

Boston University School of Law Scholarly Commons at Boston University School of Law

Faculty Scholarship

2012

Pluralism on Appeal

Paul Gugliuzza

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Courts Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Paul Gugliuzza, *Pluralism on Appeal*, 100 Georgetown Law Journal Online 36 (2012).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/169

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



Pluralism on Appeal

PAUL R. GUGLIUZZA *

TABLE OF CONTENTS

INTRODUCTION	36
I. NONPATENT CASES MATTER	37
A. UNFOUNDED ASSUMPTIONS	38
B. THE POSSIBILITY OF LIMITED SPECIALIZATION	39
II. DO GENERALISTS MAKE THE BEST SPECIALISTS?	41
CONCLUSION	43

INTRODUCTION

In a thoughtful response to my article, *Rethinking Federal Circuit Jurisdiction*,¹ Ori Aronson notes that judges “work in context, be it social, cultural, or . . . institutional,” and that “context matters” to their decisions.² Indeed, the primary aim of my article was to spur a conversation about the context in which the judges of the Federal Circuit—who have near plenary control over U.S. patent law—decide cases. That context includes many matters in narrow areas of law that bear little relation to the innovation and economic concerns that should animate patent law. To inject those concerns into the court’s province, my article introduced the concept of limited specialization, under which the Federal Circuit would retain exclusive jurisdiction over patent cases (and possibly a few other areas) while also being granted nonexclusive jurisdiction over a variety of cases that are normally appealed to the regional circuits.

In a similarly insightful response to my article, Cecil Quillen is doubtful that limited specialization would fix what he calls “the Federal Circuit problem.”³ Instead, he prefers the model of “polycentric decision making” embraced by, most notably, Professors Craig Nard and John Duffy in their important and provocative article, *Rethinking Patent Law’s Uniformity Principle*.⁴ Under that model, multiple appellate courts would decide patent cases, permitting

* Visiting Assistant Professor, University of Florida Levin College of Law. © 2012, Paul R. Gugliuzza. My sincere thanks to Ori Aronson and Cecil Quillen for their responses to my article and for comments on this Reply. Thanks also to the editors of *The Georgetown Law Journal Online* for providing a forum for this discussion and to Rachel Rebouché for helpful feedback, as always.

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

² Ori Aronson, Response, *Innovation, Aggregation, and Specialization*, 100 GEO. L.J. ONLINE 28, 29 (2012).

³ Cecil D. Quillen, Jr., Response, *Rethinking Federal Circuit Jurisdiction—A Short Comment*, 100 GEO. L.J. ONLINE 23, 27 (2012).

⁴ See *id.* at 24 n.5 (citing Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619 (2007)).

inter-court dialogue and enhancing the possibility for self-correction when one court makes a mistake.⁵

Those interested in rethinking Federal Circuit jurisdiction do not face a binary choice between polycentrism and limited specialization. Rather, there are countless ways in which the court's jurisdiction could be altered to achieve various normative goals. For example, Congress recently expanded Federal Circuit jurisdiction to include cases where the patent issue arises only in a counterclaim.⁶ To further the goals of enhancing legal uniformity and deterring forum shopping,⁷ the statutory revision overruled a decade-old Supreme Court decision that directed cases involving patent law counterclaims to the regional circuits.⁸ Also, Congress has recently considered removing the Federal Circuit's jurisdiction over veterans cases, with some arguing that this reform would speed up the protracted benefits process.⁹ To evaluate these and other possible proposals for jurisdictional reform, we need a sustained conversation about how institutional structure may impact substantive outcomes.

I therefore begin this Reply by emphasizing how my article advances that discussion by incorporating the Federal Circuit's nonpatent docket into the institutional analysis. By considering nonpatent cases, my project frames "the Federal Circuit problem" in a new and, I believe, more comprehensive way than it has been framed by Mr. Quillen and others. I then consider an observation made by Professor Aronson in his response, which captures the intuition supporting limited specialization: that generalists—those who have a broad background in a variety of fields—might be the best specialists.¹⁰ This insight, I contend, highlights how many proposals to reform patent law's appellate structure share a common belief that pluralism is good. However, it also illuminates two difficult questions we must continue to explore. First, what kind of pluralism is better, a plurality of decision-making bodies or a plurality of jurisdictional areas? And second, how much pluralism do we need?

I. NONPATENT CASES MATTER

The core claim of my article is that the Federal Circuit's nonpatent cases are crucial to analyzing the Federal Circuit as an institution, both because those nonpatent cases are important

⁵ *See id.*

⁶ Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 19(b), 125 Stat. 284, 331–32 (2011) (to be codified at 28 U.S.C. § 1295(a)(1)).

