note 34, at 379–80.

52. See, e.g., *id.* at 380 (noting that "the side that is better heeled or more powerful could capture the court and create a bench more likely to issue one-sided opinions").

53. See, e.g., Jordan, *supra* note 34, at 748; see also Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REFORM 471, 483–84 (1983) (addressing the argument that judges on specialized courts will suffer from "boredom" and "lack of intellectual challenge").

very able specialists would be more attracted to judicial work which enabled them to continue their interest.”⁵⁴ This may hold particularly true in our current age, where stagnant salaries make judicial appointments increasingly undesirable from an economic perspective.⁵⁵

In response to suggestions to centralize patent litigation, such as those made by Hand, Frankfurter, and Friendly, more specific concerns have been raised. The foundational critique of specialization in patent law was lodged by Judge Simon Rifkind in 1951. In Judge Rifkind’s view, it was not the law that made patent cases complex, it was the technology relevant to the basic requirements of the Patent Act: novelty, utility, nonobviousness, and sufficient disclosure.⁵⁶ The judge noted, however, that “[i]t is hardly to be supposed that the members of a patent court will be so omniscient as to possess specialized skill in chemistry, in electronics, mechanics and in vast fields of discovery as yet uncharted.”⁵⁷ Thus, in most cases, the “expert” judge would, in truth, bring little expertise to bear.⁵⁸ Judge Rifkind’s concern seems particularly salient when the proposal is not to centralize patent cases in one trial court, where judicial knowledge of the relevant technology might periodically enhance fact-finding, but in one *appellate* court, where review of factual issues is limited.⁵⁹

Of course, many claims about specialized courts are difficult, if not impossible, to test empirically.⁶⁰ In the absence of hard data, the decision to centralize in one court all cases of a particular type should be made with a careful, qualitative consideration of potential costs and benefits. In Part III, I outline a framework for this decision-making process and apply it to evaluate the Federal Circuit’s appellate jurisdiction. Before discussing the Federal Circuit, however, it is important to understand the unique nature of this national appellate court.

54. CARRINGTON ET AL., *supra* note 10, at 169; *see* BAUM, *supra* note 34, at 54 (arguing that, in certain circumstances, “judges may find it satisfying to specialize”); *see also* Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. CHI. L. REV. 1146, 1155 (1985) (book review) (“Of course it is somewhat less grand to be the judge of an antitrust or tax court than to be an all-purpose philosopher king. But I doubt the assertion that making the job of federal judge somewhat less grand will harm the country because the job will attract people of lesser abilities. It will attract persons of somewhat *different* abilities. It will attract people who are more deeply interested in particular subjects and less interested in running everything. That, in my opinion, would be good.”).

55. *See* William Glaberson, *Pay Frozen, More New York Judges Leave Bench*, N.Y. TIMES, July 4, 2011, <http://www.nytimes.com/2011/07/05/nyregion/with-salary-freeze-more-new-york-judges-are-leaving-the-bench.html>; Adam Liptak, *How Much Should Judges Make?*, N.Y. TIMES, Jan. 20, 2009, <http://www.nytimes.com/2009/01/20/washington/20bar.html>.

56. *See* Rifkind, *supra* note 34, at 426; *see also* 35 U.S.C. §§ 101–103, 112 (2006) (outlining the requirements for patentability).

57. Rifkind, *supra* note 34, at 426.

58. *See id.*

59. *See, e.g.*, FED. R. CIV. P. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

60. *Cf.* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 850–54 (2012) (summarizing the difficulty of reaching confident conclusions about whether specialization is preferable in various contexts).

B. SPECIALIZED APPELLATE COURTS IN THE FEDERAL SYSTEM

Under the current structure of the federal judicial system, which stems largely from the Evarts Act of 1891,⁶¹ all district courts are contained within one of twelve regional circuits.⁶² In the vast majority of cases, an appeal from a district court decision will be heard by the court of appeals for the circuit in which the district court is located.⁶³

The Evarts Act originally divided the United States into nine geographic circuits.⁶⁴ Over the past century, when a circuit's caseload has become too heavy, or a circuit has become too large, the traditional congressional response has been either to add more judges or to split the existing circuit into two smaller circuits. In 1929, Congress split the original Eighth Circuit into what are now the Eighth and Tenth Circuits.⁶⁵ In 1981, Congress split the former Fifth Circuit into what are now the Fifth and Eleventh Circuits.⁶⁶ And proposals to further split the current Ninth Circuit have been regular fixtures of Congress's agenda.⁶⁷

Despite the tradition of geographically defined appellate jurisdiction, there has been a handful of federal appellate courts with jurisdiction defined by case subject matter.⁶⁸ Congress created these courts for many of the reasons discussed above: to relieve caseload pressure, to divert time-consuming cases from the courts of general jurisdiction, and to enhance doctrinal uniformity. In creating these specialized appellate courts, Congress has followed two different models of judicial structure. Some courts have been staffed with dedicated judges who tend full time to the work of the specialized court. Other courts, by contrast, have been staffed with judges from the existing federal judiciary who

61. Judiciary Act of 1891, ch. 517, 26 Stat. 826 [hereinafter Evarts Act].

62. See 28 U.S.C. § 41 (2006).

63. See *id.* § 1294.

64. Evarts Act § 3, 26 Stat. at 827.

65. See Act of Feb. 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346, 1346-47.

66. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994. The twelfth geographic circuit, the District of Columbia Circuit, traces its origins to the Court of Appeals of the District of Columbia, which Congress created two years after passing the Evarts Act. See Act of Feb. 9, 1893, ch. 74, 27 Stat. 434. For a discussion of that court's evolution into the modern Court of Appeals for the D.C. Circuit, see JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT* 60, 234-35 (2001).

67. See, e.g., Circuit Court of Appeals Restructuring and Modernization Act of 2007, S. 525, 110th Cong. (2007); Circuit Court of Appeals Restructuring and Modernization Act of 2005, S. 1845, 109th Cong. (2005); Ninth Circuit Judgeship and Reorganization Act of 2005, H.R. 211, 109th Cong. (2005); Ninth Circuit Judgeship and Reorganization Act of 2004, S. 2278, 108th Cong. (2004); Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, H.R. 2723, 108th Cong. (2003). See generally Frank Tamulonis III, Comment, *Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?*, 112 PENN ST. L. REV. 859, 861-69 (2008) (summarizing the debate over splitting the Ninth Circuit and relevant legislative proposals).

68. Although this discussion is limited to appellate specialization in the federal judiciary, it should be noted that specialized appellate courts can be found in state judiciaries, too. Oklahoma, Texas, Alabama, and Tennessee, for example, have appellate courts that hear only criminal cases. See DANIEL JOHN MEADOR, *APPELLATE COURTS IN THE UNITED STATES* 15, apps. A-B (2d ed. 2006).

dedicate some portion of their time to the work of the specialized court.

The earliest specialized courts created by Congress followed the former model. The first specialized court created by Congress at any level was the Court of Claims, established in 1855.⁶⁹ Congress gave the court jurisdiction to hear nontort claims against the U.S. government, seeking to reduce its own burden in handling these matters through private bills.⁷⁰ In 1925, Congress split the Court of Claims in two, creating a trial-level tribunal staffed by Article I “commissioners” whose decisions were reviewed by the Article III judges of the court’s appellate division.⁷¹ Six decades later, the appellate division of the Court of Claims would be merged into the Federal Circuit.⁷²

When Congress first created a specialized appellate court from scratch in 1909, it again used the model of dedicated, full-time judges. The Court of Customs Appeals, another court that would eventually become part of the Federal Circuit, was created not only to provide a uniform doctrine governing tariffs and duties, but also to relieve the docket of the Second Circuit, whose geographic jurisdiction over the Port of New York was causing the court to be overwhelmed with customs cases.⁷³ In 1929, Congress granted the Court of Customs Appeals jurisdiction over appeals from the Patent and Trademark Office and renamed it the Court of Customs and Patent Appeals (CCPA).⁷⁴

In contrast to the specialized courts with full-time judges, the specialized appellate courts created more recently have often, but not always, drawn their judges from the existing federal judiciary. For example, the Emergency Court of Appeals (in existence from 1942 to 1961) and the Temporary Emergency Court of Appeals (in existence from 1971 to 1992) heard appeals arising under price-stabilization legislation and were staffed with temporary appointees from the existing Article III judiciary.⁷⁵ Likewise, Bankruptcy Appellate Panels (BAPs), which exist in five of the twelve regional circuits, are staffed with bankruptcy judges from within the circuit.⁷⁶

69. See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

70. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962).

71. See 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4101 (3d ed. 2007).

72. See *infra* section II.A.

73. 1 BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW § 13.5, at 280–81 (1991); see Payne–Aldrich Tariff Act, ch. 6, § 29, 36 Stat. 11, 105 (1909).

74. Act of March 2, 1929, ch. 488, 45 Stat. 1475. Another prominent example of a specialized federal appellate court with full-time, dedicated judges is the much maligned Commerce Court, which reviewed railroad disputes. See Act of June 18, 1910, ch. 309, 36 Stat. 539. Often cited as an example of the interest-group capture that can infect specialized courts, Congress gave the Commerce Court jurisdiction to review only the decisions of the Interstate Commerce Commission. See CARRINGTON ET AL., *supra* note 10, at 168; FRANKFURTER & LANDIS, *supra* note 34, at 162–74. Because of this narrow mandate, only railroad interests sought to influence the judicial selection process, and the court quickly became viewed as dominated by the railroads, which led to its swift abolition. See Dreyfuss, *supra* note 34, at 392–93.

75. 17 WRIGHT ET AL., *supra* note 71, § 4105; see Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211, 85 Stat. 743, 748; Act of Jan. 30, 1942, ch. 26, § 204(c), 56 Stat. 23, 32.

76. See Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1757 (2008) (noting the

In addition, specialized appellate courts have long played an important role in intelligence and military affairs. For example, since 1978, the Foreign Intelligence Surveillance Court has heard petitions for orders permitting electronic surveillance on foreign citizens.⁷⁷ Its decisions are reviewed by the Foreign Intelligence Surveillance Court of Review.⁷⁸ The judges of these controversial courts are sitting Article III judges selected by the Chief Justice of the United States.⁷⁹

Like the foreign-intelligence-surveillance courts, specialized military-appellate courts represent a model of dual specialization, that is, specialization at both the trial and appellate level, although judges on military courts tend to be dedicated to their court full time. The Court of Appeals for the Armed Forces (CAAF), for example, is an Article I court with jurisdiction to review sentences in courts martial.⁸⁰ By the time an appeal reaches the CAAF, it already will have been affirmed by the court of criminal appeals for the relevant branch of service (another example of appellate specialization).⁸¹ And Congress created the Court of Appeals for Veterans Claims in 1988 to review the veterans benefits decisions of the Board of Veterans' Appeals within the Department of Veterans Affairs.⁸²

In short, Congress has employed specialization at the appellate level on numerous occasions and has formed the benches of these courts in different ways. But it is important to note that the jurisdiction of the courts discussed thus far has been limited to extremely narrow segments of the expansive area governed by federal law. In the next Part, I turn to the Federal Circuit. Although the Federal Circuit's jurisdiction is also defined by subject matter and not geography, it decides a greater variety of cases than the courts discussed thus far.

II. THE FEDERAL CIRCUIT: PURPOSE AND JURISDICTION

Described by a notable government commission on the federal courts as “the most significant and innovative structural alteration” since the Evarts Act,⁸³ the Federal Circuit's subject-matter jurisdiction is broader than that of the specialized appellate courts discussed above. Although the Federal Circuit is best known for being the near-exclusive appellate court for patent cases, the court hears a wide range of cases involving such matters as veterans benefits, government contracts, government-personnel disputes, customs and tariffs issues, and tax refunds, among others.

The traditional story of the Federal Circuit's creation emphasizes that Con-

existence of BAPs in the First, Sixth, Eighth, Ninth, and Tenth Circuits); *see also* 28 U.S.C. § 158(b) (2006) (empowering each circuit's judicial council to create a BAP).

77. 50 U.S.C. § 1803(a) (Supp. III 2009).

78. *Id.* § 1803(b).

79. *Id.* § 1803(a)–(b); *see* BAUM, *supra* note 34, at 84–86 (collecting critiques of the courts).

80. *See* 17 WRIGHT ET AL., *supra* note 71, § 4107.

81. *See* 10 U.S.C. § 867 (2006); 17 WRIGHT ET AL., *supra* note 71, § 4107.

82. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113–22 (1988) (codified as amended at 38 U.S.C. §§ 7251–7299 (2006 & Supp. IV 2010)).

83. WHITE COMMISSION REPORT, *supra* note 23, at 72.

gress created the court to standardize patent law throughout the country. But, cognizant of the theorized pitfalls of specialized courts, Congress granted the Federal Circuit jurisdiction over a variety of other tribunals, to provide some “generalizing” influence.⁸⁴ This Part provides a fresh perspective on the traditional narrative. It begins by highlighting the important role that business interests played in the Federal Circuit’s creation. It then explores the surprising lack of attention that the architects of the Federal Circuit gave to the court’s nonpatent docket. In particular, I show that these architects, a group that included officials from all three branches of government, never considered how the court’s nonpatent jurisdiction might affect the development of patent law or whether the Federal Circuit was an appropriate forum for the nonpatent cases assigned to the court. Because Part III considers whether appellate centralization is appropriate in each area covered by the Federal Circuit, I conclude this Part by summarizing the Federal Circuit’s current jurisdiction.

A. “THE COURT AMERICAN BUSINESS WANTED AND GOT: THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT”⁸⁵

Despite skepticism about specialized courts, solutions to two seemingly unrelated problems coalesced in the late 1970s and early 1980s to make the Federal Circuit a reality. The first problem was economic. The late 1970s featured a recession, high unemployment, and widespread layoffs.⁸⁶ This economic malaise, coupled with severe inflation, added the word “stagflation” to the American lexicon.⁸⁷ In response, President Jimmy Carter initiated a “Domestic Policy Review,” which concluded, among other things, that technology-based products were one area “in which American companies continued to dominate world markets.”⁸⁸ The Review, as well as other contemporary studies, identified a disuniform patent law as a potential impediment to continued American dominance of the technology industry.⁸⁹

The second problem was the exploding caseloads of the federal appellate

84. See, e.g., Pauline Newman, *The Federal Circuit—A Reminiscence*, 14 GEO. MASON L. REV. 513, 520 (1992) (“[P]roponents of the Federal Circuit stressed that the range and variety of its jurisdiction would necessarily avoid the risks of specialized courts.”).

85. Title of a monograph published by the National Chamber Foundation, a policy research group affiliated with the U.S. Chamber of Commerce, to commemorate the founding of the Federal Circuit. See FRANK P. CIHLAR, *THE COURT AMERICAN BUSINESS WANTED AND GOT: THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT* (1982).

86. Pauline Newman, Foreword, *The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821, 822 (2005).

87. See OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at <http://www.oed.com/viewdictionaryentry/Entry/188670>.

88. BRUCE D. ABRAMSON, *THE SECRET CIRCUIT: THE LITTLE-KNOWN COURT WHERE THE RULES OF THE INFORMATION AGE UNFOLD* 7 (2007).

89. See COMM’N ON REVISION OF THE FED. COURT APPELLATE SYS., *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE*, 67 F.R.D. 195, 369–71 (1975) [hereinafter HRUSKA COMMISSION REPORT] (reporting the findings of a congressionally created commission); Donald R. Dunner, *The U.S. Court of Appeals for the Federal Circuit: Its Critical Role in the Revitalization of U.S. Patent*

courts. By 1973, the number of cases terminated in the courts of appeals had increased nearly 400% since 1960.⁹⁰ Congress and the Federal Judicial Center commissioned a series of reports to recommend solutions.⁹¹ The two most prominent reports, those of the Freund Committee (chaired by Harvard Law School professor Paul Freund)⁹² and the Hruska Commission (chaired by Senator Roman Hruska of Nebraska),⁹³ suggested modest reforms, such as creating a national court of appeals to help the Supreme Court resolve circuit splits, and splitting the Fifth and Ninth Circuits.⁹⁴ These reports led to no legislative action, although Congress eventually split the Fifth Circuit in 1981.⁹⁵ But one observation of the Hruska Commission would be a cornerstone for the founding of the Federal Circuit.

Writing in 1975, the Commission emphasized that forum shopping had become a “widespread” problem in patent cases, due to the perception that some circuits were hostile to patent rights, while others were not.⁹⁶ The Commission’s patent law consultants, Donald Dunner and James Gambrell, saw the root of the problem as the lack of an appellate institution to issue “nationally binding decisions” on issues of patent law.⁹⁷ Ultimately, the Commission decided not to recommend creating a national patent court due to theorized problems with specialized courts and opposition by the bench and bar.⁹⁸

The prospect of a national patent court, however, appealed to Professor Daniel Meador who, from 1977 to 1979, led the Office for Improvements in the Administration of Justice within the U.S. Department of Justice.⁹⁹ Professor Meador and his staff and successors worked relentlessly with the judicial branch and Congress to create a national court for patent appeals. Meador’s team was not only concerned about disharmony in the patent law, but also sought to address the perceived caseload crisis by removing particularly time-consuming cases from the regional circuits’ jurisdiction.¹⁰⁰

Jurisprudence, Past, Present, and Future, 43 LOY. L.A. L. REV. 775, 776–78 (2010) (describing the ideas generated by the Domestic Policy Review).

90. POSNER, *supra* note 34, at 72–73 tbl.3.6.

91. See Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581, 582 & nn.4–7 (1992). See generally *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on the Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. (1977) (examining problems facing the American judiciary at the time, including overwhelming caseloads).

92. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573 (1972).

93. HRUSKA COMMISSION REPORT, *supra* note 89; COMM’N ON THE REVISION OF THE FED. COURT APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, 62 F.R.D. 223 (1973).

94. See generally Meador, *supra* note 91, at 582 & nn.4–5 (discussing the reports).

95. See *supra* note 66 and accompanying text.

96. HRUSKA COMMISSION REPORT, *supra* note 89, at 220.

97. *Id.*

98. *Id.* at 234–36.

99. See Meador, *supra* note 91, at 581, 588.

100. Accordingly, Professor Meador’s original proposal was to create a national appellate court that heard not only patent cases but also environmental cases and other “science” cases. *Id.* at 585–86.

The problems tied together by Professor Meador's team—a need for uniformity in patent law and a need to remove complex patent cases from the regional circuits—figure prominently in the legislative history of the act that created the Federal Circuit, the Federal Courts Improvement Act of 1982 (FCIA).¹⁰¹ For example, the House Judiciary Committee report on the FCIA notes:

Directing patent appeals to the new court will have the beneficial effect of removing these unusually complex, technically difficult, and time-consuming cases from the dockets of the regional courts of appeals. . . . [But] case management is not the primary goal of the legislation; rather, the central purpose is to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist in the administration of patent law.¹⁰²

A lingering question remains, however. Appellate centralization in patent law had been suggested frequently throughout the preceding decade. Why did the Federal Circuit proposal gain traction where prior proposals faltered? One explanation may lie in the strong corporate support for the Federal Circuit.¹⁰³ By the late 1970s, business interests seem to have taken the view that greater certainty in patent litigation would simplify business planning and stimulate research and development.¹⁰⁴ Perhaps more importantly, a centralized patent court, especially one formed from the patent-friendly CCPA, could be expected to uphold patents against validity challenges.¹⁰⁵ The corresponding increase in the value of patent rights would inure to the benefit of patent owners, particularly large corporations with extensive portfolios.¹⁰⁶ This explanation for the

101. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.); *see, e.g.*, 127 CONG. REC. 27,792 (1981) (statement of Rep. Railsback).

102. H.R. REP. NO. 97-312, at 22–23 (1981).

103. *See, e.g., id.* at 22 (citing a poll conducted by the Industrial Research Institute, “a private, non-profit corporation with a membership of approximately 250 industrial companies that account for a major portion of the industrial research and development conducted in the United States,” which “overwhelmingly” favored the creation of the Federal Circuit); S. REP. NO. 97-275, at 5 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11 (similar); 127 CONG. REC. 27,793–94 (1981) (listing corporate supporters of the FCIA, including Dow Chemical, Eli Lilly, Exxon, General Motors, Goodyear, IBM, Johnson & Johnson, Merck, Monsanto, 3M, Phillips Petroleum, Polaroid, Procter & Gamble, Shell Oil, Standard Oil, and Xerox); *Industrial Innovation and Patent and Copyright Law Amendments: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 7–8 (1980) [hereinafter *House Hearing on Industrial Innovation*] (statement of Hon. Philip Klutznick, Sec’y of Commerce) (noting his own support for the FCIA, as well as the support of the private sector advisory committee on patent policy to President Carter’s Domestic Policy Review).

104. S. REP. NO. 97-275, at 6, *reprinted in* 1982 U.S.C.C.A.N. at 16 (quoting the general patent counsel of General Electric).

105. *See* Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts To Shape Judicial Policy?*, 74 JUDICATURE 217, 223 (1991).