⁷ *See* H.R. REP. NO. 109-407, at 5 (2006), *cited in* H.R. REP. NO. 112-98, at 54 n.60 (2011) (House Report on America Invents Act, erroneously referencing H.R. REP. NO. 109-405).

⁸ *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002). As a practical matter, it seems doubtful that the provision will have a significant effect. Writing in 2009, two commentators identified only five regional circuit cases involving patent law counterclaims since the Supreme Court decided *Holmes Group* in 2002. *See* Jiwen Chen, *The Well-Pleaded Complaint Rule and Jurisdiction over Patent Law Counterclaims: An Empirical Assessment of Holmes Group and Proposals for Improvement*, 8 NW. J. TECH. & INTELL. PROP. 94, 103 & n.86 (2009); C. Scott Hemphill, *Deciding Who Decides Intellectual Property Appeals*, 19 FED. CIR. B.J. 379, 399 & n.113 (2009). Although these commentators cite slightly different collections of cases to support their assertions, one can safely conclude that the number of regional circuit patent decisions is very small. *See* Hemphill, *supra*, at 399 (noting that only two of the five appellate decisions addressed a point of patent law).

⁹ *See* H.R. 1484, 112th Cong. § 3(b)(2) (2011) (as introduced in the House, Apr. 12, 2011); *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. 50–51 (2011) (statement of Hon. Bruce E. Kasold, Chief Judge, U.S. Court of Appeals for Veterans Claims).

¹⁰ *See* Aronson, *supra* note 2, at 33.

in their own right (even if they attract less scholarly attention) and because they might affect the development of patent law. These nonpatent cases have often been ignored in the institutional analysis because of three unfounded assumptions that underlie the Federal Circuit's jurisdictional structure. I begin this Part by summarizing those assumptions. Then, responding to Mr. Quillen's doubts about my normative approach, I explain how limited specialization might improve the court's current semi-specialized jurisdiction.

A. UNFOUNDED ASSUMPTIONS

The first assumption underlying the structure of the Federal Circuit is that the court's jurisdiction over *some* nonpatent cases—any nonpatent cases—will help the court avoid problems often associated with specialized courts, such as excessive rule-orientedness and interest-group capture. In my view, however, the types of nonpatent cases the Federal Circuit decides do not counter these problems and, in fact, may exacerbate them. For example, many of the court's nonpatent matters, such as veterans benefits and customs cases, are governed by extensive regulations, which potentially encourage the court to embrace a rule-focused judicial doctrine across its docket.¹¹ Moreover, although there is substantial public interest in the court's commerce-related cases, and patent cases in particular, much of the court's nonpatent docket (especially veterans benefits and government personnel disputes) is low-profile. Not surprisingly, the court's bench is dominated by appointees with backgrounds in commerce-related areas. The implicit message is that patent cases and international trade cases matter more than, say, veterans cases. This situation is troubling, both because the judges lack substantive expertise in numerous areas subject to exclusive Federal Circuit jurisdiction and because the apparent prioritization of commerce-related fields might harm the perceived legitimacy of the judicial process in noncommerce-related fields.¹²

The second assumption underlying Federal Circuit jurisdiction is that the nonpatent cases within the court's jurisdiction warranted consolidation in a single court. Although there was intense debate over centralizing patent appeals, the primary rationale behind the court's nonpatent jurisdiction was that most of those cases had previously been appealed to a single court, either the Court of Customs and Patent Appeals or the appellate division of the Court of Claims, both of which were merged into the Federal Circuit.¹³ But, by 1982, the decision to centralize appeals in these other matters was, in some cases, nearly a century old and ripe for reconsideration. Yet the architects of the Federal Circuit did not engage this question. And when additional areas like veterans benefits have been added to the court's jurisdiction, the addition has usually been supported by no more than a paean to the benefits of legal uniformity.¹⁴

The final assumption is that the model of semi-specialization does not raise its own institutional problems. There are serious questions, however, about whether a semi-specialized court might prioritize certain areas on its docket, paying close attention to cases in areas that are

¹¹ Whether the court's decision-making *process* is formalist is a matter of some dispute. See *infra* note 19 and accompanying text.

¹² See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 2 (1988) (exploring the notion that social processes "invoke fairness judgments independent of the outcome the procedure yields").