106. It should also be noted that the business community’s favorable views of the FCIA may have been shaped, in turn, by their patent lawyers, who by the late 1970s had come to support appellate centralization. *See id.*; *see also* Cecil D. Quillen, Jr., *Innovation and the U.S. Patent System*, 1 VA. L. & BUS. REV. 207, 227–28 (2006) (discussing the positions and economic interests of the PTO and the Washington, D.C. patent bar with respect to the Federal Circuit); F.M. Scherer, *The Political Economy*

Federal Circuit's creation is consistent with Lawrence Baum's argument that the most powerful driver for forming a specialized court is interest-group desire to influence the substance of judicial policy, and not the "neutral virtues" of efficiency, accuracy, and uniformity that permeate the political debate.¹⁰⁷

To be sure, the support of industry for a national patent court was not the sole stimulus for the Federal Circuit's creation. As noted, the support of the Department of Justice played a crucial role in rallying congressional support for the FCIA. Also, the Federal Circuit might never have been created without the support of the judges of the two courts that were being abolished, the CCPA and the Court of Claims, as well as the Judicial Conference of the United States.¹⁰⁸ And the support of eminent scholars and notable federal judges was surely influential, if difficult to quantify.¹⁰⁹

But even those most closely associated with the birth of the Federal Circuit acknowledge the importance of industry in the court's creation. Professor Meador, for example, noted that, while trial lawyers were generally opposed to the court's creation, his staff "had organized the corporate patent counsel into an effective support group for the Federal Circuit."¹¹⁰ At the final judicial conference of the CCPA, held in May 1982, Chief Judge Markey recognized those who had "contributed so much to what will be the Court of Appeals for the Federal Circuit on October 1, 1982," a group that included representatives from Monsanto, DuPont, FMC Corporation, and Combustion Engineering Corporation.¹¹¹ At that same conference, Senator Bob Dole recognized that the "strong interest of business representatives in this legislation" was a significant reason for the passage of the FCIA.¹¹² Federal Circuit Judge Marion Bennett, writing

of Patent Policy Reform in the United States, 7 J. ON TELECOMM. & HIGH TECH. L. 167, 190 (2009) (noting the strong support for the FCIA from corporate patent counsel).

107. BAUM, *supra* note 34, at 207–09; accord JAFFE & LERNER, *supra* note 14, at 10 ("The change [i.e., shifting patent appeals from the regional circuits to the Federal Circuit] was presented in the congressional hearings as a benign one, bringing consistency to the chaotic world of patent litigation, and predictability to the enforcement of valid patent rights. But it was clear from the beginning that advocates of stronger patent protection hoped that the new court would come down squarely on the side of patent holders."). This notion is also consistent with broader public choice literature suggesting that legislative reform can often be understood as self-interested behavior by a small, well-organized group, as corporate patent owners seemed to have been in the lead-up to the FCIA. See STEARNS & ZYWICKI, *supra* note 34, at 49–50 (citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971)). For Professor Baum's specific analysis of the Federal Circuit's creation, see BAUM, *supra* note 34, at 181, noting that "[c]orporate support for [the Federal Circuit] proposal gave it additional impetus and played a key part in creation of the Federal Circuit in 1982," and *id.* at 204, observing that "[s]everal considerations led Congress to establish the Federal Circuit, but one major reason was corporate interest in the outcomes of patent litigation."

108. Charles W. Adams, *The Court of Appeals for the Federal Circuit: More Than a National Patent Court*, 49 MO. L. REV. 43, 63 (1984).

109. See 127 CONG. REC. 27,793 (1981) (providing a list of individuals supporting the Federal Circuit's creation).

110. Meador, *supra* note 91, at 610.

111. THE NINTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, 94 F.R.D. 347, 350 (1982) [hereinafter CCPA NINTH JUDICIAL CONFERENCE].

112. *Id.* at 355.

in the court's official history, noted that the court was "pressed by patent-dependent industry and much of the patent bar."¹¹³ And Judge Pauline Newman, who, at the time of the passage of the FCIA, was Director of Licensing for FMC Corporation, described her appearance before the House Committee considering the bill as follows:

[O]ut marched the corporate patent counsel. I had never been inside the halls of Congress. We brought the industrial might of the nation. We brought our chief executives and our research directors and our union leaders. The industries that were now working to create this court represented three-quarters of the nation's industrial product.¹¹⁴

In its final form, the FCIA, with its strong industrial backing, encountered little opposition in Congress. It passed the House by a vote of 321 to 76 and the Senate by a vote of 83 to 6.¹¹⁵

B. "NOT A 'SPECIALIZED COURT'"¹¹⁶

The FCIA's history, in addition to revealing the strong corporate interest in creating the Federal Circuit, also shows that Congress was concerned about the court falling prey to the theorized pitfalls of specialization.¹¹⁷ Congress repeatedly noted that the Federal Circuit "is not a 'specialized court,'" emphasizing the court's jurisdiction over not just patent cases, but a variety of other matters.¹¹⁸ The nonpatent cases funneled to the Federal Circuit, however, consisted almost entirely of cases that were previously within the appellate jurisdiction of the CCPA and the Court of Claims, two courts that were abolished to create the Federal Circuit. And the historical record evinces little analysis of whether the Federal Circuit was being given a mix of nonpatent cases that (a) warranted centralization on their own merits or (b) would have beneficial effects on the court's patent law.¹¹⁹

113. *Origins of the United States Court of Appeals for the Federal Circuit*, in THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, A HISTORY: 1982–1990, at 11 (Marion T. Bennett ed., 1991) [hereinafter FEDERAL CIRCUIT HISTORY (1982–1990)]; see also *id.* at 12 (noting that "industry . . . had solidly urged that this new court be formed").

114. Pauline Newman, *Origins of the Federal Circuit: The Role of Industry*, 11 FED. CIR. B.J. 541, 543 (2002); accord Newman, *supra* note 84, at 517; see also THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, A HISTORY 1990–2002, at 25 (Kristin L. Yohannan ed., 2004) [hereinafter FEDERAL CIRCUIT HISTORY (1990–2002)] (containing biographical information on Judge Newman).

115. 127 CONG. REC. 27,985–86 (1981) (House vote); 127 CONG. REC. 29,888 (1981) (Senate vote); see also Meador, *supra* note 91, at 617 (discussing the final passage and enactment of the FCIA).

116. H.R. REP. NO. 97-312, at 19 (1981).

117. See, e.g., *id.* at 31 ("Several witnesses . . . expressed fears that the Court of Appeals for the Federal Circuit would be unduly specialized or would soon be captured by specialized interests."). See generally Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1004–06 (1991) (discussing opposition to the FCIA due to the "specialized" nature of the Federal Circuit's docket).

118. See H.R. REP. NO. 97-312, at 19 (1981); S. REP. NO. 97-275, at 6 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 16.

119. Rather, it seems to have been assumed that simply giving the court *some* nonpatent cases, particularly those that were centralized long ago in the CCPA and the Court of Claims, would avoid the

Indeed, one might criticize Congress for not considering these important issues.¹²⁰ But merging the CCPA and the Court of Claims was a pragmatic way to create a court of appeals for patent cases, and pragmatism is important when legislation involves judicial reform—a topic unlikely to stoke much political interest.¹²¹ Having said that, there remains a gap in understanding about whether the nonpatent docket of the Federal Circuit helps the court avoid the theorized problems of specialized courts and whether the court’s nonpatent cases, on their own merits, should be centralized in one court. The remainder of this Article tries to fill that gap.

Even acknowledging this deficit in understanding, one might still defend the

“tunnel vision” effect of specialization. See *House Hearing on Industrial Innovation*, *supra* note 103, at 392 (testimony of Maurice Rosenberg, Assistant Att’y Gen., Office for Improvements in the Admin. of Justice) (“When you have as broad a spectrum of work as [the Federal Circuit will], it seems to me that the criticism that the court would be narrow or specialized ought to disappear.”); *Federal Courts Improvement Act of 1979: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 96th Cong. 34 (1979) [hereinafter *Senate 1979 Hearing on FCIA*] (statement of Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice) (noting that the Federal Circuit’s “rich docket assures that the work of the proposed new court [will] be broad and diverse and not narrowly specialized”); *Federal Courts Improvement Act of 1979: Addendum to Hearings Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 96th Cong. 57 (1979) [hereinafter *Senate 1979 Hearing on FCIA Addendum*] (statement of Donald R. Dunner) (noting that the FCIA “disarms” the objection that “the quality of decisionmaking [will] suffer as the specialized judges become subject to ‘tunnel vision’” because the Federal Circuit will be given “a fairly broad jurisdictional base”). For significant congressional debates and hearings on FCIA and its predecessor bills, see, for example, *Federal Courts Improvement Act of 1981—S. 21, and State Justice Institute Act of 1981—S. 537: Hearing Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 97th Cong. (1981); *House Hearing on Industrial Innovation*, *supra* note 103; *Court of Appeals for the Federal Circuit—1981: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. (1981); *Senate 1979 Hearing on FCIA*, *supra*; *Senate 1979 Hearing on FCIA Addendum*, *supra*; 127 CONG. REC. 27,791–94 (1981) (House debate on FCIA); 126 CONG. REC. 25,364–67 (1980) (House debate on predecessor bill); 125 CONG. REC. 23,461–63 (1979) (Senate debate on predecessor bill).

120. Cf. Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 715 & n.4 (2003) (noting the FCIA architects’ focus on patent law at the expense of a debate over the merits of creating the Court of Federal Claims to replace the trial division of the Claims Court); Ellen E. Sward & Rodney F. Page, *The Federal Courts Improvement Act: A Practitioner’s Perspective*, 33 AM. U. L. REV. 385, 396 (1984) (noting that “[t]he basis for Congress’s approach to the problem of overspecialization appears to have been the ease with which the consolidation could be accomplished”). As additional fodder for critiquing Congress’s focus on patent law to the potential detriment of nonpatent litigants forced into the Federal Circuit, consider the remarks of Judge Pauline Newman in a recent speech:

[T]he [Federal Circuit] was formed for one need, to recover the value of the patent system as an incentive to industry. The combination of the Court of Claims and the Court of Customs and Patent Appeals was not desired of itself, it was done for this larger purpose. This was our mission—our only mission.

George C. Beighley, Jr., *The Court of Appeals for the Federal Circuit: Has It Fulfilled Congressional Expectations?*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 671, 702 (2011) (quoting Hon. Pauline Newman, Circuit Judge, U.S. Court of Appeals for the Federal Circuit, Address to Federal Circuit Law Clerks (Feb. 5, 2010)).

121. See Meador, *supra* note 91, at 596 (noting “the low priority accorded judicial reform measures in Congress”).

inattention to nonpatent cases because many of the nonpatent cases were already appealed to a national appellate court, either the CCPA or the appellate division of the Court of Claims. From a modern perspective, however, the original justifications for centralizing certain appeals in the CCPA and Court of Claims were (and remain) due for reconsideration. Customs cases, for example, were shifted to a centralized appellate court in part because, in the 1920s, the Second Circuit was overrun with customs appeals.¹²² Given changes in shipping and importing practices throughout the twentieth century, it is worthwhile to consider whether a centralized forum for customs appeals is still needed.

Likewise, Congress created the Court of Claims in 1855 to render nonfinal recommendations to Congress on claims against the United States. Over the next 130 years, Congress incrementally expanded the court's jurisdiction and authority, resulting in the "odd assortment" of cases currently before the court.¹²³ Thus, as Lawrence Baum has noted, "[t]he purposes for which the Court of Claims was created have largely lost their relevance."¹²⁴

In the end, if the Federal Circuit were to be formed out of the CCPA and the Court of Claims, the remainder of those courts' jurisdiction had to go somewhere. Advocates for reforming the federal appellate courts had a difficult enough time getting Congress to approve a national patent court. By 1982, it had been fourteen years since the first significant study recommending the incorporation of subject-matter courts into the federal appellate system.¹²⁵ And Professor Meador's proposals for national tax and science courts had been quickly rejected.¹²⁶ A reasonable conclusion is that there was simply little political will to reconsider the merits of centralized appeals in the relatively obscure cases orphaned by the abolition of the CCPA and the Court of Claims.¹²⁷ Thus, even though the architects of the Federal Circuit paid little attention to the court's nonpatent docket and its potential effects on patent law, the conventional wisdom remains that Congress framed the Federal Circuit's nonpatent jurisdiction to help the court avoid becoming a "narrow specialized tribunal."¹²⁸

122. See *supra* note 73 and accompanying text.

123. Judith Resnik, *Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character*, 71 GEO. WASH. L. REV. 798, 802 (2003).

124. BAUM, *supra* note 34, at 157.

125. See AM. BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS 7 (1968).

126. See Meador, *supra* note 91, at 602–04.

127. Moreover, without inheriting jurisdiction beyond patent cases, the new Federal Circuit would have been noticeably underworked. The CCPA and the regional circuits combined decided only about 300 patent cases annually before the Federal Circuit's creation. See *Senate 1979 Hearing on FCIA Addendum*, *supra* note 119, at 38–39 (using figures from 1978). This would have resulted in a workload of about twenty-five cases per judge, or one-fifth of the caseload of the circuit with the next-lightest per-judge docket. *Id.* at 39 ("Filings per judgeship in the 11 circuits ran from a low of 123 in the Eighth Circuit to a high of 238 in the Ninth Circuit.")

128. Chief Judge Haldane Robert Mayer, *Foreword* to FEDERAL CIRCUIT HISTORY (1990–2002), *supra* note 114, at xxi; see Beighley, *supra* note 120, at 689–90 (quoting Chief Judge Rader and Donald Dunner); Dreyfuss, *Case Study*, *supra* note 5, at 4 ("Partly out of recognition of the dangers of

C. THE “OTHER” FEDERAL CIRCUIT

Before considering the institutional-design questions that, to date, have been ignored—how the Federal Circuit’s nonpatent jurisdiction might affect patent law, how the court’s patent jurisdiction might affect nonpatent cases, and, more broadly, whether centralizing appeals makes sense in the court’s nonpatent cases—it helps to understand the exact parameters of the Federal Circuit’s jurisdiction.

The Federal Circuit, according to one of its judges, “reviews more tribunals than any other circuit.”¹²⁹ In patent cases, the Federal Circuit has jurisdiction over three types of appeals: (1) appeals from district court cases “arising under” the patent laws (typically, patent infringement suits or suits seeking a declaratory judgment of noninfringement),¹³⁰ (2) appeals from decisions of the PTO’s Board of Patent Appeals and Interferences (typically, rejections of patent applications),¹³¹ and (3) appeals from investigations by the International Trade Commission into the importation of goods alleged to infringe a U.S. patent.¹³² Collectively, these patent cases comprise forty-three percent of the Federal Circuit’s cases.¹³³

The other fifty-seven percent comes from an array of tribunals and involves a wide range of matters that, by and large, involve some function of the federal government.¹³⁴ The simplest way to obtain a sense of the Federal Circuit’s nonpatent jurisdiction is through the table below. The left column lists the most significant nonpatent tribunals over which the Federal Circuit has appellate jurisdiction.¹³⁵

specialization, Congress did not make the CAFC’s patent jurisdiction specialized in the traditional sense of possessing jurisdiction in but a single area of the law.” (footnote omitted).

129. Chief Judge Helen W. Nies, *Foreword* to FEDERAL CIRCUIT HISTORY (1982–1990), *supra* note 113, at xiii.

130. 28 U.S.C. §§ 1295(a)(1), 1338(a) (2006). Despite the Federal Circuit’s jurisdiction over all cases “arising under” the patent laws, the Federal Circuit does not have completely exclusive jurisdiction over district court patent appeals because the Supreme Court has held that cases involving only patent law defenses do not “aris[e] under” the patent laws. *See* *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808–09 (1988); *see also* *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831–34 (2002) (holding that patent-law compulsory counterclaims do not “aris[e] under” the patent laws), *abrogated by* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 19(b), 125 Stat. 284, 331 (2011) (to be codified at 28 U.S.C. § 1295(a)(1)).

131. 28 U.S.C. § 1295(a)(4)(A) (2006). In September 2012, the Board of Patent Appeals and Interferences will be abolished and replaced by the Patent Trial and Appeal Board. *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 7, 125 Stat. 284, 313–15 (2011) (to be codified at 35 U.S.C. §§ 6, 134, 141).

132. 28 U.S.C. § 1295(a)(6) (2006); *see* 19 U.S.C. § 1337(a)(1)(B) (2006).

133. *See 2011 Federal Circuit Appeals*, *supra* note 20.

134. *See id.*

135. In addition to its appellate jurisdiction, the Federal Circuit has jurisdiction to hear petitions for review of the rule-making actions of the Department of Veterans Affairs. 38 U.S.C. § 7292(c) (2006). The table below excludes tribunals over which the Federal Circuit has jurisdiction, but hears appeals from very infrequently, such as the Board of Directors of the Office of Compliance in cases involving employment-related claims by congressional employees, *see* 2 U.S.C. §§ 1301, 1407 (2006), the Equal Employment Opportunity Commission in cases involving employees of the Executive Office of the President, the Executive Residence at the White House, and the official residence of the Vice President, *see* 3 U.S.C. §§ 401(a)(4), 454(b)(1), (3)

The right column provides a representative summary of the issues that arise in the cases appealed.

| Lower Tribunal | Representative Issues |
|-------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Court of Federal Claims ¹³⁶ | Takings claims (including patent and copyright-infringement claims) ¹³⁷ against the federal government Suits for refunds of federal taxes Suits over the pay of federal government employees Disputes that arise under, or relate to, federal government contracts, including claims under the Contract Disputes Act ¹³⁸ and the Tucker Act ¹³⁹ Protests regarding the formation of government contracts Suits by Indian tribes against the federal government Claims for injuries caused by certain childhood vaccines |
| Boards of Contract Appeals ¹⁴⁰ | Government-contract disputes under the Contract Disputes Act |
| U.S. District Courts ¹⁴¹ | Contract actions against the federal government under the “Little” Tucker Act (concurrent jurisdiction with the Court of Federal Claims) |
| Merit Systems Protection Board ¹⁴² | Appeals by federal government employees of adverse employment actions (for example, removals, suspensions, and reductions in grade or pay) Federal government employee retirement disputes Disciplinary actions brought by the Board’s Special Counsel Appeals from arbitration decisions involving unionized employees of the federal government |
| Court of International Trade ¹⁴³ | Antidumping investigations Application of tariff and duty schedules to imported goods Civil actions against the United States arising out of any law pertaining to international trade |
| Patent and Trademark Office (in trademark matters) ¹⁴⁴ | Rejection of trademark registration Interference proceedings Proceedings to cancel trademark registration |
| Court of Appeals for Veterans Claims ¹⁴⁵ | Decisions by the Department of Veterans Affairs and Board of Veterans’ Appeals regarding veterans benefits |

While this table shows that the Federal Circuit's docket contains a variety of cases, the court's docket is not as diverse as those of the regional circuits. There are no criminal cases or immigration cases. As Judge Posner put it, the Federal Circuit is a semi-specialized court: "it is not a court with jurisdiction over just one area of law" but "[i]t is more specialized than any of the regional courts of appeals."¹⁴⁶

As discussed, the legislative history of the FCIA evinces little deliberation over why, beyond mere convenience, it made sense to place many of these cases within the Federal Circuit's exclusive jurisdiction.¹⁴⁷ But some of these nonpatent cases were added to the Federal Circuit's jurisdiction after the court was created, and the legislative history of those additions provides a limited amount of insight into Congress's deliberations. The most notable addition to the Federal Circuit's jurisdiction came in 1988, when Congress passed the Veterans' Judicial Review Act.¹⁴⁸ Before 1988, a statute barred veterans from seeking judicial review of their benefits claims.¹⁴⁹ According to the legislative history of the Act, the primary motive for centralizing veterans appeals was to maintain uniformity within benefits law. The House Report on the Act, for example, notes that "it is strongly desirable to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions on the same subject

(2006), the Government Accountability Office (GAO) Personnel Appeals Board in cases involving employment actions at the GAO, *see* 31 U.S.C. §§ 753, 755(a) (2006), and the Bureau of Justice Assistance within the Department of Justice in cases involving claims for benefits under the Public Safety Officers' Benefits Act, *see* 42 U.S.C. § 3796c-2 (Supp. 2008).

136. 28 U.S.C. § 1295(a)(3) (2006). Originally called the U.S. Claims Court upon creation of the Federal Circuit and abolition of the Court of Claims, Congress changed the tribunal's name to the Court of Federal Claims in 1992. *See* Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4516, 4516 (codified in scattered sections of 28 U.S.C.); U.S. COURT OF FEDERAL CLAIMS, THE PEOPLE'S COURT 10, *available at* http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited May 17, 2012). The jurisdiction of the Court of Federal Claims is outlined in 28 U.S.C. § 1494 (2006).

137. 28 U.S.C. §§ 1498(a)–(b) (2006).

138. 41 U.S.C. § 7104(b)(1) (Supp. IV 2010).

139. 28 U.S.C. § 1491(a)(1) (2006).

140. 28 U.S.C. § 1295(a)(10) (Supp. IV 2010); 41 U.S.C. § 7107(a)(1)(A) (Supp. IV 2010).

141. 28 U.S.C. § 1295(a)(2) (2006). Contract actions are subject to concurrent jurisdiction between the district courts and the Court of Claims under the Little Tucker Act only if the amount in dispute is \$10,000 or less. *See* 28 U.S.C. § 1346(a)(2) (Supp. IV 2010).

142. 28 U.S.C. § 1295(a)(9) (2006); 5 U.S.C. §§ 7121(f), 7703 (2006).

143. 28 U.S.C. § 1295(a)(5) (2006); 28 U.S.C. § 1581 (2006 & Supp. IV 2010). *See generally* Edward D. Re, *Litigation Before the United States Court of International Trade*, 26 N.Y.L. SCH. L. REV. 437, 442–43 (1981) (describing the jurisdiction of the Court of International Trade).

144. 28 U.S.C. § 1295(a)(4) (2006); 15 U.S.C. § 1071(a) (Supp. IV 2010).

145. *See* 38 U.S.C. § 7292(a) (2006).

146. POSNER, *supra* note 34, at 245.

147. *See supra* section II.B.

148. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4120–21 (1988) (codified as amended at 38 U.S.C. §§ 7251–7299 (2006 & Supp. IV 2010)).

149. *See* Gugliuzza, *supra* note 26, at 1210–11 & n.64.

due to the availability of review in the 12 [f]ederal [c]ircuits.”¹⁵⁰

Other recent additions to Federal Circuit jurisdiction include cases arising from the federal compensation program for childhood vaccine injuries.¹⁵¹ These cases had initially been filed in the district courts and appealed to the regional circuits,¹⁵² but Congress was concerned that the cases did not satisfy the “case or controversy” requirement of Article III, so it redirected the cases to the Claims Court (as the Court of Federal Claims was called at the time).¹⁵³ The fact that the cases would be appealed to a centralized appellate forum seems to have been an afterthought.¹⁵⁴ Also, in 1992, Congress abolished the Temporary Emergency Court of Appeals (TECA), transferring that court’s jurisdiction to the Federal Circuit.¹⁵⁵ But the TECA’s caseload was so small at the time that there was little discussion of the merits of continued centralized appeals in those cases.¹⁵⁶

In sum, while the Federal Circuit’s jurisdiction covers topics beyond patent law, surprisingly little attention has been paid to the question of whether this jurisdictional mix makes sense as a normative matter. Save for occasional congressional references to uniformity (which can be argued to be beneficial in all areas of the law) and to a generic desire to avoid overspecialization, this issue has largely been ignored. More than anything else, the court’s current jurisdiction seems to be a function of the lobby for a national patent court, historical accident, and convenience.

III. PROBLEMS WITH THE FEDERAL CIRCUIT’S JURISDICTION

As discussed in the Introduction, critiques of modern patent law are abundant. Evaluating the merits of those arguments is beyond the scope of this Article. It seems reasonable, however, to attribute any perceived problems with patent law at least in part to the Federal Circuit because of its near-exclusive jurisdiction over patent cases. In that vein, commentators have previously suggested that the model of centralizing patent appeals is fundamentally flawed.¹⁵⁷ But I am skeptical that the Federal Circuit will be stripped of its patent jurisdiction anytime soon.¹⁵⁸ Accordingly, for a possible structural cure

150. H.R. REP. NO. 100-963, at 28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5810.

151. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 4307, 101 Stat. 1330, 1330-224 to -225 (codified as amended at 42 U.S.C. § 300aa-11 to -12 (2006 & Supp. III 2009)).

152. Drug Export Amendments Act of 1986, Pub. L. No. 99-660, § 311, 100 Stat. 3743, 3761-62.

153. *See* H.R. REP. NO. 100-495, at 771-72 (1987).

154. *See id.* at 772 (observing that Claims Court decisions were appealed to the Federal Circuit but not discussing the significance of appellate centralization in vaccine cases).

155. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 102, 106 Stat. 4506, 4506-07 (codified at 15 U.S.C. § 3416(c) (2006) and 28 U.S.C. § 1295(a) (2006 & Supp. IV 2010)).

156. *See* S. REP. NO. 102-342, at 25 (1992).

157. *See supra* notes 14-19 and accompanying text.

158. *See* BAUM, *supra* note 34, at 229 (noting that “courts that are established as permanent bodies through legislation tend to become permanent” and that “it is considerably more likely that [the court’s] jurisdiction will be expanded than that it will be abolished”).

to patent law's ills, I look beyond the Federal Circuit's patent jurisdiction.

To date, discussions of problems in Federal Circuit patent law have not incorporated the nonpatent cases that comprise the majority of the court's docket. In this Part, I begin to inject that element into the conversation by noting a paradox in the court's current jurisdictional structure: The court's jurisdiction over relatively specialized and noncommercial cases may be too narrow for the Federal Circuit to develop the sensitivity to innovation and competition policy that scholars have found lacking in the court's patent jurisprudence. At the same time, the Federal Circuit may have jurisdiction over too many different subject areas to become expert in them all, thus defeating an important purpose of appellate centralization. After discussing this paradox at a general level, I then analyze specific areas of the court's jurisdiction in more detail, considering how each area might affect patent cases and whether those appeals should be centralized in one court.

A. LACK OF "GENERALIZING" INFLUENCE FROM THE NONPATENT DOCKET

When Congress created the Federal Circuit, it was simply assumed that the nonpatent docket the court inherited from the CCPA and the Court of Claims would sufficiently "generalize" the new court so that it would not embody the problems theorized to be associated with specialized courts. Thus, the first question addressed in this Part is whether the "semi-specialized" nonpatent docket provides the Federal Circuit with any experience or knowledge that might positively influence the development of patent law.

1. Narrowness of the Federal Circuit's Nonpatent Jurisdiction

There are at least three ways in which the Federal Circuit's nonpatent docket may be too narrow to provide the court with a broader perspective about the role of patents in the modern economy. First, aside from patent infringement cases, the Federal Circuit hears few disputes between commercial entities.¹⁵⁹ Rather, the federal government is a party to most of the court's nonpatent cases. These government-centered cases provide the court with little insight into how forces besides the incentive of a government-issued patent might motivate innovation. By contrast, commercial cases, such as antitrust cases, might help the court better understand how market forces and other factors affect innova-

159. The Federal Circuit does occasionally hear commercial claims, such as antitrust or state-law tort claims when they are part of a case "arising under" the patent laws, 28 U.S.C. §§ 1295(a)(1), 1338(a), 1367(a) (2006); *see, e.g., In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1330 & n.8 (Fed. Cir. 2008) (affirming Federal Circuit jurisdiction over a state-law antitrust claim based on alleged fraud before the PTO), and the Federal Circuit sometimes encounters economic analysis in antidumping or countervailing duty appeals from the Court of International Trade, *see, e.g., SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011) (vacating Department of Commerce methodology for calculating the value of imported goods because the methodology made it "difficult for an exporter to know whether it is dumping or to change its pricing practice to avoid dumping").

tion. As Professor Dreyfuss has noted, “antitrust cases have historically proven to be an important avenue for the introduction of economics into decisionmaking.”¹⁶⁰ Indeed, Professors Christina Bohannon and Herbert Hovenkamp have recently argued that patent courts should require infringement plaintiffs to demonstrate “IP injury,” borrowing directly from the “antitrust injury” requirement, which, because of antitrust law’s aim to promote competition, requires a plaintiff to prove a reduction in the “incentive to compete.”¹⁶¹ Similarly, the IP injury requirement would mandate that infringement plaintiffs show that the defendant’s use of the patented technology “harms the IP holder’s ex ante incentives to innovate.”¹⁶² Exposing the Federal Circuit more frequently to antitrust law, with its clear focus on promoting competition, might refocus the court on the fundamental purpose of the patent laws—promoting innovation.¹⁶³

The relative lack of commercial cases on the Federal Circuit’s docket also presents a danger that the court will believe “technological progress requires greater emphasis on patents,” leading it “to hold patents valid and infringed” when market incentives may be sufficient to promote innovation.¹⁶⁴ Moreover, an injection of economic analysis into the court’s docket might steer the court away from the bright-line, industry-insensitive rules it seems to prefer. In the field of antitrust, for example, the introduction of economic thought steered the courts away from the per se rule and toward a rule-of-reason analysis for most allegedly anticompetitive conduct.¹⁶⁵

A second way in which the Federal Circuit’s docket might be too narrow is that it involves almost exclusively the programs of the federal government. Repeated exposure to the federal government as a litigant could potentially bias the court in favor of the government and its programs.¹⁶⁶ The generally held view that the Federal Circuit is relatively protective of patent validity supports this theory.¹⁶⁷ Repeated exposure to the federal government as a litigant may, in fact, affect all areas of the court’s jurisdiction, not just patent law. The Federal

160. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 788 (2004).

161. Bohannon & Hovenkamp, *supra* note 5, at 979–80 (internal quotation marks omitted); *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (holding that antitrust plaintiffs “must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent”).

162. Bohannon & Hovenkamp, *supra* note 5, at 987.

163. For a more extensive discussion of Professors Bohannon and Hovenkamp’s IP injury proposal, *see* CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 33–59 (2012).

164. Dreyfuss, *supra* note 160, at 787–88.

165. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 9–10 (1984).

166. *See* POSNER, *supra* note 34, at 256.

167. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 336–38 (2003); John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 251 (1998); Glynn S. Lunney, Jr., *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 SUP. CT. ECON. REV. 1, 15–16 (2004); *see also* JAFFE & LERNER, *supra* note 14, at 126 (arguing more broadly that the Federal Circuit has changed patent law “in the direction of stronger patent protection”).

Circuit has been shown to be deferential to government agencies on matters of international trade.¹⁶⁸ And qualitative evidence in the government-contracts field supports the theory that the Federal Circuit is a particularly hospitable forum for government litigants.¹⁶⁹ Future empirical work could confirm or refute the theory that the Federal Circuit favors the government and governmental programs the court frequently encounters.

Finally, the areas of law covered by the Federal Circuit's nonpatent jurisdiction might be too specialized to generalize the court's patent jurisprudence. Rather than involving the decisions of a stable cohort of district judges with a widely varied docket, Federal Circuit nonpatent cases are singular, dealing with importation rules, veterans benefits, federal employee conduct, and the like, and seem to provide the court with little sense of the broader federal docket.¹⁷⁰ Many of the court's nonpatent cases implicate complex statutes and regulations administered by bureaucratic government agencies.¹⁷¹ Veterans-benefits cases, for example, often involve terms of art and an alphabet soup of acronyms that can be difficult for an outsider to navigate.¹⁷² International trade cases likewise implicate complex tariff and duty schedules.¹⁷³

Furthermore, many of the sources of law encountered in these nonpatent cases are heavily rule oriented. The extensive benefits regulations issued by the Department of Veterans Affairs¹⁷⁴ and the three-thousand-plus page Harmonized Tariff Schedule at issue in many international trade cases¹⁷⁵ are but two examples. The technical, rule-driven nature of these fields of law might partially explain the court's comfort in patent cases with clear rules rather than flexible

168. See UNAH, *supra* note 7, at 156–57.

169. See W. Stanfield Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors"*, 40 PUB. CONT. L.J. 275, 346 (2011); see also *infra* section III.C.2 (discussing favoritism in government contracts appeals). Running contrary to any potential theory of government favoritism is the criticism of the court's takings law as relatively protective of property interests. See *infra* note 313 and accompanying text.

170. See Dreyfuss, *Institutional Identity*, *supra* note 5, at 788 n.4 (noting that the Federal Circuit's nonpatent cases do not "provide the court with a particularly comprehensive view of the federal docket").

171. See Sward & Page, *supra* note 120, at 398–99 (asserting that the nonpatent areas over which the Federal Circuit was given exclusive jurisdiction "involve complex statutes that . . . require some time for judges to master").

172. See Gugliuzza, *supra* note 26, at 1203–10 (providing background on the benefits process and discussing acronyms frequently encountered in Federal Circuit benefits cases); see, e.g., *Guillory v. Shinseki*, 603 F.3d 981, 986 (Fed. Cir. 2010) ("On appeal, Guillory . . . contends that the court erred in refusing to find CUE in the 1992 RO decision that declined to award aid and attendance retroactively to 1966, apparently based on the allegedly pre-existing seizure disorder and CUE in earlier ratings decisions that failed to award compensation for the seizure disorder. In order to qualify for aid and attendance, a veteran must have an SMC rating under subsection (o), or the rate between subsections (n) and (o) authorized under subsection (k)." (citing 38 U.S.C. § 1114(r))).

173. See 1 CLUBB, *supra* note 73, § 19.5 (describing the process of classifying and valuing imported goods).

174. See 38 C.F.R. §§ 0.735-1 to 76.4 (2011).

175. See U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (Revision 1) (2011), available at <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1101htsa.pdf>.

standards, despite the fact that, as others have explained, the Patent Act is relatively open-ended and suitable for an instrumentalist interpretation.¹⁷⁶ Given the demonstrated differences in innovation practices among different industries,¹⁷⁷ we should be concerned about a jurisprudence that appears to hamper the ability of trial judges to tailor patent law to peculiar facts of a particular case.¹⁷⁸ Moreover, as I discuss in more detail below, a similar preference for bright-line rules can be seen in the court's nonpatent case law, particularly in the fields of veterans benefits and government contracts.

2. Possibilities for Generalizing Influence Under the Current Structure

Of course, even if the subject matter of the Federal Circuit's nonpatent cases is too narrow to provide the court with insight into the role of patents in the modern economy, it is possible that other mechanisms provide the court with the broader perspective that its nonpatent cases may not. I discuss two formal mechanisms that can and sometimes do broaden the court's perspective beyond the areas of law assigned to the Federal Circuit. Neither of these mechanisms, however, are currently used to their fullest potential.

First, the narrowness of the Federal Circuit's jurisdiction could be mitigated by a bench comprised of judges with a wide variety of perspectives. Although the judges of the Federal Circuit come from somewhat varied backgrounds,¹⁷⁹ the bench currently is to some extent skewed in favor of the court's commerce-related areas, namely patents and international trade. Five of the court's eleven active judges had significant experience with patent law before joining the Federal Circuit¹⁸⁰ and two other active judges had some preappointment expo-

176. See Menell, *supra* note 8, at 28 (“[A]lthough the modern statute[] ha[s] become bloated with detailed and often technical provisions, fundamental aspects of the . . . patent regime[] . . . remain relatively terse . . .” (footnote omitted)); Nard, *supra* note 8, at 53 (“[T]he patent code, much like the Sherman Act, is a common law enabling statute, leaving ample room for courts to fill in the interstices or to create doctrine emanating solely from Article III’s province.” (footnotes omitted)).

177. See DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* 37–65 (2009); Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 *BERKELEY TECH. L.J.* 1155, 1158–85 (2002).

178. See Lunney, *supra* note 167, at 70 (critiquing the Federal Circuit’s narrowing of the nonobviousness requirement and broadening of the doctrine of equivalents as “reduc[ing] the room for judicially tailoring patent protection to the individually optimal level”); Thomas, *supra* note 6, at 774–75 (acknowledging that “[t]he term ‘formalism’ is not necessarily a pejorative,” but arguing that “an orientation towards rules threatens to make the patent law hidebound and unresponsive to changing conditions”); cf. Chiang, *supra* note 8, at 89 (questioning whether Federal Circuit law is formalistic in practice).

179. See Golden, *supra* note 19, at 666–67, 675–76.

180. Judges with significant patent law experience include Judge Newman (who has a Ph.D. in chemistry and worked as a patent attorney and counsel with FMC Corp. for thirty years), Judge Lourie (who also has a Ph.D. in chemistry and worked as patent and trademark counsel for SmithKline Beecham Corp.), Judge Linn (who served as a patent examiner and as an intellectual-property lawyer in private practice), Judge Moore (who has a master’s degree from the Massachusetts Institute of Technology, was a Federal Circuit law clerk, and served as an intellectual-property-law professor for nearly a decade), and Judge O’Malley (who, as a district court judge, tried over one-hundred patent and trademark cases, sat by designation in the Federal Circuit, see, e.g., *Ormco Corp. v. Align Tech., Inc.*,

sure to patent law.¹⁸¹ Moreover, the two most recent appointees to the court have extensive backgrounds in international trade law.¹⁸² The patent and international trade backgrounds of a majority of the court's judges seems out of balance, given that these cases comprise less than half of the court's docket.

Accordingly, Federal Circuit judges themselves have called for the appointment of jurists who are more familiar with the other areas of the court's jurisdiction.¹⁸³ In his final State of the Court address, Chief Judge Michel lamented that the court lacked any judge "who ha[d] specialized in contract, international trade, veterans or personnel law."¹⁸⁴ Scholars¹⁸⁵ and practitioners¹⁸⁶ have made similar pleas.

498 F.3d 1307, 1320 (Fed. Cir. 2007) (O'Malley, J., concurring in part and dissenting in part), and commented and wrote on matters of patent law, *see, e.g.*, Kathleen M. O'Malley et al., Panel Discussion, *Claim Construction from the Perspective of the District Judge*, 54 CASE W. RES. L. REV. 671 (2004). *See also* FEDERAL CIRCUIT HISTORY (1990–2002), *supra* note 114, at 17–165 (providing biographical information about the Federal Circuit's judges); *Judges*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/judges/randall-r-rader-chief-judge.html> (last visited Feb. 7, 2012) [hereinafter, *Federal Circuit Judges*] (same). The President's most recent nominee to the court, Richard G. Taranto, also has extensive experience in patent law, having handled dozens of patent appeals, both in the Federal Circuit and the Supreme Court. *See* Press Release, The White House, President Obama Nominates Richard Gary Taranto to Serve on the U.S. Court of Appeals (Nov. 10, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/11/10/president-obama-nominates-richard-gary-taranto-serve-us-court-appeals>; *Next Federal Circuit Judge Nominee: Richard G. Taranto*, PATENTLY-O (Nov. 10, 2011, 9:42 PM), <http://www.patentlyo.com/patent/2011/11/next-federal-circuit-judge-nominee-richard-g-taranto.html>. As this Article goes to press, Mr. Taranto's nomination remains pending in the Senate.

181. This group includes Chief Judge Rader (who served as counsel to the Senate Judiciary Committee's Subcommittee on Patents, Trademarks, and Copyrights), FEDERAL CIRCUIT HISTORY (1990–2002), *supra* note 114, at 49, and Judge Dyk (who argued several appeals in the Federal Circuit while in private practice), *see id.* at 71. Also, Senior Judge Gajarsa served as a patent examiner and patent agent in the 1960s, about thirty years before he was appointed to the bench. *Id.* at 61.

182. These two judges are Judge Jimmie V. Reyna, who worked in private practice as an international-trade attorney and has authored two books on the subject, and Judge Evan J. Wallach, who was formerly a judge on the U.S. Court of International Trade. *See Federal Circuit Judges*, *supra* note 180.

183. *See, e.g.*, Robert K. Huffman, *Federal Circuit Decisions on Government Contracts: Insights from the Roundtable*, 24 NASH & CIBINIC REP. ¶ 7, at 28 (2010) ("Judge Michel urged the members of the Government contracts bar to consider seeking the nomination of persons with Government contracts expertise and experience Judge Michel stated that the appointment of one or more individuals with such experience could go a long way towards raising the court's understanding of the real-world effects of its decisions in the Government contracts area.").

184. Chief Judge Paul R. Michel, U.S. Court of Appeals for the Federal Circuit, State of the Court Address at the Judicial Conference for the U.S. Court of Appeals for the Federal Circuit 1–2 (May 20, 2010), available at <http://www.cafc.uscourts.gov/images/stories/announcements/2010/stateofthecourt10.pdf>. Of course, with the confirmations of Judges Reyna and Wallach, the court no longer lacks experience in international trade. *See Federal Circuit Judges*, *supra* note 180. Judge Sharon Prost has preappointment experience in labor law, but Judge Michel's comments suggest that her expertise does not lie in issues relevant to appeals from the Merit Systems Protection Board. *See id.*

185. *E.g.*, Dreyfuss, *supra* note 160, at 797 ("The Federal Circuit's perspective could also be expanded by appointing . . . individuals with backgrounds in antitrust litigation, economic analysis, and economic and industrial history.").

186. *See, e.g.*, Pamela A. MacLean, *A Circuit Ripe for Remake*, NAT'L L.J. (ONLINE), Jan. 12, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427395535> ("The government-contract bar has long sought and desired someone with more substantive expertise in the contracts area" (quoting

A second existing way to mitigate the narrowness of the Federal Circuit's jurisdiction would be to capitalize on the statutory authorization for federal judges to sit by designation on other federal courts.¹⁸⁷ One way the designation mechanism could be used is to have Federal Circuit judges frequently sit by designation in the district courts and on other courts of appeals. Federal Circuit judges do sometimes sit by designation in district courts, but these visits seem to focus on gaining exposure to patent litigation at the trial level rather than gaining a broader understanding of federal law. Chief Judge Rader, for example, has sat by designation in a district court at least six times,¹⁸⁸ but all fourteen of his opinions in the *Federal Supplement* arise from patent cases.¹⁸⁹

Visits to the regional circuit courts of appeals, on the other hand, expose the judges to a wide range of law, at least for a fleeting moment. Writing almost a decade ago, Professor Dreyfuss criticized the Federal Circuit for not having its judges sit by designation in its sister circuits as frequently as other courts.¹⁹⁰ Since that time, however, the numbers have changed. As the table below shows, with the exception of 2011, the Federal Circuit has in recent years been a leader in the number of extracircuit decisions participated in by its judges. Of the thirteen courts of appeals, the Federal Circuit ranked sixth in 2011, second in 2010, third in 2009, third in 2008, fourth in 2007, and third in 2006. And it should be noted that one of the circuits that consistently beats the Federal

Scott McCaleb, partner at Wiley Rein and then-president-elect of the Federal Circuit Bar Association) (internal quotation marks omitted)).

187. See 28 U.S.C. §§ 291–292 (2006).

188. See Chief Judge Randall R. Rader, U.S. Court of Appeals for the Federal Circuit, The State of Patent Litigation, Remarks at the Eastern District of Texas Judicial Conference 4 (Sept. 27, 2011), available at <http://www.patentlyo.com/files/raderstateofpatentlit.pdf>; see also *Judges Sitting by Designation with Other Circuits*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/images/stories/announcements/CAFC_Judges_Sitting_by_Designation_2006_to_2011.pdf (last visited Apr. 3, 2012) [hereinafter *Federal Circuit Judges Sitting by Designation*] (noting that Federal Circuit judges have sat by designation on another federal court forty times since 2006). The list maintained by the Federal Circuit omits, at minimum, Judge Rader's visit to the Eastern District of Texas in 2010. See, e.g., *Clearvalue, Inc. v. Pearl River Polymers, Inc.*, 704 F. Supp. 2d 584, 586–87 (E.D. Tex. 2010) (Rader, J., sitting by designation) (recusing himself from conducting a trial of a matter in which he had previously considered a petition for rehearing en banc in the Federal Circuit).

189. See *Clearvalue, Inc. v. Pearl River Polymers, Inc.*, 704 F. Supp. 2d 584 (E.D. Tex. 2010); *IP Innovation L.L.C. v. Red Hat, Inc.*, 705 F. Supp. 2d 692 (E.D. Tex. 2010); *Performance Pricing, Inc. v. Google Inc.*, 704 F. Supp. 2d 577 (E.D. Tex. 2010); *PA Advisors, LLC v. Google, Inc.*, 706 F. Supp. 2d 739 (E.D. Tex. 2010); *IP Innovation L.L.C. v. Red Hat, Inc.*, 705 F. Supp. 2d 687 (E.D. Tex. 2010); *Cornell Univ. v. Hewlett-Packard Co.*, 654 F. Supp. 2d 119 (N.D.N.Y. 2009); *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279 (N.D.N.Y. 2009); *Loral Fairchild Corp. v. Victor Co. of Japan*, 208 F. Supp. 2d 344 (E.D.N.Y. 2002); *Loral Fairchild Corp. v. Victor Co. of Japan*, 931 F. Supp. 1014 (E.D.N.Y. 1996); *Loral Fairchild Corp. v. Victor Co. of Japan*, 911 F. Supp. 76 (E.D.N.Y. 1996); *Loral Fairchild Corp. v. Victor Co. of Japan*, 906 F. Supp. 813 (E.D.N.Y. 1995); *Loral Fairchild Corp. v. Victor Co. of Japan*, 906 F. Supp. 798 (E.D.N.Y. 1995); *Ristvedt-Johnson, Inc. v. Brandt, Inc.*, 805 F. Supp. 557 (N.D. Ill. 1992); *Ristvedt-Johnson, Inc. v. Brandt, Inc.*, 805 F. Supp. 549 (N.D. Ill. 1992).

190. Dreyfuss, *supra* note 160, at 794.

Circuit, the Ninth Circuit, has nearly three times as many judges as the Federal Circuit.¹⁹¹

Number of Appeals Decided as a Visiting Judge¹⁹²

| Judges Appointed to the | 2011 | 2010 | 2009 | 2008 | 2007 | 2006 |
|------------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|
| First Circuit | 0 | 0 | 0 | 0 | 0 | 0 |
| Second Circuit | 15 | 5 | 24 | 35 | 0 | 2 |
| Third Circuit | 54 | 40 | 59 | 93 | 34 | 20 |
| Fourth Circuit | 0 | 0 | 0 | 0 | 0 | 0 |
| Fifth Circuit | 31 | 21 | 17 | 1 | 14 | 46 |
| Sixth Circuit | 61 | 50 | 89 | 96 | 168 | 105 |
| Seventh Circuit | 77 | 63 | 48 | 29 | 61 | 63 |
| Eighth Circuit | 16 | 60 | 130 | 280 | 221 | 335 |
| Ninth Circuit | 85 | 142 | 214 | 217 | 212 | 170 |
| Tenth Circuit | 54 | 87 | 92 | 54 | 52 | 11 |
| Eleventh Circuit | 0 | 0 | 0 | 2 | 20 | 3 |
| D.C. Circuit | 21 | 15 | 9 | 0 | 0 | 0 |
| Federal Circuit | 36 | 102 | 116 | 97 | 73 | 158 |

191. *Compare Judges of this Court in Order of Seniority*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (Jan. 2012), http://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 (twenty-five active judges, nineteen senior judges), with *Federal Circuit Judges*, *supra* note 180 (eleven active judges, five senior judges).

192. Most of the data in this table and the following table were compiled from table V-2 of the annual report *Judicial Business of the United States Courts*. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR 401–05 tbl.V-2 (2012) [hereinafter 2011 JUDICIAL BUSINESS], <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 404–08 tbl.V-2 (2011) [hereinafter 2010 JUDICIAL BUSINESS], <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 399–401 tbl.V-2 (2010), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 404–08 tbl.V-2 (2009), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/front/JudicialBusinesspdfversion.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 406–10 tbl.V-2 (2008), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/front/JudicialBusinesspdfversion.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 406–10 tbl.V-2 (2007), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/front/completejudicialbusiness.pdf>. The Administrative Office of the U.S. Courts does not, however, track how many Federal Circuit dispositions involve visiting judges. Accordingly, it seems that table V-2 does not include decisions by judges

When the figures are limited to active judges only, the Federal Circuit's status as pacesetter stands out even more clearly. Over the last six years, the active judges of the Federal Circuit tend to have participated in more extracircuit dispositions than the active judges of the twelve regional circuits combined.

Number of Appeals Decided as a Visiting Judge, Active Judges Only¹⁹³

| Judges Appointed to the | 2011 | 2010 | 2009 | 2008 | 2007 | 2006 |
|-------------------------|------|------|------|------|------|------|
| First Circuit | 0 | 0 | 0 | 0 | 0 | 0 |
| Second Circuit | 0 | 0 | 0 | 0 | 0 | 0 |
| Third Circuit | 0 | 0 | 0 | 0 | 12 | 0 |
| Fourth Circuit | 0 | 0 | 0 | 0 | 0 | 0 |
| Fifth Circuit | 0 | 0 | 0 | 0 | 0 | 0 |
| Sixth Circuit | 0 | 0 | 0 | 0 | 3 | 0 |
| Seventh Circuit | 0 | 0 | 9 | 0 | 0 | 0 |
| Eighth Circuit | 4 | 0 | 6 | 0 | 0 | 0 |
| Ninth Circuit | 0 | 0 | 0 | 0 | 0 | 0 |
| Tenth Circuit | 14 | 35 | 39 | 15 | 0 | 1 |
| Eleventh Circuit | 0 | 0 | 0 | 0 | 0 | 0 |
| D.C. Circuit | 21 | 15 | 9 | 0 | 0 | 0 |
| Federal Circuit | 21 | 68 | 58 | 53 | 63 | 97 |

That said, one should not overestimate the “generalizing” effect of the judges’ visits to the regional circuits. In 2010, for example, only five of the court’s then-eleven active judges sat by designation on the regional circuits, and all but one of those visits were for only two days of argument.¹⁹⁴ So, if sitting by designation is to be a primary means of exposing Federal Circuit judges to the breadth of federal law, it would need to be used more frequently.

on the regional circuits when visiting the Federal Circuit. Therefore, in this table, I have added to the figures compiled by the Administrative Office the small number of Federal Circuit decisions involving a visiting circuit judge, which I identified by examining a list of judges that have sat by designation on the Federal Circuit, *see U.S. Court of Appeals for the Federal Circuit Visiting Judges*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/images/stories/announcements/VJ_Chart_for_Website_8.pdf (last visited Mar. 29, 2012) [hereinafter *Federal Circuit Visiting Judges*] (listing visits by Circuit Judges Richard A. Posner (Seventh Circuit) and Kent A. Jordan (Third Circuit) and by Senior Circuit Judge Richard D. Cudahy (Seventh Circuit)), and then searching Westlaw’s Federal Circuit database (CTAF) for dispositions in which those judges were members of the panel.

193. *See supra* note 192 for information on the sources of this data.

194. *See Federal Circuit Judges Sitting by Designation, supra* note 188.

The Federal Circuit could also generalize its bench by having visiting judges sit with the court. As the table below illustrates, the Federal Circuit uses visiting judges, but not with as much frequency as most regional circuits.

Decisions Including a Visiting Judge¹⁹⁵

| Deciding Court | 2011 | 2010 | 2009 | 2008 | 2007 | 2006 |
|------------------|-------|-------|-------|-------|-------|-------|
| First Circuit | 93 | 117 | 252 | 268 | 192 | 202 |
| Second Circuit | 540 | 1,168 | 1,367 | 1,030 | 861 | 1,074 |
| Third Circuit | 166 | 341 | 584 | 448 | 678 | 611 |
| Fourth Circuit | 124 | 212 | 208 | 294 | 137 | 132 |
| Fifth Circuit | 66 | 74 | 75 | 54 | 30 | 46 |
| Sixth Circuit | 1,174 | 741 | 979 | 1,354 | 1,732 | 1,543 |
| Seventh Circuit | 119 | 90 | 41 | 0 | 3 | 0 |
| Eighth Circuit | 157 | 116 | 135 | 91 | 49 | 63 |
| Ninth Circuit | 1,211 | 1,172 | 912 | 1,158 | 912 | 958 |
| Tenth Circuit | 48 | 65 | 41 | 57 | 119 | 82 |
| Eleventh Circuit | 319 | 302 | 318 | 417 | 458 | 358 |
| D.C. Circuit | 0 | 0 | 0 | 15 | 0 | 3 |
| Federal Circuit | 11 | 38 | 115 | 153 | 133 | 6 |

The quantitative data suggest that the court could use visitors to a greater extent. As a qualitative matter, the court might also seek visiting judges with more diverse backgrounds. Then-Chief Judge Michel, speaking shortly after the Federal Circuit began, in 2006, regularly to invite visitors to join its bench, suggested that the court gave preference to visitors from trial courts that handle a large amount of patent litigation.¹⁹⁶ Of course, because few of the Federal Circuit's nonpatent cases are appealed from the district courts, it is hard to find

195. Like the data above, most of the figures in this table were derived from 2011 JUDICIAL BUSINESS, *supra* note 192. As noted, however, the Administrative Office of the U.S. Courts does not track how many Federal Circuit dispositions involve visiting judges. *See supra* note 192. To obtain the number of Federal Circuit decisions including a visiting judge, I searched the Westlaw Federal Circuit database (CTAF) for records containing the term "sitting /3 designation." I then verified each result to ensure that it represented a disposition on the merits that included a visiting judge. Note also that, in calculating the number of relevant decisions for each year, I have mirrored the Administrative Office's practice of reporting annual data from October 1 through September 30 of the following calendar year. So, for example, the data indicated on the table as from 2011 covers decisions issued from October 1, 2010 through September 30, 2011.

196. *See* Paul R. Michel, *Chief Judge Paul R. Michel's Address to the Federal Circuit Judicial Conference on the State of the Court*, 7 J. MARSHALL REV. INTELL. PROP. L. 647, 649 (2008) ("Since September 2006, we have invited those district judges from all around America *who often try patent cases* to sit with us on regular panels." (emphasis added)); *see also* *Federal Circuit Visiting Judges*,

other federal judges with experience in issues like veterans benefits and government contracts. The court could, however, use the designation process to involve judges who, while not intimately familiar with the areas of law under the court's jurisdiction, could provide a unique perspective on those areas. For example, circuit and district judges from the Second Circuit often handle complex commercial cases, and their knowledge of business litigation could influence patent-law decisions to better acknowledge the realities of the market and of complex litigation. Also, judges from the D.C. Circuit are versed in the intricacies of administrative law and agency practice, and could provide a fresh perspective in cases arising from the PTO and the Department of Veterans Affairs. Further, the Federal Circuit has exclusive appellate jurisdiction over the Court of International Trade, yet only three of that court's seven currently active judges have sat with the Federal Circuit.¹⁹⁷ And all federal district and circuit judges hear contract cases and cases involving claims against the federal government (for example, civil rights cases under *Bivens*¹⁹⁸ or tort claims under the Federal Tort Claims Act¹⁹⁹). By inviting a wider variety of district judges to sit by designation, the Federal Circuit could cause its law to evolve in a way more cognizant of the role of federal law in the nation and the commercial economy.²⁰⁰

In sum, existing mechanisms can and sometimes do expose the Federal Circuit's judges to other fields of federal law and broader social and economic issues that might have a beneficial effect on the development of the laws within the Federal Circuit's exclusive jurisdiction.²⁰¹ These mechanisms, however,

supra note 192 (listing the forty-seven judges who sat by designation in the Federal Circuit from September 2006 to February 2012).

197. One can verify this assertion by searching the Westlaw Federal Circuit database (CTAF) for "sitting /3 designation /s 'international trade.'" The three currently active judges that have sat with the Federal Circuit are Judges Donald Pogue, Gregory Carman, and Jane Restani. Although Judges Pogue and Restani have visited in the last five years, Judge Carman's visit was in the mid-1990s.

198. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

199. 28 U.S.C. § 1346(b) (2006).

200. That said, some scholars have suggested that visiting district judges are overly deferential to the circuit judges with whom they sit. See Paul M. Collins, Jr. & Wendy L. Martinek, *The Small Group Context: Designated District Court Judges in the U.S. Courts of Appeals*, 8 J. EMPIRICAL LEGAL STUD. 177, 182 (2011) (citing literature). Deferential behavior would, of course, limit the impact visiting judges have on patent law.

201. There are, naturally, other mechanisms that I have not discussed in detail here but that have the capability to expose the Federal Circuit to social and economic concerns relevant to patent law, such as the court's use (or nonuse) of legal scholarship. See Craig Allen Nard, *Toward a Cautious Approach to Obeisance: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence*, 39 HOUS. L. REV. 667 (2002); Schwartz & Petherbridge, *supra* note 3. While I have focused on relatively formal mechanisms, such as the court's nonpatent jurisdiction, the appointments process, and the designation process, I recognize that informal mechanisms, such as attendance at conferences, visits to law schools, and even reading the newspaper, surely illuminate the judges' understanding of their court's role in the political and economic system. Nevertheless, I view the more formal mechanisms as highly important because they are easy for the interested public to observe and require less voluntary action on the part of the judge. Moreover, the formal mechanisms I have discussed influence the judges strictly in their capacity as a judge. My hypothesis is that if Federal Circuit judges were a little less like patent jurists

could be used more fully. And arguably the most important mechanism, the court's nonpatent docket, may be too narrow to provide sufficient generalizing influence. Thus, we should continue to consider whether the Federal Circuit's nonpatent docket needs reimagining.

B. A PARADOX: IS THE FEDERAL CIRCUIT'S JURISDICTION ALSO TOO BROAD?

As shown, the Federal Circuit's nonpatent docket may be an insufficient generalizing mechanism because it does not force the judges to be generalists. Instead, it forces them to focus on a few discrete areas of federal law. Of course, one might argue that this lack of generalizing influence is outweighed by the benefits of centralizing all of these appeals in one appellate court. Centralizing in one tribunal all cases in one subject area of the law has, as noted, three primary benefits: uniformity, efficiency, and accuracy. Although a single court should produce a relatively uniform law,²⁰² it is debatable whether the Federal Circuit develops sufficient expertise to enhance accuracy in the nonpatent fields it supervises.

To begin, most of the court's judges have little to no background in many of the fields covered by the Federal Circuit's jurisdiction. Most notably, veterans and personnel cases comprised thirty-seven percent of the court's merits decisions in 2011.²⁰³ Yet no sitting judge has any discernable experience in those areas.²⁰⁴ To be sure, a Federal Circuit judge eventually gets experience in all areas of the court's jurisdiction simply by sitting on the bench, hearing and deciding cases. But that experience may not fully solve the problem of the lack of preappointment diversity of background. Some have questioned whether it is wise to force someone who is an expert in one field—say, patent law or international trade law—to adjudicate cases in areas in which that person has little interest—say, veterans-benefits law. As Professor Dreyfuss has suggested, judges who have no interest in the area in which they are working can, in general, “be expected to prefer doctrines that will lead to easier, quicker, and faster decisions over resolutions that safeguard accuracy.”²⁰⁵ This would be particularly alarming in the case of the Federal Circuit with its exclusive or

who happen to have a narrow, unchanging docket of nonpatent cases and a little more like other federal appellate judges (with a generally broad docket and perhaps special expertise in one or two areas, *see* Cheng, *supra* note 28, at 540), patent law might better align with a thoughtful innovation policy.

202. *But cf., e.g.,* Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOYOLA L.A. L. REV. 801, 818 (2010) (suggesting that the relatively high rate of dissent in the Federal Circuit shows that the court's law is not overly uniform); Petherbridge, *supra* note 16, at 428 (arguing that Federal Circuit decisions on the doctrine of equivalents exhibit “noticeable heterogeneity”); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1111–12 (2004) (studying Federal Circuit cases interpreting patent claims and identifying two distinct methods of claim construction).

203. *See* 2011 *Federal Circuit Appeals*, *supra* note 20.

204. *See supra* notes 179–86 and accompanying text.

205. *See* Dreyfuss, *Institutional Identity*, *supra* note 5, at 820; *see also* Lee, *supra* note 13, at 25–26 (arguing that the “well-recognized formalistic nature of Federal Circuit patent jurisprudence. . . . oper-

near-exclusive jurisdiction over many areas.

Moreover, it is questionable whether any person, let alone a person juggling the caseload of a federal appellate judge, could become an expert in all of the different areas over which the Federal Circuit exercises jurisdiction. If the judges of the Federal Circuit hear appeals from so many tribunals that they cannot gain more than a passing familiarity with each area, the theorized benefits that flow from specialized adjudication may be compromised.

In short, it may be too much to expect Federal Circuit judges to provide expert adjudication in every case. By way of analogy to patent law, what makes a patent case difficult is not the complexity of the law, but the complexity of the technology underlying the case. It is therefore appropriate to question whether an expert patent appellate court makes sense, as some scholars have, because no judge could master all of the diverse technological fields in which patent cases arise²⁰⁶ and because the factual complexity counsels specialization at the trial level, not the appellate level.²⁰⁷ Similarly, it might be a stretch to expect the Federal Circuit's judges to master diverse legal fields such as veterans benefits, government contracts, international trade, and patent law. If Federal Circuit judges are unable to become experts in all of these fields, it raises serious questions about whether exclusive jurisdiction is appropriate.

C. EVALUATING THE FEDERAL CIRCUIT'S NONPATENT JURISDICTION

Twenty years ago, a commentator discussing the Federal Circuit's jurisdiction over Indian claims lamented: "When Congress enacted the Federal Courts Improvement Act . . . , it did so with a great deal of thought about the need for uniformity and predictability in the American patent system, but with no thought about the impact of the newly created system on Indian claims against

ates as a heuristic that lowers the cognitive burdens associated with lay adjudication of technological disputes").

206. See Rai, *supra* note 14, at 1068–69.

207. See Dreyfuss, *Case Study*, *supra* note 5, at 73–74; Donna M. Gitter, *Should the United States Designate Specialist Patent Trial Judges? An Empirical Analysis of H.R. 628 in Light of the English Experience and the Work of Professor Moore*, 10 COLUM. SCI. & TECH. L. REV. 169, 197–99 (2009); James F. Holderman, *Judicial Patent Specialization: A View from the Trial Bench*, 2002 U. ILL. J.L. TECH. & POL'Y 425, 430–32; John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with that of the District Courts?*, 32 HOUS. L. REV. 67, 71–72 (1995); Jeff Becker, Comment, *On Creating Specialized Patent District Courts: Why H.R. 34 Does Not Go Far Enough to Address Reversal Rates in District Courts*, 61 SMU L. REV. 1607, 1626 (2008); Case & Miller, *supra* note 49, at 317–18; see also Kesan & Ball, *supra* note 49, at 444 (presenting an empirical study that makes "a real but modest case" for establishing specialized patent trial courts); Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 932–34 (2001) (suggesting that a specialized trial court for patent cases would, among other things, eliminate forum shopping and increase predictability of results); cf. Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1448 (2010) (arguing that, by restricting venue choices in patent litigation, cases involving particular types of technology would cluster in particular district courts, allowing those courts to "develop[] a proficiency in the industry-specific issues that commonly arise").

the Government.”²⁰⁸ As I have shown, the same might be said with regard to all of the areas of the court’s nonpatent jurisdiction. To date, no one—not even Congress when it created the Federal Circuit—has contemplated the wisdom of centralizing the cases that comprise the court’s nonpatent docket. In this section, I begin to consider that question, focusing in detail on the court’s veterans-benefits and government-contracts cases and also briefly examining the other areas of the court’s nonpatent jurisdiction.

Before performing this analysis, it is important to outline some guiding principles. Although many commentators have spoken on the usefulness of specialized courts in particular fields,²⁰⁹ one helpful model developed by Professor Dreyfuss organizes the considerations around factors such as (1) the field of law proposed to be specialized and (2) the identity of participants in disputes in the field.²¹⁰ As for the field of law, she suggests that appellate specialization may be desirable where, among other things, uniformity is highly desirable, the law is complex, there is some degree of consensus on the objectives of the law in the specialized field, and there is not a sufficient number of cases for the generalist judiciary to gain a basic familiarity with the area.²¹¹ As for the identity of participants, specialization may be warranted where parties share similar levels of wealth and where the parties have access to legal services of similar sophistication.²¹² Wealthy or repeat players, such as corporations and the federal government, generally fare well in court because they—and their lawyers—know how the system operates.²¹³ This effect can be magnified in a specialized court.²¹⁴

With these principles in mind, I evaluate the Federal Circuit’s docket. I organize the discussion in three parts, first focusing on cases in which the centralization rationales are particularly suspect, then turning to cases in which there is a danger of favoritism of a serial litigant, and finally discussing the components of the court’s nonpatent jurisdiction on which further research is needed.

1. Suspect Rationales for Centralization: Veterans and Personnel Appeals

There are some areas where the need for appellate centralization seems highly suspect, most notably, the cases in which the private litigants the Federal Circuit encounters are always individuals, as opposed to business organizations. I focus mainly on veterans cases but also briefly discuss personnel cases.

208. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 754 (1992).

209. *See supra* note 34.

210. *See Dreyfuss, supra* note 34, at 407.

211. *See id.* at 409–20.

212. *See id.* at 422–25.

213. *See Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 124–25 (1974).

214. *See Dreyfuss, supra* note 34, at 422–23.

a. Veterans Appeals. Preliminarily, a brief explanation of the Federal Circuit's jurisdiction over veterans cases is in order. A veterans-benefits case begins when a veteran files a claim for disability benefits with one of the fifty-eight regional offices of the Department of Veterans Affairs (VA).²¹⁵ The claim is adjudicated by an individual employee at the regional office.²¹⁶ That decision may be appealed to the Board of Veterans' Appeals (an administrative tribunal within the VA).²¹⁷ A veteran displeased with the Board's decision may appeal to the Court of Appeals for Veterans Claims (Veterans Court), an Article I court.²¹⁸ The decisions of the Veterans Court can be appealed to the Federal Circuit, but Federal Circuit review is limited to questions of law only.²¹⁹

Surprisingly, there was almost no judicial review of the VA's benefits decisions until 1988.²²⁰ That year, Congress passed the Veterans' Judicial Review Act (VJRA), which created the Veterans Court and granted the Federal Circuit exclusive jurisdiction over appeals from that tribunal.²²¹ According to the legislative history of the Act, Congress's primary objective in centralizing appeals in the Federal Circuit was to avoid the problem of conflicting opinions on legal rules that must be administered by a single government agency of nationwide jurisdiction.²²²

These concerns about uniformity certainly have persuasive power. But, as Professor Dreyfuss has suggested in the Social Security context,²²³ the uniformity concern in benefits law may not be as great as it initially appears. A key reason that legal uniformity is desirable is so that intercircuit actors (such as potential patent infringers) can accurately predict the legal consequences of their actions. While review of veterans claims by the regional circuits might create some disuniformity in doctrine, any problems would be minimal for at

215. Gugliuzza, *supra* note 26, at 1204; *see also Contact Veterans Benefits Administration, VETERANS BENEFITS ADMINISTRATION*, <http://www.vba.va.gov/bln/21/ro/rocontacts.htm> (last visited Mar. 29, 2012) (listing the regional offices).

216. *See* Gugliuzza, *supra* note 26, at 1205.

217. *Id.* at 1206.

218. *See* 38 U.S.C. §§ 7251, 7266(a) (2006).

219. *Id.* § 7292(d); *D'Amico v. West*, 209 F.3d 1322, 1325 (Fed. Cir. 2000) (noting that the Federal Circuit does not "have jurisdiction to review a factual determination or an application of a law or regulation to the facts unless a constitutional issue is presented").

220. Gugliuzza, *supra* note 26, at 1210.

221. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113, 4120-21 (1988) (codified as amended at 38 U.S.C. §§ 7251-7299 (2006 & Supp. IV 2010)).

222. H.R. REP. NO. 100-963, at 28 (1988); *see Judicial Review of Veterans' Affairs: Hearing before the H. Comm. on Veterans' Affairs*, 100th Cong. 66 (1988) (testimony of Richard W. Johnson, Jr., Director of Legislative Affairs, Non Commissioned Officers Association). Another concern may have been at play, however. During the drafting of the Act, district judges strongly disfavored being given jurisdiction over veterans cases because there could be a large number of them and because they "did not seem especially interesting or consequential." BAUM, *supra* note 34, at 161. Some judges even lobbied Congress to keep veterans cases out of the district courts. *Id.* at 162 (citing PAUL C. LIGHT, *FORGING LEGISLATION 177* (1992)). By analogy, one might reasonably infer that judges on the regional courts of appeals, too, would have preferred to assign relatively undesirable veterans appeals to the Federal Circuit.

223. *See* Dreyfuss, *supra* note 34, at 419-20.

least two reasons. First, veterans do not plan to become disabled depending on the interpretation of governing statutes and regulations. And, second, because veterans claimants are not inter-circuit actors, a disuniform law would not be overly difficult to administer.²²⁴ Although horizontal equity might be compromised as different VA regional offices apply different standards in particular situations, the percolation of legal conflict might, in the long run, help the law move toward a more accurate outcome by promoting a dialogue among the circuits.²²⁵

Another reason that veterans cases might warrant centralization, which is not emphasized in the legislative history of the VJRA, is the unique nature of the veterans-benefits system. The veterans claims process is not intended to be adversarial. Rather, the VA has a statutory duty to help veterans develop their claims.²²⁶ And the standard of proof is lower than the familiar preponderance-of-the-evidence standard for civil cases. When the evidence in support of and against a veteran's claim is in "approximate balance," the VA is required to "give the benefit of the doubt to the claimant."²²⁷ The unusual, pro-claimant nature of the veterans-benefits system might suggest that the regional circuits, just because they hear, for example, social security appeals, are not necessarily equipped to adjudicate veterans claims.

That said, despite the veterans statute's high aspirations, its promise of a uniquely paternalistic system is not always fulfilled. As I have written elsewhere, the claims process is inherently adversarial, and institutional problems at the VA can compound hostility between veterans and the VA.²²⁸ Some veterans

224. Indeed, the Senate Committee on Veterans' Affairs objected to centralizing veterans appeals in the Federal Circuit because it saw no compelling need for national jurisdiction over veterans claims. *See* S. REP. NO. 100-418, at 71 (1988) ("[A]s part of the process creating the Court of Appeals for [t]he Federal Circuit, special note was made by the Senate Judiciary Committee that any expansion of its jurisdiction should be predicated on an adequate showing of the need for nationwide subject matter jurisdiction. The Committee . . . is not satisfied that such a need exists in the context of VA claims." (citation omitted)).

Another important benefit of legal uniformity is that it discourages forum shopping. *See* Kesan & Ball, *supra* note 49, at 403. While this is a valid concern in patent cases that involve large, multijurisdictional litigants, review of veterans cases in, say, the twelve regional circuits would not lead to rampant forum shopping, as veterans could easily be limited to seeking review in their circuit of domicile.

225. *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 699 & n.68 (1984) (outlining the benefits of percolation). *But see* Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689-91 (1990) (arguing that "the virtues of percolation have been wildly exaggerated").

226. *See* 38 U.S.C. § 5103(a) (Supp. IV 2010).

227. 38 U.S.C. § 5107(b) (2006); 38 C.F.R. § 3.102 (2011). *See generally* Miguel F. Eaton, Sumon Dantiki & Paul R. Gugliuzza, *Ten Federal Circuit Cases from 2009 that Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155, 1159 (2010) (describing the pro-claimant nature of veterans-benefits laws).

228. Gugliuzza, *supra* note 26, at 1206-07 & nn.36-37 (collecting commentary). To gain a sense of the complexity of the veterans-benefits system and the types of disputes that might arise between a veteran and the VA, simply peruse the leading practitioner treatise, *VETERANS BENEFITS MANUAL* (Barton F. Stichman & Ronald B. Abrams eds., 2010), which spans over two-thousand pages.

navigate the system at a particular disadvantage because the statute prohibits them from retaining paid legal counsel until the administrative appeal process begins.²²⁹

In gauging whether appellate centralization is desirable, the reality of the VA's claims system cuts both ways. On one hand, we might prefer an expert court, clerk's office, and pro bono bar to shepherd the appeals of often-unrepresented and disabled veterans. On the other hand, a specialized court might identify too strongly with the decisions of the executive branch on veterans claims and provide doctrinal uniformity by regularly ruling in the government's favor. The very limited empirical data available suggest that the Federal Circuit rejects veterans' appeals at a high rate.²³⁰ Moreover, some have argued that protection of the executive branch has become the norm in government-contracts disputes, as I discuss below.²³¹

Even if a need for uniformity and the uniqueness of the veterans-benefits system provided modest justifications for a national appellate court, three other concerns still weigh against centralization. First, because the veterans-adjudication system is already specialized—including two specialized appellate tribunals (the Board and the Veterans Court)—there seems to be little need for further centralization at the court-of-appeals level.²³² The Article I Veterans Court, which decides exponentially more veterans cases than the Federal Circuit, is capable of providing a relatively uniform body of law on its own. The Chief Judge of the Veterans Court recently suggested to Congress that Federal Circuit review in veterans cases may add to the process nothing more than delay.²³³

Also, the lack of percolation in veterans law might be manifesting itself in recent Federal Circuit veterans jurisprudence that, like Federal Circuit patent law, has been criticized by the Supreme Court for its seeming formalism. The Supreme Court heard only two veterans cases in the first twenty years after Congress gave the Federal Circuit jurisdiction over veterans appeals.²³⁴ But

229. See 38 U.S.C. § 5904(c)(1) (2006).

230. See Gugliuzza, *supra* note 26, at 1258 (examining published opinions in 2010 and noting a 78.6% affirmance rate in veterans cases, as compared to a 62% overall affirmance rate in the courts of appeals); cf. Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 492 & tbl.1 (2007) (examining all nonjurisdictional Federal Circuit veterans decisions from January 2004 to March 2006, and reporting an affirmance rate of 73.6%).

231. See *infra* section III.C.2.

232. See Dreyfuss, *supra* note 34, at 429; see also Allen, *supra* note 230, at 523–24 (outlining the “problematic” relationship between the Federal Circuit and the Veterans Court).

233. See *House Hearing on H.R. 1484*, *supra* note 24, at 50–51.

234. See *Scarborough v. Principi*, 541 U.S. 401, 405–06 (2004) (holding that an attorney's fees application under the Equal Access to Justice Act could be amended after the filing deadline to allege that the government's litigating position “was not substantially justified,” as required by the statute for fee recovery (internal quotation marks omitted)); *Brown v. Gardner*, 513 U.S. 115, 117 (1994) (holding that a veteran is not required to show negligence or carelessness by VA physicians to recover damages

then, in 2009, the Supreme Court overruled Federal Circuit case law, which held that any error by the VA in notifying a veteran of the evidence needed to substantiate the veteran's claim "should be presumed prejudicial, requiring reversal [of the VA's decision] unless the VA can show that the error did not affect the essential fairness of the adjudication."²³⁵ In language that sounds familiar to patent lawyers and scholars, the Court criticized the Federal Circuit's presumption of prejudice as "too complex and rigid."²³⁶ The presumption, in the Court's view, "impose[d] unreasonable evidentiary burdens upon the VA" and was "too likely too often to require the [Veterans Court] to treat as harmful errors that [were] in fact . . . harmless."²³⁷ In place of the Federal Circuit's rule-like presumption, the Supreme Court instructed the court to apply the same harmless-error standard as generally applies in other types of appeals: a "case-specific application of judgment, based upon examination of the record."²³⁸

Similarly, in 2011, the Supreme Court unanimously reversed an en banc Federal Circuit decision holding jurisdictional the 120-day deadline for a veteran to appeal a decision from the Board to the Veterans Court.²³⁹ Under the Federal Circuit's holding, the appeal deadline could not be equitably tolled based on the circumstances of the case,²⁴⁰ but the Supreme Court disagreed, emphasizing the proveteran, informal, and nonadversarial nature of the veterans-benefits system.²⁴¹

Of course, examples of flexible, case-specific standards can also be found in Federal Circuit veterans case law,²⁴² just as standards can be found in Federal Circuit patent law.²⁴³ My point here is merely to note that a potential parallel to the Federal Circuit's much-criticized formalism in patent law—increasing Supreme Court intervention to reverse rigid Federal Circuit rules—can also be found in the court's veterans law. This similarity suggests that veterans law might benefit from a more generalized perspective at the appellate level and that formalism in the Federal Circuit might not be a problem in patent law only—it

for injuries resulting from VA medical treatment), *superseded by statute*, 38 U.S.C. § 1151(a)(1)(A) (requiring claimant to show that injury resulted from "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the [VA]").

235. *Sanders v. Nicholson*, 487 F.3d 881, 889 (Fed. Cir. 2007), *rev'd sub nom.* *Shinseki v. Sanders*, 556 U.S. 396 (2009).

236. *Sanders*, 556 U.S. at 399.

237. *Id.*

238. *Id.* at 407. *See generally* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2883 (2d ed. 1995) (discussing the harmless-error provision of Rule 61 of the Federal Rules of Civil Procedure).

239. *Henderson v. Shinseki*, 589 F.3d 1201, 1212 (Fed. Cir. 2009) (en banc), *rev'd sub nom.* *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011).

240. *Henderson*, 589 F.3d at 1212.

241. *Henderson*, 131 S. Ct. at 1205–06.

242. *See, e.g.*, *Gugliuzza*, *supra* note 26, at 1220–21 (surveying the Federal Circuit's 2010 veterans opinions and noting that "[t]he decisions tend to reject categorical rules").

243. *See, e.g.*, *In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988) (outlining eight factors to balance in determining whether a patent's specification sufficiently enables a person skilled in the art to make and use the invention, as required by 35 U.S.C. § 112 (2006)).

could be an institutional or structural problem with the Federal Circuit.

The identity of participants in veterans cases is a second concern weighing against appellate centralization. Veterans, paradigmatic “one-shot” litigants, face the federal government, which appears in many Federal Circuit cases (the most notable exception being patent infringement appeals from the district courts). In patent cases, worries about a specialized court’s possible bias are tempered by the fact that many patent litigants are sometimes plaintiffs and sometimes defendants.²⁴⁴ In veterans cases, however, the lineup is almost always the same: the government on one side, defending a decision by the VA, and a one-shot veteran on the other. Of course, this dynamic of an individual seeking relief against the government is unavoidable in veterans cases, regardless of forum. But it is the *combination* of the sophistication disparity with the fact that the advantaged party, the federal government, appears in such a large number of Federal Circuit cases that suggests the Federal Circuit might be a particularly poor forum for veterans appeals.²⁴⁵ That said, a high affirmance rate in veterans cases might also stem from substantive limits on judicial review and the multilayer appeals process that precedes Federal Circuit review. Future empirical work might identify areas of law in which appellate review is similarly limited and compare affirmance rates with those in veterans cases, to gauge whether the Federal Circuit’s veterans jurisprudence is out of the mainstream.

Third, there is a geographic fairness concern about centralizing veterans appeals in a national court located in Washington, D.C., staffed by judges who must live in the Washington metropolitan area.²⁴⁶ A veteran might live anywhere in the country, and so traveling to the Nation’s capital might be prohibitive.²⁴⁷ To be sure, in an appellate proceeding where the court may hear only questions of law, the veteran has little participatory role to play in the case. Yet when a litigant cannot see the process by which his claim is decided, such as an appellate oral argument (if it is allowed), the legitimacy of the system is

244. See Case & Miller, *supra* note 49, at 310.

245. See BAUM, *supra* note 34, at 38–39 (noting that “where one-shotters and repeat players contend with each other, repeat players are likely to be in a much better position to exert direct or indirect influence over a court” and that this capture effect can be magnified when the government is a repeat litigant); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 339 (1991) (“[T]he nature of a [specialized] court’s docket should expose the judges to both sides of pertinent controversies, instead of a set of appeals presenting skewed arguments . . .”).

246. See 28 U.S.C. § 44(c) (2006) (“While in active service, each circuit judge of the Federal judicial circuit appointed after the effective date of the Federal Courts Improvement Act of 1982, and the chief judge of the Federal judicial circuit, whenever appointed, shall reside within fifty miles of the District of Columbia.”). Section 44(c) is colloquially known as the “Baldwin rule” because it was included in the FCIA to prevent the accession of Judge Phillip Baldwin, a native Texan unlikely to move to Washington, to the position of Chief Judge. See Elizabeth I. Winston, *Differentiating the Federal Circuit*, 76 MO. L. REV. 813, 818–19 & n.24 (2011).

247. Cf. Dreyfuss, *Case Study*, *supra* note 5, at 71 (noting that “[i]f . . . specialization is extended to areas where the litigants are localized and economically disadvantaged, a travel requirement would be a serious concern”).

undercut.²⁴⁸ Indeed, it was this very concern that caused the Senate Committee on Veterans' Affairs to object to the portion of the Veterans' Judicial Review Act that granted exclusive jurisdiction to the Federal Circuit.²⁴⁹

Of course, the Federal Circuit is statutorily authorized to sit anywhere in the country and is required to choose "[t]he times and places of [its] sessions . . . with a view to securing reasonable opportunity to citizens to appear before the court with as little inconvenience and expense to citizens as is practicable."²⁵⁰ This provision was included in the statute specifically so that individual litigants with cases before the Federal Circuit would "not be required to travel to Washington to present their appeal, but [would] be assured of a forum nearer to the place where they live or work."²⁵¹ Chief Judge Markey, the Federal Circuit's first chief judge, insisted that the court was "fully aware" of the need to accommodate litigants outside Washington and that the court "welcomed that responsibility and fully intend[ed] to meet it with enthusiasm and dispatch."²⁵² Yet, in practice, the Federal Circuit sits outside of Washington, D.C. relatively infrequently, usually only once a year and often (but not always) in cities that might be thought of as technology centers, such as Palo Alto, Houston, and Atlanta.²⁵³ Commentators have rightly called on the court to sit outside of the Beltway more frequently, in respect of the travel burden placed on litigants.²⁵⁴ This need is particularly acute for veterans, whose cases comprise seventeen percent of the Federal Circuit's docket.²⁵⁵

248. See CARRINGTON ET AL., *supra* note 10, at 17–18 (noting that seeing oral argument "gives litigants the sense of participation which is an essential of the adversary tradition").

249. S. REP. NO. 100-418, at 70–71 (1988) (noting that "providing for review of VA claims in [the Federal Circuit] does not seem as desirable as providing for review in the [f]ederal [c]ircuits generally in order to provide wider access for veteran-plaintiffs").

250. 28 U.S.C. § 48(d) (2006).

251. 127 CONG. REC. 27,992 (1981) (statement of Rep. Kastenmeier). *But see* 127 CONG. REC. 29,888 (1981) (statement of Sen. Simpson) ("The proponents of this measure hasten to point out that critics such as myself ignore the fact that the new court would travel to different areas of the country to hear appeals, but I would point out that the new court is to be composed of a limited number of judges, with a logistical difficulty in making themselves available . . .").

252. Howard T. Markey, *The Phoenix Court*, 10 APLA Q.J. 227, 235 (1982).

253. See *Out of Washington Sessions*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (NOV. 9, 2011), http://www.cafc.uscourts.gov/images/stories/the-court/CHART_by_DATE2.pdf. Moreover, according to my informal discussions with advocates who have argued at the court's out-of-Washington sessions, those sessions do not typically focus on local litigants or cases arising out of the local district courts.

254. See Winston, *supra* note 246, at 828–30.

255. 2011 *Federal Circuit Appeals*, *supra* note 20. Although the Veterans Court (the Article I court whose decisions are appealed to the Federal Circuit) is also based in Washington, this does not, in my view, negate the geographic fairness concerns presented by the Federal Circuit. One significant difference between the Federal Circuit and the Veterans Court is that it is highly unusual for the Veterans Court to grant oral argument. In 2011, for example, the Veterans Court decided 4,620 appeals, but heard only twenty-one oral arguments. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: OCTOBER 1, 2010 TO SEPTEMBER 30, 2011, at 1, 4 (2012) [hereinafter VETERANS COURT ANNUAL REPORT], available at http://www.uscourts.cavc.gov/documents/FY_2011_Annual_Report_FINAL_Feb_29_2012_1PM_.pdf. Oral argument is a much more common occurrence in the Article III courts of appeals, like the Federal Circuit. See 2011 JUDICIAL BUSINESS, *supra* note 192, at 36 tbl.S-1 (reporting

b. Personnel Appeals, Briefly. Concerns about Federal Circuit jurisdiction over veterans cases seem to apply with similar strength to personnel cases. Just like veterans, government employees are, by and large, not inter-circuit actors with a compelling need for a completely predictable body of law throughout the country.²⁵⁶ Moreover, government employees do not plan to be demoted or fired depending upon judicial interpretation of controlling statutes and regulations. In addition, like the veterans system, the personnel system presents a situation of dual specialization, with trial-level adjudication centralized at the Merits System Protection Board (MSPB) and appeals centralized in the Federal Circuit.²⁵⁷ And, as with veterans law, no judge has been appointed to the Federal Circuit based on expertise in the field. Finally, although it is somewhat more logical to situate federal-government-personnel appeals in the Nation's capital than to situate veterans appeals there, only about fifteen percent of the country's federal

that oral arguments were held in 7,601 of 30,290 cases decided by the regional circuits in 2011 (25.1%). Although I am not aware of any accessible data on the percentage of veterans cases granted oral argument by the Federal Circuit, the court seems to entertain argument in a sizeable portion of cases in which the veteran is represented by counsel. For example, in late February 2012, a review of the Federal Circuit's oral argument calendar for its upcoming March and April 2012 sessions indicated that, of twenty-five veterans cases to be submitted at those sittings, ten (40%) were scheduled for oral argument. See *Upcoming Oral Arguments*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.ca9c.uscourts.gov/argument/upcoming-oral-arguments.html> (last visited Feb. 23, 2012) (listing the Federal Circuit's current calendar of oral arguments; the March and April 2012 calendars discussed are on file with the author). Even if some of those cases were designated for submission on the briefs as the calendar drew near, more and more veterans are being afforded top-notch appellate counsel under a variety of pro bono programs, see Gugliuzza, *supra* note 26, at 1217–20, so at least some veterans should continue to obtain oral argument in the Federal Circuit.

In any event, the disparity between oral argument percentages at the Veterans Court and the Federal Circuit is not surprising given the stark differences between the procedural rules in the Veterans Court and the Federal Rules of Appellate Procedure, as well as the differing caseloads in those courts. The rules of the Veterans Court permit oral argument only on a motion of a party and expressly indicate that “[o]ral argument normally is not granted on . . . matters being decided by a single Judge.” VETS. CT. R. 34(b). In the Veterans Court, nearly every case is decided by a single judge. See VETERANS COURT ANNUAL REPORT, *supra*, at 2 (reporting only forty-two appeals decided by multi-judge panels in 2011). By contrast, the Federal Rules of Appellate Procedure permit submission on the briefs only upon the unanimous agreement of the three-judge panel. FED. R. APP. P. 34(a)(2). Although a detailed analysis of the Veterans Court's practice is beyond the scope of this Article, the limited availability of oral argument seems somewhat defensible given (1) that the court decides a relatively high volume of cases that turn on documentary evidence and (2) that the court grants relief (reversal, vacatur, or remand for further factual development by the VA) in the vast majority of its decisions. See VETERANS COURT ANNUAL REPORT, *supra*, at 2. And even if the low incidence of oral argument in the Veterans Court were worthy of critique, I do not view the Veterans Court's location in Washington as a justification for centralizing veterans appeals in the Federal Circuit. Rather, I would view the Veterans Court's location with the same skepticism that I view the Federal Circuit's location.

256. Likewise, because government employees are local actors, opportunities for forum-shopping in personnel cases would seem to be minimal. See *supra* note 224.

257. Unlike with veterans law, the Supreme Court has not recently intervened in the Federal Circuit's personnel jurisprudence. It appears that the last Supreme Court decision to involve a Federal Circuit MSPB appeal was issued in 2001. See *U.S. Postal Serv. v. Gregory*, 534 U.S. 1 (2001). But even in that case, the Supreme Court rejected a “sweeping rule” adopted by the Federal Circuit (that, in disciplinary proceedings, the MSPB could *never* consider certain prior disciplinary actions) in favor of allowing the MSPB “broad discretion” in determining the weight to give those prior actions. *Id.* at 3, 7.

civilian employees work in the Washington, D.C. metropolitan area, meaning that many MSPB litigants face a travel burden in hearing their appeals adjudicated by the Federal Circuit in Washington.²⁵⁸

c. Concluding Thoughts on Veterans and Personnel Appeals: The Federal Circuit's Self-Image. As discussed above, the Federal Circuit was created largely at the behest of businesses that sought a centralized forum for patent appeals to increase certainty and to enhance the value of their intellectual property.²⁵⁹ The business-related portion of the Federal Circuit's docket has grown in prominence since the court's creation and this growth is reflected in the court's bench. As noted, veterans and personnel cases comprise almost 40% of the docket, yet no sitting judge has any discernable experience in those areas.²⁶⁰ By contrast, areas that comprise a much smaller component of the docket, such as international trade (3%),²⁶¹ are represented, perhaps disproportionately so. This apparent prioritization of appointments is troubling, for it may suggest a marginalization of certain types of Federal Circuit cases.

Turning specifically to patent law, the proportion of patent cases on the court's docket has grown from roughly 25% in the 1980s²⁶² to over 40% today.²⁶³ Moreover, these patent cases almost surely occupy a disproportionate share of the court's working time. Judge Michel, for example, has suggested that patent cases, due to their complexity, "take[] perhaps ten times the work of [a] personnel case."²⁶⁴ And three of the leading law school casebooks on patent law and patent litigation are authored by Federal Circuit judges, further solidifying a perception of the Federal Circuit as *the patent court*.²⁶⁵

The increased quantity and prominence of patent cases, coupled with the increased importance of intellectual property rights to the American business

258. See U.S. OFFICE OF PERS. MGMT., FEDERAL CIVILIAN WORKFORCE STATISTICS: THE FACT BOOK 17 (2007 ed.), available at <http://www.opm.gov/feddata/factbook/2007/2007FACTBOOK.pdf>.

259. See *supra* notes 103–14.

260. See *supra* notes 203–04 and accompanying text.

261. 2011 *Federal Circuit Appeals*, *supra* note 20.

262. See HOWARD T. MARKEY, THE FIRST TWO THOUSAND DAYS: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 1982–1988, at 25 chart 6 (1988) (listing Federal Circuit appeals filed by source from October 1982 through June 1988). To calculate the "roughly 25%" figure mentioned in the text, I added the percentage of filings from the district courts (14%), the International Trade Commission (1%), and the PTO (10%). Because the PTO filings likely include some trademark cases, the percentage of patent cases was probably *less* than 25%.

263. 2011 *Federal Circuit Appeals*, *supra* note 20.

264. See Paul R. Michel, Foreword, *The Court of Appeals for the Federal Circuit Must Evolve To Meet the Challenges Ahead*, 48 AM. U. L. REV. 1177, 1181 (1999).

265. See MARTIN J. ADELMAN, RANDALL R. RADER & JOHN R. THOMAS, CASES AND MATERIALS ON PATENT LAW (3d ed. 2009) (Chief Judge Rader); KIMBERLY A. MOORE, PAUL R. MICHEL & TIMOTHY R. HOLBROOK, PATENT LITIGATION AND STRATEGY (3d ed. 2008) (Judge Moore and now-retired Judge Michel); F. SCOTT KIEFF, PAULINE NEWMAN, HERBERT F. SCHWARTZ & HENRY E. SMITH, PRINCIPLES OF PATENT LAW (5th ed. 2011) (Judge Newman).

community,²⁶⁶ has dramatically increased the profile of the once-obscure Federal Circuit. Roughly a decade ago, Judge Michel summarized the court's increasing visibility:

Another change that [has] occurred during the court's existence eludes measurement by numbers. One might say that the Court of Appeals for the Federal Circuit has finally, or increasingly, been "discovered." For example, the court is now much more widely known and recognized among practitioners in areas other than those within the jurisdiction of the court. The court is also much better known among legal commentators, law school professors, and legal journalists. *The Legal Times*, for example, covers the court's work more extensively now than five years ago, when the court was almost never mentioned. A recent edition of *Corporate Counsel* magazine featured an article discussing the court. As a result of the court's increased exposure, the number and quality of law clerk applications has increased steadily. Top students from the most prestigious law schools in the country, many of whom formerly applied only to the regional circuits, are now applying for clerkships at the Federal Circuit.²⁶⁷

This newfound fame caused Judge Michel to speculate that, because "the court will become increasingly important to the national economy and the fortunes of nearly all U.S. corporations . . . the Federal Circuit ultimately may be characterized not so much as a science and technology court, but as a business court, or the 'corporation' court."²⁶⁸ There is a serious question about whether it is ideal for a court that sees itself as "the corporation court" to be the exclusive Article III court of appeals for disabled veterans and aggrieved government employees. As the prominence of the court's patent and other business-related cases continues to grow, there is a danger that nonpatent, noncommerce-related cases may become marginalized.²⁶⁹

266. See, e.g., LANDES & POSNER, *supra* note 167, at 2–3; Alan Greenspan, Chairman, Fed. Reserve Bd., Intellectual Property Rights, Remarks at the Stanford Institute for Economic Policy Research Economic Summit (Feb. 27, 2004), available at <http://www.federalreserve.gov/boarddocs/speeches/2004/200402272/default.htm>.

267. Michel, *supra* note 264, at 1181–82 (footnote omitted). For Judge Michel's more recent assessment of the Federal Circuit's ever-increasing profile, see Michel, *supra* note 25, at 1208–11 ("[W]e now receive a level of attention unheard of when I joined the court in 1988, or even ten years later.").

268. Michel, *supra* note 264, at 1185; see also Michel, *supra* note 25, at 1211 ("Some consider our court the technology court—and so it is. But it is also the business and commerce court, the innovation court, and the job-creating, prosperity-expanding court.").

269. Cf. LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 20–24 (2005) (arguing that bankruptcy judges compete for the bankruptcy cases of large public companies because of, among other things, the power and celebrity that accompany the cases); RICHARD A. POSNER, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13 (1993) (noting that "prestige is unquestionably an element of the judicial utility function").

2. Favoritism and Formalism: Government-Contracts Appeals

The largest component of Court of Federal Claims appeals on the Federal Circuit's docket consists of cases involving government contracts, which include contract disputes, bid protests, and contract claims under the Tucker Act.²⁷⁰ In addition, the Federal Circuit has exclusive jurisdiction to hear appeals from boards of contract appeals.²⁷¹ And the Federal Circuit also has jurisdiction over "Little" Tucker Act cases, government contract claims of \$10,000 or less that are not subject to the Contract Disputes Act.²⁷² Little Tucker Act claims may be filed in either the Court of Federal Claims or a U.S. district court.²⁷³

The need for a uniform body of law is significant in the government-contracts field. The federal government is, by definition, an intercircuit actor, and a government contract could be nationwide—or even worldwide—in scope.²⁷⁴ Likewise, government-contracts cases can be complex, a further factor favoring centralized adjudication. The complexity in a government-contracts case can be factual—decades-long disputes over contracts to provide water to arid communities, for example²⁷⁵—or because of the specialized nature of government contracts and their "standard clauses."²⁷⁶ The heightened need for uniformity and the complexity of the cases make a solid argument for keeping these cases

270. See *2011 Federal Circuit Appeals*, *supra* note 20 (reporting that government-contracts claims constituted five percent of all appeals filed).

271. 28 U.S.C. § 1295(a)(10) (Supp. IV 2010). There are currently three boards of contract appeals: (1) the Armed Services Board of Contract Appeals (which has jurisdiction over the Department of Defense), (2) the Civilian Board of Contract Appeals (which has jurisdiction over most executive agencies), and (3) the Postal Service Board of Contract Appeals (which, not surprisingly, has jurisdiction over Postal Service and Postal Rate Commission contracts). See Michael J. Schaengold & Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 FED. CIR. B.J. 279, 284 (2008); see also 41 U.S.C. § 7105 (Supp. IV 2010) (authorizing formation of the boards of contract appeals). Whether a dispute proceeds in the Court of Federal Claims or before a board of contract appeals is left largely to the election of the contractor. See *Nat'l Neighbors, Inc. v. United States*, 839 F.2d 1539, 1541 (Fed. Cir. 1988); see also Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243, 327–29 (2009) (discussing the relative merits of the various bodies that entertain bid protests, including the procuring agency itself, the Government Accountability Office, and the Court of Federal Claims). See generally Schaengold & Brams, *supra* (discussing the relative merits of electing the boards or the Court of Federal Claims to adjudicate a government contract dispute).

272. See Schaengold & Brams, *supra* note 271, at 298.

273. See 28 U.S.C. § 1346(a)(2) (Supp. IV 2010).

274. In fact, the Court of Federal Claims is statutorily authorized to conduct proceedings in foreign countries. See 28 U.S.C. § 798(b) (2006).

275. See *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1349 (Fed. Cir. 2009).

276. See Jeri Kaylene Somers, Foreword, *The Boards of Contract Appeals: A Historical Perspective*, 60 AM. U. L. REV. 745, 747 (2011). For example, the government typically retains the right to change the contract's requirements, so long as it pays for any increased costs. See, e.g., *Bell v. United States*, 404 F.2d 975, 976–77 (Ct. Cl. 1968) (per curiam) (quoting standard changes clause, providing that "[t]he Contracting Officer may at any time, by a written order, and without notice to the sureties make changes of any one or more of the following types: . . . If such changes cause an increase or decrease in the amount of work under this contract or in the cost of performance of this contract or in the time required for its performance an equitable adjustment shall be made."); see also JOHN CIBINIC, JR. ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS app. (4th ed. 2006) (listing standard clauses).

before a national appellate court, like the Federal Circuit.

Yet, at bottom, a contract is still a contract. Courts of all levels, both state and federal, regularly engage in contract interpretation, and perhaps introducing some generalized experience at one level of the process could lead to more dynamic government-contracts jurisprudence.²⁷⁷ Indeed, this generalized perspective might be desirable in view of the low number of government-contracts cases that have reached the Federal Circuit in recent years. From 2008 to 2010, the Federal Circuit has decided, on average, only thirty-eight government-contracts cases per year,²⁷⁸ roughly five percent of its docket.²⁷⁹

Two specific factors might tip the scale against Federal Circuit jurisdiction over government contracts cases. The first is, somewhat surprisingly, the identity of the participants. One might not think that party identity would play a significant role in government-contracts cases, which typically involve a business entity litigating against the federal government. Yet concerns have recently been raised in the government-contracts literature and by Federal Circuit judges about whether the Federal Circuit provides contractors with a level playing field.

At the final judicial conference of the Court of Customs and Patent Appeals, Chief Judge Markey, noting the significant number of cases in which the government would appear as a party before the newly created Federal Circuit, expressed his hope that the new court would earn the title “Conscience of the Government.”²⁸⁰ Judge Markey referred to a quotation by Abraham Lincoln (memorialized in a stone carving in the lobby of the Federal Circuit’s courthouse) that “[i]t is as much . . . the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private

277. See Schooner, *supra* note 120, at 762 (“Surely, the public contracts bar cannot assert with a straight face that contract disputes are more difficult than antitrust or securities regulation issues, which are tried in courts of general jurisdiction. Most would concede that specialized adjudication of public contract disputes is not necessary . . .”).

278. Between the time I drafted this Article and the time of its publication, the Federal Circuit removed from its website the data that support this assertion. (That data indicated that the Federal Circuit decided thirty-five government-contracts cases in 2010, forty-one in 2009, and thirty-nine in 2008.) Other observers of the Federal Circuit have—correctly, in my view—expressed disappointment that the court has removed this useful data and, apparently, will not collect this data in the future. See Jason Rantanen, *Federal Circuit Statistics—FY 2011*, PATENTLY-O (Oct. 26, 2011, 4:44 PM), <http://www.patentlyo.com/patent/2011/10/federal-circuit-statistics-fy-2011.html>.

279. See, e.g., *2011 Federal Circuit Appeals*, *supra* note 20. Of course, as I have noted above, the raw number of cases decided is not a perfect proxy for the amount of work the court does in a particular field. Even one complex government-contracts case can result in significant experience for the court, see, e.g., *McDonnell Douglas Corp. v. United States*, 567 F.3d 1340, 1342 (Fed. Cir. 2009) (“This American version of *Jarndyce and Jarndyce* has entered its eighteenth year of litigation. . . . As we are writing what necessarily will become ‘*McDonnell Douglas XIV*,’ we will only provide a summary of relevant facts here.” (citations to *McDonnell Douglas X–XIII* omitted)), *vacated sub nom.* Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900 (2011), whereas the large number of, say, veterans cases, might actually provide little experience, as many of those cases are simply dismissed for lack of jurisdiction, see Gugliuzza, *supra* note 26, at 1221 n.129.

280. CCPA NINTH JUDICIAL CONFERENCE, *supra* note 111, at 351 (internal quotation marks omitted); accord Markey, *supra* note 252, at 227–28.

individuals.”²⁸¹ The idea behind Judge Markey’s remarks was not that the government should lose every case appealed to the Federal Circuit, but that the government, when it waives its sovereign immunity, should be held to the same standards as its opponents. Indeed, in the government-contracts field, the Supreme Court has long held that if the government “comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.”²⁸²

Yet government-contracts commentators have argued that the Federal Circuit, in recent years, has refused to ensure a level playing field between the federal government and its contractors.²⁸³ Rather than serving as the conscience of the government, the Federal Circuit, in these scholars’ views, now seems to see its role as protector of the public fisc, adopting various presumptions that favor the government in contract disputes.²⁸⁴

To the extent one believes that the Federal Circuit would generally like to avoid review and reversal by the Supreme Court, this potential government favoritism may not be surprising. A paid petition for certiorari filed by a private party has a three-to-four-percent chance of being granted, at best.²⁸⁵ In a government-contracts case, which will almost invariably not present a circuit split due to the centralization of appeals in the Federal Circuit, that figure might well be lower. By contrast, petitions filed by the Solicitor General are granted roughly seventy percent of the time.²⁸⁶ While the extent to which these general statistics might translate to government-contracts cases has not been studied, future empirical work might seek to document whether the federal government is unusually successful in government-contracts cases, either in the Federal Circuit or in the Supreme Court.

The second factor that might weigh against exclusive Federal Circuit jurisdiction in government-contracts cases relates to the court’s judicial method. In a

281. CCPA NINTH JUDICIAL CONFERENCE, *supra* note 111, at 352 (internal quotation marks omitted). The quotation comes from President Lincoln’s 1861 State of the Union address. See President Abraham Lincoln, First Annual Message to Congress (Dec. 3, 1861), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29502#axzz1dc2hEQGs>.

282. *Cooke v. United States*, 91 U.S. 389, 398 (1875). See generally REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 85 (2007) [hereinafter AAP REPORT], available at https://www.acquisition.gov/comp/aap/24102_GSA.pdf (“The United States Supreme Court . . . has held for some 130 years that the same rules of contract interpretation and performance apply to both the government and contractors.”).

283. See Johnson, *supra* note 169; Ralph C. Nash, *Fairness to Contractors: A National Policy?*, 25 NASH & CIBINIC REP. ¶ 22 (2011); Steven L. Schooner, *A Random Walk: The Federal Circuit’s 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067, 1081 (2011) (citing Ralph C. Nash, Jr., *The Government Contracts Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586, 587 (2010) [hereinafter Nash, *Government Contracts Decisions*]).

284. See Schooner, *supra* note 283, at 1080 (citing AAP REPORT, *supra* note 282).

285. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1493–94 (2008).

286. See *id.*; see also John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 529–44 (2010) (discussing the Solicitor General’s influence over the Supreme Court’s patent law docket and success in Supreme Court patent cases).

critique that will again sound familiar to patent law scholars, eminent government contracts scholar Ralph Nash identifies three problems in the Federal Circuit's contracts jurisprudence.²⁸⁷ First, he laments that the Federal Circuit prefers bright-line rules over case-specific standards in contract disputes, noting that this approach leads to "unfair results" in close cases.²⁸⁸ Second, he theorizes that the Federal Circuit "mistrust[s]" trial judges, a characteristic he criticizes because the trial judges in government-contracts cases, particularly judges of the boards of contract appeals, "are the most experienced judges in their field . . . with a requirement of five years of experience before appointment."²⁸⁹ Finally, Professor Nash postulates that the Federal Circuit is seeking to impose "rigorous standards" on those who draft government contracts.²⁹⁰ He criticizes this tendency because it causes industry to view contracts with the government as high-risk, a factor that is priced into government-procured goods and services, to the public's detriment.²⁹¹

As an illustration of government favoritism combined with a formalist judicial method, Professor Steven Schooner points to the Federal Circuit's 2010 decision in *Agredano v. United States*.²⁹² In that case, Francisco Agredano had purchased a Nissan Pathfinder at an auction of forfeited vehicles conducted by the U.S. Customs and Border Protection Service (Customs).²⁹³ To participate in the auction, Customs required Agredano to sign a form indicating that all vehicles were sold "AS IS."²⁹⁴ The Pathfinder had been seized by Customs when its prior owner tried to smuggle marijuana from Mexico into the United States.²⁹⁵ Customs has a regulatory obligation to remove all contraband from seized vehicles, so, when Customs initially seized the Pathfinder, it had removed some marijuana from it.²⁹⁶ But, unbeknownst to anyone, over thirty-seven pounds of marijuana remained concealed in the vehicle.²⁹⁷ When Agredano was traveling back to Mexico with his brother-in-law, Mexican soldiers discovered the drugs and arrested both men.²⁹⁸ The men spent almost a year in prison before being freed by a Mexican appellate court.²⁹⁹

After a trial that featured nineteen witnesses, Judge Hewitt of the Court of Federal Claims issued a lengthy opinion awarding Agredano over \$550,000 in damages (\$350,000 of which were for the attorneys' fees Agredano incurred in

287. Nash, *Government Contracts Decisions*, *supra* note 283, at 612–14.

288. *See id.* at 612–13.

289. *Id.* at 613.

290. *Id.* at 614.

291. *See id.*

292. 595 F.3d 1278 (Fed. Cir. 2010); *see* Schooner, *supra* note 283, at 1111–15.

293. *Agredano*, 595 F.3d at 1279.

294. *Id.*

295. *Id.* at 1279–80.

296. *See id.* at 1280.

297. *See Agredano v. United States*, 82 Fed. Cl. 416, 421 (Fed. Cl. 2008), *rev'd*, 595 F.3d 1278 (Fed. Cir. 2010).

298. *Agredano*, 595 F.3d at 1280.

299. *Id.*

the Mexican criminal proceedings).³⁰⁰ The court noted that Customs had a legal duty to remove all contraband from seized vehicles, that Agredano expected that the Pathfinder was free from contraband, and that this “meeting of the minds” gave rise to an implied contractual warranty that the Pathfinder was, in fact, free of contraband.³⁰¹ In a terse opinion, the Federal Circuit reversed. Writing for the court, Judge Mayer noted Federal Circuit precedent holding that “regulatory . . . functions” do not give rise to contractual duties.³⁰² The court also emphasized that the express disclaimer signed by Agredano defeated any claim of implied warranty.³⁰³

Professor Schooner correctly questions the result of *Agredano*, pointing out that the purpose of contract law is to allocate risk and that the government was clearly in the superior position to mitigate the risk of the epic damages Agredano sustained.³⁰⁴ Indeed, *Agredano* represents a mode of legal analysis that is highly formalistic (looking only to bright-line rules and not considering the extraordinary facts of the case), is extremely dismissive of the trial judge’s extensive fact-finding, and reaches a result that is incredibly solicitous of the government. Although *Agredano* might be an extreme example of a formalist, progovernment streak, commentators have shown that other examples abound.³⁰⁵

The court has not steered a pro government course without objection. Stanfield Johnson has recently noted Judge Pauline Newman’s role as the Federal Circuit’s “great dissenter.”³⁰⁶ He argues that Judge Newman has distinguished herself as the lone advocate for a “national policy of fairness to contractors,”³⁰⁷ a policy that seems grounded in Supreme Court precedent, the Federal Circuit’s history as the Court of Claims, and Judge Markey’s initial hope for the court.

At bottom, this discussion about whether the Federal Circuit is the appropriate venue for government-contracts cases might ultimately turn on a policy question about the correct role of the courts in adjudicating government-contract disputes: Should there be a level playing field, or should the government, given the historical immunity of the sovereign, have an advantage in its courts? Resolving this policy question is beyond the scope of this Article. But the question itself highlights a lack of consensus on the policy that should be furthered by government-contracts law, and this lack of consensus suggests that a dialogue among multiple appellate courts, rather than centralized review, may

300. *Agredano*, 82 Fed. Cl. at 419–20, 451–52.

301. *Id.* at 430, 440.

302. *Agredano*, 595 F.3d at 1281 (quoting *D & N Bank v. United States*, 331 F.3d 1374, 1378–79 (Fed. Cir. 2003)).

303. *Id.*

304. Schooner, *supra* note 283, at 1114; *see also* 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:1 (4th ed. 2011) (“Contract law is designed to protect the expectations of the contracting parties. It is intended to enforce the expectancy interests created by the parties’ promises so that they can allocate risks and costs during their bargaining.” (footnote omitted)).

305. *See, e.g.*, Johnson, *supra* note 169, at 278–330.

306. *Id.* at 276 (internal quotation marks omitted).

307. *Id.* (internal quotation marks omitted).

be a preferable design.³⁰⁸

3. A Diversity of Expertise?

In this section, I briefly consider other areas of the Federal Circuit's nonpatent jurisdiction, offering a preliminary analysis and suggestions for future research.

a. Noncontract Appeals from the Court of Federal Claims. In addition to government-contract cases, the Federal Circuit hears a small number of appeals from the Court of Federal Claims that involve, most notably, tax refunds and takings. In the field of tax law, exclusive Federal Circuit jurisdiction over appeals from the Court of Federal Claims does not ensure uniform doctrine, one of the prime benefits of appellate centralization. This is because a taxpayer who wants to challenge a tax bill has three options: (1) litigate the IRS's deficiency claim in the Article I U.S. Tax Court, (2) pay the tax and sue for a refund in the Court of Federal Claims, or (3) pay the tax and sue for a refund in a federal district court.³⁰⁹ The regional circuits have appellate jurisdiction over cases litigated in the Tax Court or a district court,³¹⁰ with the Federal Circuit's jurisdiction limited to refund suits in the Court of Federal Claims.³¹¹

Takings law is another area in which Federal Circuit jurisdiction does not ensure uniformity. Although the Federal Circuit, because of its jurisdiction over the Court of Federal Claims, hears all takings claims against the federal government, the state courts and regional circuits both interpret the Fifth Amendment's Takings Clause in cases involving takings by state or local governments.³¹² Moreover, as for accuracy, the substance of the Federal Circuit's takings jurisprudence has been attacked by commentators.³¹³ Again, further research could usefully weigh the costs and benefits of centralizing appeals from the Court of Federal Claims in takings cases.

b. Appeals from the Court of International Trade. Appeals from the Court of International Trade often involve antidumping investigations or the application

308. See Dreyfuss, *supra* note 34, at 414 (arguing that “[p]ublic consensus on the goals of the law administered by [a] specialized tribunal . . . [is] one of the most striking contributors to the success of specialization”).

309. 17 WRIGHT ET AL., *supra* note 71, § 4102.

310. *Id.*

311. See 28 U.S.C. § 1295(a)(3) (2006).

312. See, e.g., Guggenheim v. City of Goleta, 638 F.3d 1111, 1119 (9th Cir. 2010) (en banc); Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

313. See Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 192–98 (1995); David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 828–31 (1999); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 511–13 (1998); see also BAUM, *supra* note 34, at 159–60 (citing additional commentary).

of tariff schedules to imported goods.³¹⁴ Because these cases implicate the United States' relations with foreign nations, there is, arguably, a heightened need for uniform legal doctrine in this area.³¹⁵ For example, it would be anomalous if CamelBak's eponymous hydration packs were subject to a 17.8% duty when imported through the Port of New York but a 7% duty if imported through the Port of Los Angeles.³¹⁶ Indeed, the Constitution explicitly mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States."³¹⁷ Moreover, antidumping and countervailing duty cases may require the Federal Circuit to engage in economic analysis, a potentially valuable feature that is lacking in most of the court's nonpatent cases. However, at least one scholar has concluded that the court's international-trade jurisprudence is highly protective of American industry,³¹⁸ suggesting that political concerns, and not economic analysis, might be driving decisions.

c. Trademark Appeals. Reexamining the Federal Circuit's jurisdiction over trademark law is also an interesting exercise. Because patents and trademarks are issued by the same administrative agency, review of decisions from the PTO has long been located in a specialized appellate court, first the CCPA and now the Federal Circuit.³¹⁹ During the existence of the CCPA, the division of trademark jurisdiction between the specialized court and the regional circuits was similar to the division in patent cases: appeals from the PTO would usually be decided by the CCPA and appeals in infringement litigation would go to the regional circuits. Upon the creation of the Federal Circuit, however, trademark-infringement appeals, unlike patent-infringement appeals, remained in the regional circuits. An early proposal would have included trademark-infringement appeals within the Federal Circuit's jurisdiction.³²⁰ The trademark bar and the Department of Justice, however, opposed this proposal.³²¹ Although the House passed an early version of the FCIA that would have given the Federal Circuit jurisdiction over trademark-infringement appeals, this proposal was later removed from the bill.³²²

As this discussion suggests, in trademark law, unlike in patent law, concerns about divergent law among the regional circuits and forum shopping do not appear to have gained significant traction. That said, if we are to reimagine the

314. See 1 CLUBB, *supra* note 73, § 13.12, at 294 & n.4.

315. See Meador, *supra* note 23, at 616–17.

316. See CamelBak Prods., LLC v. United States, 649 F.3d 1361, 1363 (Fed. Cir. 2011) (overturning Customs' classification of CamelBak's product as a backpack subject to a 17.8% duty, rather than as an insulated beverage bag subject to a 7% duty).

317. U.S. CONST. art. I, § 8, cl. 1.

318. UNAH, *supra* note 7, at 170.

319. See *supra* note 74; 28 U.S.C. § 1295(a)(4) (2006).

320. Paul M. Janicke, *To Be or Not To Be: The Long Gestation of the U.S. Court of Appeals for the Federal Circuit (1887–1982)*, 69 ANTITRUST L.J. 645, 656 (2001).

321. *Id.* at 657–59.

322. *Id.* at 659.

Federal Circuit's jurisdiction, one matter to consider is the multiple appellate tracks for trademark cases, which, much as with tax cases, would seem to hamper legal uniformity. Another interesting fact to note is that the number of trademark appeals currently handled by the Federal Circuit is small—fifteen total in 2010,³²³ or about two percent of the court's total caseload. With so few cases, it may be hard for Federal Circuit judges to become experts in the field, which calls into question another theorized benefit of appellate centralization. There were, however, over 3,600 trademark suits filed in the district courts in 2011.³²⁴ Although the Administrative Office of the U.S. Courts does not track how many trademark appeals are decided annually by the regional circuits, adding those cases to the Federal Circuit's docket would enhance uniformity and undoubtedly permit the court to develop more familiarity with the area. On the other hand, the large number of cases might suggest that no specialized expertise is needed—judges on the regional circuits can decide enough trademark cases to gain familiarity with the law.

* * *

This Part has raised questions about whether certain areas of the Federal Circuit's nonpatent jurisdiction should be unified in a national appellate court. As I have shown, centralization not only seems inconsistent with institutional choice literature, it might also do nothing to promote the development of a patent law that is sensitive to innovation policy. Many areas of law to which the Federal Circuit's nonpatent jurisdiction extends have little to do with the commercial, competition, and innovation concerns that should animate patent law. And some of these areas are governed by technical statutes and extensive regulations, which might encourage the formalist, rule-oriented judicial method that the Federal Circuit has been criticized for applying in patent cases. Federal Circuit "formalism" has manifested itself in some of these nonpatent areas, such as veterans-benefits and government-contracts law. Thus, we ought to rethink the scope of the Federal Circuit's jurisdiction, a project I begin in the next Part.

IV. TRANSFORMING THE FEDERAL CIRCUIT

According to many scholars, patent law is in crisis—rather than promoting innovation, it may be stifling it. And some of this crisis, these scholars argue, is the fault of the Federal Circuit. So, what is the solution? Prior proposals have focused on reforming substantive patent law³²⁵ and on reforming the Federal

323. *See supra* note 278.

324. 2011 JUDICIAL BUSINESS, *supra* note 192, at 162 tbl.C-7.

325. *See, e.g.*, BESSEN & MEURER, *supra* note 5, at 235–53; BURK & LEMLEY, *supra* note 177, at 131–41; JAFFE & LERNER, *supra* note 14, at 2, 101. Congress has also made a handful of changes to the patent statute in the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified in scattered sections of 28 and 35 U.S.C.), by, for example, granting the PTO authority to set its own fees, *id.* § 10, providing a mechanism for pre-issuance submission of prior art by third parties,

Circuit's exclusive patent jurisdiction.³²⁶ In this Part, I sketch a different possible solution, focusing on the entire breadth of the Federal Circuit's appellate jurisdiction. The changes I suggest are preliminary. Further research can and should be done to delineate the optimal boundaries of the Federal Circuit's jurisdiction.

A. NEW JURISDICTIONAL POSSIBILITIES

As discussed, consolidating veterans and personnel cases in a single appellate court seems to run counter to sensible principles of institutional choice. Thus, one normative possibility is to distribute these appeals to the regional circuits. In these cases, appeals could go to the regional circuit covering the veteran's or employee's domicile. Alternatively, in veterans cases, some have suggested eliminating judicial review altogether at the court-of-appeals level and making the Veterans Court's decisions directly reviewable in the Supreme Court by certiorari.³²⁷ Either way, there seems to be a strong case to remove veterans and personnel cases from the Federal Circuit's exclusive jurisdiction, whatever the final destination for those cases might be.

A more difficult decision is what to do with the Federal Circuit's jurisdiction over the Court of Federal Claims. One solution is simply to abolish the Court of

id. § 8, changing the priority rule from first to invent to first to file, *id.* § 3, and implementing a postgrant opposition process, *id.* § 6. Whether these changes will end the patent crisis remains to be seen, although some are skeptical. See, e.g., Sarah Tran, *Patent Powers*, 25 HARV. J.L. & TECH. (forthcoming 2012) (manuscript at 2), available at <http://ssrn.com/abstract=1947517> (noting that "leaders in the patent community have given the Act mixed reviews"); Lee Petherbridge & Jason Rantanen, Jay P. Kesan, Debate, *America Invents, More or Less?*, 160 U. PA. L. REV. PENUMBRA 229 (2012), <http://www.pennumbra.com/debates/pdfs/AmericaInvents.pdf> (debate on whether the Act will stimulate innovation and create jobs); *Talk of the Nation: Will Patent Reform Bill Help or Hurt Inventors* (NPR broadcast Sept. 12, 2011), available at <http://www.npr.org/2011/09/12/140404985/will-patent-reform-bill-help-or-hurt-inventors> (comments of James Bessen).

326. See Nard & Duffy, *supra* note 14, at 1623–24; Rai, *supra* note 14, at 1124–25.

327. See *House Hearing on H.R. 1484*, *supra* note 24, at 50–51 (discussing the delay engendered by the current two-tier system of appellate review). The idea of direct Supreme Court review of an Article I court is not unprecedented. Review of the Court of Appeals for the Armed Forces proceeds in this fashion. See 28 U.S.C. § 1259 (2006). That said, there may be good reasons to keep a layer of review between the Veterans Court and the Supreme Court. For instance, the Veterans Court has a high-volume caseload (especially as compared to the CAAF), so Federal Circuit review might serve a useful screening function for the Supreme Court. Compare VETERANS COURT ANNUAL REPORT, *supra* note 255, at 1 (noting that the Veterans Court decided 4,620 appeals in 2011), with REPORT OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES: SEPTEMBER 1, 2010 TO AUGUST 31, 2011, <http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf> (last visited May 17, 2012) (noting that the CAAF decided 829 cases in 2011). It is beyond the scope of this Article to analyze fully whether to eliminate Article III court-of-appeals review in veterans cases. However, given the conflicting considerations on both sides of the debate, it would certainly make sense to create, as has been proposed in Congress, an expert commission to explore fully this issue. See H.R. 1484, 112th Cong. § 3(a)-(b) (as introduced in House, Apr. 12, 2011) (providing for the establishment of a "Veterans Judicial Review Commission" to "(1) evaluate the administrative and judicial appellate review processes of veterans' and survivors' benefits determinations" and "(2) make specific recommendations and offer solutions to improve the accuracy, fairness, transparency, predictability, timeliness, and finality of such appellate review processes").

Federal Claims, as some commentators and policymakers have suggested.³²⁸ An analysis of the continued need for the Court of Federal Claims is beyond the scope of this Article. But those proposals, if adopted, would moot the question of what to do with the Federal Circuit's appellate jurisdiction over the Court of Federal Claims.

Assuming that the Court of Federal Claims continues to exist, I have shown that there are serious questions about whether it makes sense to consolidate government-contracts appeals in a national appellate court. Moreover, some of the areas over which the Court of Federal Claims has jurisdiction, such as tax law and takings claims, receive no uniformity benefit from centralized appellate review, as other appellate courts regularly decide cases in those areas. And given the small number of each of the widely varied types of cases appealed from the Court of Federal Claims, any expertise justification for appellate centralization is questionable. Serious consideration should thus be given to redistributing appeals from the Court of Federal Claims (and the boards-of-contract-appeals) to the regional circuits. These cases, like veterans and personnel cases, could instead be appealed to the regional circuit encompassing the plaintiff's domicile or principal place of business.

An additional reason to redistribute veterans cases, personnel cases, and appeals from the Court of Federal Claims is that, as discussed, the Federal Circuit's nonpatent jurisdiction might currently be too broad for the court to become an expert in all of the areas to which it is exposed. If veterans appeals, personnel appeals, and appeals from the Court of Federal Claims and boards-of-contract-appeals were removed from the Federal Circuit's jurisdiction, the court would be left almost exclusively with patent cases (from the PTO, the district courts, and the International Trade Commission), trademark cases (from the PTO), and international-trade cases (from the Court of International Trade). This jurisdiction would, perhaps, be narrow enough for the court to better develop expertise in these discrete areas.

The model I have outlined thus far would remove from Federal Circuit jurisdiction over fifty percent of the cases decided on the merits in 2011.³²⁹ This raises the question: How would we fill the remainder of the Federal Circuit's time? One possibility is that, after cutting over half of the Federal Circuit's docket, we simply finish the job by abolishing the court altogether.³³⁰ As a

328. See, e.g., 153 CONG. REC. 3684 (2007) (statement of Sen. Dorgan) ("Abolish the U.S. Court of Federal Claims. The docket of the Court of Federal Claims includes a hodgepodge of cases The light caseload of this court could be handled more efficiently by Federal district courts."); Schooner, *supra* note 120, at 718 ("The [Court of Federal Claims] has evolved into a somewhat confusing jurisdictional catch-all, rather than a forum that serves a needed purpose."); Editorial, *Court of Extravagance*, WASH. POST, Mar. 26, 2003, at A16 ("The claims court seems like an extravagant means of handling an almost random collection of cases. Inertia is a bad reason to keep such an entity around.").

329. See *2011 Federal Circuit Appeals*, *supra* note 20.

330. Cf. Quillen, *supra* note 106, at 233 (arguing for returning appellate jurisdiction in patent cases to the regional circuits).

matter of political economy, I do not view a proposal to abolish the Federal Circuit as likely to succeed. That said, in an era marked by declining government revenue and calls in some quarters for sharp cuts in government spending, it might not be wholly infeasible to abolish a semi-specialized court like the Federal Circuit.³³¹

Any proposal to abolish the Federal Circuit should be accompanied by a detailed structural and empirical analysis, and I will not attempt one here. Rather, I consider various ways in which we might fill the Federal Circuit's docket if we were to remove the court's exclusive jurisdiction over veterans, personnel, and Court of Federal Claims appeals. One possibility would be to grant the Federal Circuit exclusive jurisdiction over one discrete area with enough cases to fill the newly vacant half of the court's docket. For example, a recent legislative proposal suggested granting the Federal Circuit exclusive jurisdiction over immigration cases.³³² The need for one uniform voice in matters affecting foreign relations might suggest that immigration cases are a strong candidate for centralization.³³³ I strongly disagree with this proposal, however. Unlike international trade cases, where sophisticated entities appear on both sides of the case, immigration cases present a vast disparity in wealth and sophistication. Moreover, the sheer number of immigration cases that would be shifted to the Federal Circuit would inundate the court. In 2011, 6,333 petitions for review of immigration proceedings were filed in the regional circuits.³³⁴ That same year, 1,349 cases were filed in the Federal Circuit.³³⁵ Even if the Federal Circuit retained all of its current areas of jurisdiction, immigration cases would still comprise 82% of the court's docket.

Alternatively, I suggested above that the court might benefit from a larger docket of commercial cases, and, in particular, antitrust cases.³³⁶ Given the relative complexity of antitrust litigation, we might consider giving the Federal Circuit exclusive jurisdiction over that area. Exclusive antitrust jurisdiction

331. Any effort to abolish an Article III court like the Federal Circuit would have to confront constitutional limits on the removal of judges from office. *See* U.S. CONST. art. III, § 1 (providing that Article III judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"). The most likely method of addressing this problem would be to reassign the Federal Circuit's judges to other circuits. *See* Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 991–92 (2007) (noting that Congress, when it abolished the Article III Commerce Court, reassigned the court's judges to other Article III courts).

332. *See* Securing America's Borders Act, S. 2454, 109th Cong. § 501(e)(1) (2006).

333. *See* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . ."); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (noting "the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place" (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964))); *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (noting "the Nation's need to 'speak with one voice' in immigration matters" (quoting Brief for Respondents at 19, *Zadvydas v. Davis*, 533 U.S. 678 (2001) (No. 99-7791))).

334. 2011 JUDICIAL BUSINESS, *supra* note 192, at 74 tbl.B-3.

335. *Id.* at 109 tbl.B-8.

336. *See supra* notes 159–65 and accompanying text.

might not be desirable, however, for at least two reasons. First, antitrust law serves a variety of policy goals (such as protecting the market mechanism, enhancing consumer welfare, and promoting innovation), and there is a continuous debate over the proper weight that law should accord to each of those objectives.³³⁷ This lack of policy consensus cuts against specialization in the antitrust area.³³⁸ Second, the Federal Circuit's existing antitrust jurisprudence, particularly its high-profile decision in the Xerox independent-service-organizations litigation,³³⁹ has sometimes been criticized for "exalt[ing] protection of intellectual property rights" over protection of competition.³⁴⁰

Rather than give the Federal Circuit new areas of exclusive jurisdiction, I offer a different possibility: funneling to the Federal Circuit a cross-section of cases that are currently appealed to the regional circuits. This jurisdiction would *not* be exclusive of the other circuits. By making Federal Circuit judges more like "generalist judges who partially specialize in a few subject matters,"³⁴¹ such as patents (and, potentially, trademarks and international trade), this proposal sits nicely with emerging empirical scholarship suggesting that this is actually the model followed in the regional circuits³⁴² and with theoretical scholarship exploring the virtues of "cross-adjudication"—a system of limited specialization with mandatory interaction among different kinds of courts.³⁴³ Moreover, systems of limited specialization by generalist judges are currently in use today, most notably for the purpose of this Article, in U.S. district courts participating in the Patent Pilot Program. This program permits certain district judges in certain judicial districts to, in essence, volunteer to hear patent cases when their colleagues do not want to.³⁴⁴ A similar model at the appellate level—limited specialization in patent law (and perhaps a few other areas) by otherwise generalist judges—could be an improvement on the Federal Circuit's current model, where the judges are not necessarily generalists but, instead, hear appeals and write opinions in a variety of narrow areas of federal law.

One challenge of a model of limited specialization would be determining how broad the court's nonexclusive jurisdiction should be. Should it cover all areas

337. See generally LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 1.5 (2d ed. 2006).

338. See Dreyfuss, *supra* note 34, at 414.

339. See *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000).

340. Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 ANTITRUST L.J. 913, 921–22 (2001); see MICHAEL A. CARRIER, *INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW* 80, 84–85 (2009); Rai, *supra* note 14, at 1106–10.

341. Hansford, *supra* note 30, at 1173.

342. See Cheng, *supra* note 28, at 548–60.

343. See Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231, 288–91 (2011).

344. See Pilot Program in Certain District Courts, Pub. L. No. 111-349, 124 Stat. 3674 (2011); see also *District Courts Selected for Patent Pilot Program*, ADMIN. OFFICE OF THE U.S. COURTS (June 7, 2011), http://www.uscourts.gov/news/newsview/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx (listing the selected courts and briefly explaining the program).

of federal law or only certain subjects? If limited specialization were seriously pursued, the Federal Circuit should certainly be given jurisdiction over some commercial cases, which would inject economic concerns into the court's docket and would hopefully force the court to consider how market incentives, as opposed to the patent grant, can fuel innovation. By exposing Federal Circuit judges to the gamut of commercial issues faced by federal appellate judges, Federal Circuit judges would potentially create a patent law that is more policy conscious, less formalist, and, ideally, more responsive to the different innovation dynamics present in different industries. Although the court's antitrust jurisprudence has been criticized for emphasizing intellectual property rights, it seems at least possible that a steadier diet of commercial cases could cause the court to become more sensitive to the delicate balance between antitrust and intellectual property.

This broadening of the court's docket to include commercial cases would potentially have the generalizing influence on patent law that commentators have found lacking under the current jurisdictional structure. But rather than have the generalizing influence come from an external force (for example, other regional circuits,³⁴⁵ en banc review by generalist judges,³⁴⁶ or the Supreme Court³⁴⁷), this would make the Federal Circuit judges *themselves* the generalists. By seeing a wide variety of cases—including nonpatent commercial cases—the judges would hopefully obtain a better understanding that the patent grant is only one way in which the economy encourages innovation.³⁴⁸

One question under this model of limited specialization would concern areas of federal appellate jurisdiction that seem far removed from patent law, such as immigration, criminal, and habeas corpus cases. On one hand, these cases might not be appropriate for funneling to the Federal Circuit. If the primary purpose of granting the court jurisdiction over some cases normally appealed to the regional circuits is to help the court understand the role played by patent law in the modern economy, cases on issues like immigration and criminal law do not seem to serve that purpose. Moreover, given the historical tie between geographic jurisdiction and criminal prosecution,³⁴⁹ it might be advisable to keep criminal and habeas appeals in the relevant regional circuits. As I explain below, however, there are particular methods of implementing a system of limited specialization that would overcome these objections and give the Federal Circuit a nonpatent jurisdiction that encompasses nearly all areas of federal law.

345. Nard & Duffy, *supra* note 14, at 1623–24.

346. Rai, *supra* note 14, at 1124–25.

347. Golden, *supra* note 19, at 662–64.

348. See Dreyfuss, *Case Study*, *supra* note 5, at 54.

349. See, e.g., U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .”).

B. IMPLEMENTING A NEW JURISDICTIONAL MODEL

So, how exactly could this model of limited specialization be implemented? There seem to be at least three possibilities. First, cases that do not fall within the Federal Circuit's exclusive jurisdiction could be randomly reassigned from the regional circuits to the Federal Circuit immediately after the appellant files a notice of appeal. The number of cases randomly reassigned would turn on the size of the Federal Circuit's exclusive caseload, and the goal would be to make Federal Circuit judges bear roughly the same total workload as the average federal appellate judge. The benefit of this approach is that the Federal Circuit would see a literal cross-section of federal appellate cases (subject to any particular subject areas that might be withdrawn from the reassignment system, such as criminal, habeas, and immigration cases). The judges would become true generalists, with specialties in the areas retained exclusively for the Federal Circuit.

A strong argument against this randomization approach, however, is that it is unfair to litigants. True, the Federal Circuit could apply the substantive law of the relevant regional circuit (just as it currently does in patent cases for issues not unique to patent law).³⁵⁰ But parties may have made strategic decisions based on the presumption of an appeal to the regional circuit, and it may be unfair to upset the parties' expectations at such a late point in the case. Moreover, the boundaries that currently define Federal Circuit choice of law (patent versus nonpatent issues, substantive versus procedural issues) have proven elusive and, in the view of some commentators, unworkable.³⁵¹ To solve this problem, the Federal Circuit could apply its own law to all issues, but that might further upset the parties' expectations because they will not know whether their case is headed to the Federal Circuit until after judgment.³⁵²

To overcome concerns about the uncertainty of the appellate forum and applicable law, a second possibility would be to give the Federal Circuit a fixed geographic jurisdiction. For example, we might remove Maryland and Virginia from the Fourth Circuit and reassign all appeals from district courts in those states to the Federal Circuit. The Federal Circuit would retain its nationwide jurisdiction over patent cases (among others, possibly), thereby retaining the uniformity benefits of appellate centralization. But the court's geographic juris-

350. See *Atari, Inc. v. JS & A Grp., Inc.*, 747 F.2d 1422, 1438–40 (Fed. Cir. 1984) (en banc), *overruled on other grounds by* *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998) (en banc in relevant part).

351. See Ted L. Field, *Improving the Federal Circuit's Approach to Choice of Law for Procedural Matters in Patent Cases*, 16 *Geo. Mason L. Rev.* 643, 645–46 (2009); Joan E. Schaffner, *Federal Circuit "Choice of Law": Erie Through the Looking Glass*, 81 *Iowa L. Rev.* 1173, 1181–82, 1191–1204 (1996).

352. Of course, to address this problem, we could run the random reassignment system at an earlier point in the case, perhaps shortly after the complaint is filed. That way, parties would know throughout the proceedings that an appeal is headed to the Federal Circuit. Under this approach, however, we would have less ability to ensure the Federal Circuit gets an appropriate workload, given that it would be difficult to predict, at such an early stage of the case, whether an appeal would be taken.

diction over two nearby states would provide the court with a broader docket that includes other business-related cases.

A third, related way to implement a model of limited specialization would be to consolidate the Federal Circuit with an existing circuit. One candidate would be the D.C. Circuit. The merged court's geographic jurisdiction over the District would provide some variety while, again, ensuring that patent law remains relatively uniform. In addition, this restructuring would add to the D.C. Circuit's already extensive administrative-law-docket reviews of the actions of the PTO and International Trade Commission (ITC). The D.C. Circuit's experience reviewing the work of administrative agencies could improve the Federal Circuit's administrative law jurisprudence, which has been criticized as heavy-handed and not sufficiently deferential to the on-the-ground expertise of the administrative agencies.³⁵³ Moreover, the D.C. Circuit's caseload, although it includes some complex cases, is relatively light compared to the other circuits, making it a strong candidate for consolidation with the Federal Circuit.³⁵⁴ That said, a Federal Circuit–D.C. Circuit merger would likely meet significant political resistance, given that it would merge a very prestigious court (the D.C. Circuit, which has, for example, four former judges currently sitting on the Supreme Court³⁵⁵) with a less prestigious court (the Federal Circuit, which has never had a judge elevated to the Supreme Court). It is also questionable whether the D.C. Circuit has a large enough business docket to provide patent law with the positive effects that I hypothesize might flow from cross-pollination.³⁵⁶

To be frank, I am not sure whether any of these solutions are more feasible than others' suggestions to introduce a level of generalist review of the Federal Circuit or to strip the Federal Circuit of its exclusive patent jurisdiction. On one hand, by trying to fix patent law by, in essence, leaving patent law alone, we might avoid the interest-group politics that frequently derail efforts at legislative patent reform.³⁵⁷ On the other hand, court reform is a topic in which it can be

353. See *Dickinson v. Zurko*, 527 U.S. 150, 152–54, 165 (1999) (reversing Federal Circuit decision that the “clearly erroneous” standard of Federal Rule of Civil Procedure 52(a) applies to Federal Circuit review of PTO fact-finding and holding that the more deferential standards of the Administrative Procedure Act apply); Sapna Kumar, *Expert Court, Expert Agency*, 44 U.C. DAVIS L. REV. 1547, 1552–53 (2011) (arguing for *Chevron* deference to the patent-law decisions of the ITC).

354. See 2011 JUDICIAL BUSINESS, *supra* note 192, at 59 tbl.B, reporting 1,132 cases filed in the D.C. Circuit, staffed at the time by nine active judges, for a caseload of 126 cases per judge. Compare the D.C. Circuit's caseload with a caseload of roughly 350 per active judge in the nearby Fourth Circuit, and a caseload of roughly 500 per active judge in the Ninth Circuit. See *id.*

355. Chief Justice Roberts and Justices Scalia, Thomas, and Ginsburg are all former D.C. Circuit judges. See *Biography of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 6, 2012).

356. For example, only one antitrust case made it to the D.C. Circuit in all of 2011. See 2011 JUDICIAL BUSINESS, *supra* note 192, at 105 tbl.B-7.

357. See BURK & LEMLEY, *supra* note 177, at 95–108. Of course, in September 2011, Congress overcame these obstacles to enact the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified in scattered sections of 28 and 35 U.S.C.).

difficult to stoke legislative interest.³⁵⁸ Further complicating matters, regional circuit judges might actively resist adding matters like veterans benefits and government contracts to their dockets, just as district judges resisted the addition of veterans cases to their dockets in the 1980s.³⁵⁹ Then again, perhaps the judges of the Federal Circuit would enjoy a more varied docket and would advocate for a modest change in their jurisdiction, especially if the change permitted the court to retain its prestigious, exclusive jurisdiction over patent cases.

C. OBJECTIONS AND RESPONSES

The normative possibilities that I have outlined are merely preliminary suggestions. There are, however, many possible objections to the reimagining that I have begun in this Article. Although I have attempted to respond to these objections throughout the text, in this section, I respond to some additional counterarguments to the unprecedented alteration of federal appellate jurisdiction that I have considered.

First, as a less drastic alternative to a model of limited specialization, one might suggest sending Federal Circuit judges to visit in the regional circuits more frequently. Indeed, as I have shown, Federal Circuit judges are relatively frequent visitors to their sister circuit courts of appeals.³⁶⁰ Perhaps we should encourage Federal Circuit judges to ride circuit even more often to give them additional “generalist” experience. I would reject this proposal, however, because keeping the Federal Circuit’s judges on panels together has the added benefit of maintaining close relationships and collegiality among the judges of the court. Moreover, a concern often voiced in debates about specialized courts is that the judgeships on the specialized court will be viewed as less prestigious and desirable than judgeships on courts of general jurisdiction.³⁶¹ Although this concern might be overblown to the extent that some judges might *prefer* to specialize,³⁶² it could gain some salience if Federal Circuit judges spent much of their time as “fill-in” judges on the regional circuits, akin to the days of Supreme Court Justices riding circuit. In that circumstance, one could expect that a Federal Circuit judgeship might be viewed as markedly inferior to a judgeship on a regional circuit court of appeals.

Another less drastic approach to limited specialization might use a continuing-education requirement to mandate that the court’s judges be exposed to the economic and innovation concerns that many believe are not currently reflected in the court’s patent case law.³⁶³ Proponents of a CLE-like approach might

358. See Meador, *supra* note 91, at 596.

359. BAUM, *supra* note 34, at 161–62; LIGHT, *supra* note 222, at 177.

360. See *supra* notes 190–94 and accompanying text.

361. See CARRINGTON ET AL., *supra* note 10, at 168.

362. See *supra* notes 53–55 and accompanying text.

363. See Scherer, *supra* note 106, at 212 (“[I]t would be desirable for the highest judicial authorities to encourage attendance of [Federal Circuit] judges at broad-ranging seminars on the science, sociol-

emphasize that, in the antitrust field, academics and government-enforcement agencies played an important role in first pushing the courts to inject economic analysis into the case law; it was not the courts changing their approach *sua sponte*.³⁶⁴ The spur for change in patent law, then, might need to come from an external force.

I do not disagree that an education approach could have positive effects. However, an informal version of this approach already seems to occur in patent law. As I have discussed throughout this Article, there is a rich and growing literature on the connections between patent law, innovation, and economic consequences. On the whole, it is fair to believe that Federal Circuit judges are generally aware of these discussions. Recent scholarship suggests that Federal Circuit judges cite academic literature in their opinions with a frequency similar to that of regional circuit judges.³⁶⁵ And, perhaps more importantly, Federal Circuit judges are active participants at conferences, symposia, and other events that provide opportunities for interaction with academics and business leaders.³⁶⁶ Yet, given widespread criticism of the court's jurisprudence, this knowledge seems not to have translated to a patent law attuned to the desires of innovators. So, while an approach that emphasizes CLE-like programs might be reasonable, more dramatic steps may be necessary to effect real change.³⁶⁷

Another possible objection to the model of limited specialization that I have sketched is that distributing to the regional circuits veterans and personnel cases (and possibly others) would result in an unwarranted addition to the overburdened dockets of the regional circuits. A look at the numbers, however, reveals

ogy, and economics of technological innovation. . . . They should be planned and operated by a reputable university faculty and staffed by scholars with a diverse range of interests and biases.”)

364. See BOHANNAN & HOVENKAMP, *supra* note 163, at 38.

365. Schwartz & Petherbridge, *supra* note 3, at 25.

366. For a few examples, consider Michel, *supra* note 7; Plager, *supra* note 7; *What You Need To Know About the New N.D. Cal. Patent Pilot Program*, STANFORD LAW SCHOOL (Jan. 18, 2012), <http://www.law.stanford.edu/calendar/details/6397/What%20You%20Need%20to%20Know%20About%20The%20New%20ND%20Cal%20Patent%20Pilot%20Program> (last visited Mar. 29, 2012); *The Future of Patent Law*, UNIV. OF SAN DIEGO SCHOOL OF LAW (Jan. 20, 2012), http://home.sandiego.edu/patrick.riedling/CENTERS/CIPLM/patent_law_conference_email.htm (last visited Mar. 29, 2012); *Joint Judicial Conference with the Tokyo Intellectual Property High Court in Tokyo, Japan*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/2011/joint-judicial-conference-with-the-tokyo-intellectual-property-high-court-in-tokyo-japan-updated-may-2-2011.html> (last visited Mar. 29, 2012).

367. A variation on the continuing-education approach would be to emphasize that it is the responsibility of the parties to bring their best arguments to the court; if they think that economic analysis or innovation studies would help them win the case, it is their responsibility to present those studies. Again, however, it is hard to believe that the court is generally unaware of these broader concerns, at least in its most high-profile cases. As Ryan Vacca has recently chronicled, the Federal Circuit liberally allows amicus briefs in its en banc cases, Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 743–44 (2011), and the court's invitations are often accepted by people and organizations with a wide range of viewpoints, *see, e.g., In re Bilski*, 545 F.3d 943, 946–49 (Fed. Cir. 2008) (en banc) (reporting thirty-nine amicus briefs, from organizations as diverse as IBM and the American Civil Liberties Union, and from various groups of scholars), *aff'd sub nom. Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

that that this concern is exaggerated. In the types of cases I suggest might be appropriate to remove from the Federal Circuit's exclusive jurisdiction, 657 appeals were filed in the Federal Circuit in 2011.³⁶⁸ That same year, in all of the regional circuits combined, 55,126 appeals were filed.³⁶⁹ Adding to the regional circuits the cases I have suggested amounts to an increase of merely 1.19%, or about 55 cases per circuit. To put this in perspective, the number of appeals filed in all of the regional circuits decreased by 1.5% from 2010 to 2011, and has decreased by over 17% since 2006.³⁷⁰ Thus, the regional circuits likely have the capacity to handle the modest caseload increase that a proposal of limited specialization would entail.

Finally, one might argue that my proposal would not change results in the cases I propose to remove from the Federal Circuit's jurisdiction. After all, many veterans appeals fail because the Federal Circuit is limited to reviewing only questions of law, and is not permitted to review questions of fact or the application of law to fact.³⁷¹ Likewise, the MSPB is accorded deference under the applicable standard of review.³⁷² Even if it were true that my proposal would not change case outcomes, the proposal is, in my view, still worth considering. My concerns are threefold: First, as I have explained, appellate centralization in many of the areas currently appealed to the Federal Circuit is not supported by a coherent theory of institutional choice. Second, I am concerned about symbolism. Relegating certain litigants to a specialized or semi-specialized court—when there is no compelling uniformity, efficiency, or accuracy justification—sends a message to those litigants that they are less important than those who have access to a court closer to home. Finally, an important hypothesis of this Article is that changing the court's nonpatent docket, regardless of the results in those nonpatent cases, might improve the court's patent law. I suggest ending the model of Federal Circuit jurisdiction under which the judges are primarily patent jurists who must also decide a

368. 2011 JUDICIAL BUSINESS, *supra* note 192, at 109 tbl.B-8. This figure includes cases originating in the boards-of-contract appeals, the Court of Federal Claims, the Veterans Court, the Department of Veterans Affairs, the MSPB, and the Office of Compliance.

369. *Id.* at 14.

370. *Id.*; 2010 JUDICIAL BUSINESS, *supra* note 192, at 14. During this same time period, the number of active judges sitting on the courts of appeals declined by less than two percent, from 164 in October 2006, see *Federal Judicial Vacancies*, ADMIN. OFFICE OF THE U.S. COURTS (Oct. 1, 2006), <http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/200610/summary.pdf> (listing 179 authorized judgeships and 15 vacancies), to 161 in October 2011, see *Archive of Judicial Vacancies*, ADMIN. OFFICE OF THE U.S. COURTS (Oct. 1, 2011), <http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/201110/psoutput/jdarjcnt.html> (listing 18 vacancies for the same number of judgeships).

371. See 38 U.S.C. § 7292(d) (2006).

372. See 5 U.S.C. § 7703(c) (2006) (providing that the Federal Circuit may overturn an MSPB decision only if it is arbitrary, capricious, otherwise not in accordance with law, obtained without required procedures, or unsupported by substantial evidence); see also MARKEY, *supra* note 262, at 20 (noting that the court's "90% rate of affirmance in petitions for review of MSPB decisions could mislead a reader unfamiliar with the Court's statutorily-limited standard of review, the prior reviews by the agency, the Administrative Law Judge, and the Board, and the fact-specific nature of the petitions, more than half of which are filed by pro se petitioners").

narrow assortment of nonpatent cases. Instead, I suggest a jurisdictional model that places the judges in a role more similar to that of other federal appellate judges: a generally broad docket but with the potential for expertise in a few areas, like patent law.

CONCLUSION

As the Federal Circuit's thirtieth birthday approaches, it is time to rethink the court's jurisdiction. The possibilities I have sketched might not be perfect. But formulating a perfect proposal is not the goal of this Article. Rather, I hope to call attention to the need for future scholarship, when critiquing the Federal Circuit as an institution, to account for the large component of the court's docket that does not involve patent law. Throughout this Article, I have identified future research tasks (many of which are empirical) that might help better define the optimal jurisdiction of the Federal Circuit.

As an intellectual-property scholar, I am concerned that the Federal Circuit's nonpatent docket may have unappreciated effects on patent law. However, I have also sought to flag an important issue of institutional choice that patent scholars are well-equipped to address: whether the Federal Circuit's jurisdiction makes sense as a normative matter. In that vein, I have sketched a model that, I hope, would not only give us a better patent court but also provide the best possible system for all litigants whose appeals are currently heard by the Federal Circuit.