¹³ Of course, another animating factor behind granting the Federal Circuit nonpatent jurisdiction was to avoid creating an overly specialized institution, as the first assumption highlights. See Gugliuzza, *supra* note 1, at 1457.

¹⁴ *Id.* at 1460–64.

highly scrutinized by the bar, the academy, and others (like patent law) while paying less attention to areas in which there is a smaller critical audience (like veterans benefits). To be clear, I do not think that the Federal Circuit has consciously marginalized certain nonpatent cases. However, my article questions the court's jurisdiction over those nonpatent cases given the growing social importance of patent law, the growing importance of the Federal Circuit to patent law, and the increasing perception by the public, the bar, and even the court's own judges that the Federal Circuit is primarily a business-oriented patent court.¹⁵ Given these structural characteristics, we should reconsider whether the court should be the exclusive forum for aggrieved veterans and government employees, especially if reform might also benefit patent law.

B. THE POSSIBILITY OF LIMITED SPECIALIZATION

A jurisdictional model of limited specialization has at least two potential benefits over the current Federal Circuit model. First, a broader nonpatent docket might make the court more attuned to the business and social reality that undergirds patent cases, helping to cure the oft-discussed problem that Federal Circuit patent law is insufficiently sensitive to innovation policy.¹⁶ Mr. Quillen believes it is a "heroic" assumption that Federal Circuit judges would be willing to learn about innovation policy, economics, or business reality from nonpatent cases,¹⁷ but I am not convinced that his skepticism is justified.

Mr. Quillen bases his argument in part on frequent statements by the court's judges that policy is irrelevant to their work.¹⁸ But one could certainly discount these remarks as mere public posturing based on prevailing conceptions of the judicial role.¹⁹ In any event, limited specialization is not designed to get judges to base decisions on abstract policy concerns. Rather, it seeks to better acquaint judges with the *context* in which patent disputes arise so that they better understand the *consequences* of their decisions.

Moreover, there is an intuitive appeal to the idea that changing the court's nonpatent docket would change patent law. As Mr. Quillen notes, it became easier to obtain a patent after patent appeals were centralized in the Federal Circuit.²⁰ If a semi-specialized patent court articulated and applied patent law in a different way than the regional circuits did, it seems reasonable to believe that a reimagined Federal Circuit, one that hears cases from a wider variety of areas, would also alter the status quo. Limited specialization might have institutional benefits, too, for it would expose the Federal Circuit more frequently to district court litigation. This experience might result in a better understanding of the difficult work that district judges must do and

¹⁵ *Id.* at 1485–86.

¹⁶ *Cf.* CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 61 (2012) ("A perfect patent system would provide the optimal incremental incentive to innovate in addition to other incentives that already exist in a particular area of enterprise. . . . The patent system we actually have is very far from perfect." (emphasis omitted))

¹⁷ Quillen, *supra* note 3, at 27.

¹⁸ *See id.* at 26; *see also* Gugliuzza, *supra* note 1, at 1440 n.7 (collecting statements).

¹⁹ *See* Tun-Jen Chiang, *Formalism, Realism, and Patent Scope*, 1 IP THEORY 88, 94, 97 (2010) (noting that the Federal Circuit regularly deploys formalist rhetoric "given that the public loves the idea of mechanical jurisprudence" but arguing that the court is "in fact making pragmatic decisions according to extra-formal policy considerations").

²⁰ Quillen, *supra* note 3, at 23 n.3.

perhaps lower Federal Circuit reversal rates that some scholars have flagged as detrimental to the patent system.²¹

Mr. Quillen nevertheless prefers to restore appellate jurisdiction in patent cases to the regional circuits, viewing this as a “complete solution” to the Federal Circuit problem.²² In my view, however, this solution is incomplete. The Federal Circuit problem is about more than just patent law, leading to a second potential advantage that limited specialization has over the current jurisdictional structure: it could provide a better forum for the Federal Circuit’s nonpatent litigants. Exclusive Federal Circuit jurisdiction over matters like veterans benefits and government employee disputes raises concerns about government favoritism, geographic fairness, and marginalization of cases that are not seen as particularly important.²³ Limited specialization recognizes these consequences of Federal Circuit jurisdiction and offers the potential solution of distributing those cases among the regional circuits.

Is limited specialization politically feasible? Mr. Quillen has his doubts,²⁴ and given the partisan environment in Washington, a comprehensive jurisdictional reform of a relatively unknown court might seem to be a low priority. Yet Congress has frequently grappled with issues of Federal Circuit jurisdiction. The recent expansion of the court’s jurisdiction to include patent law counterclaims was many years in the making.²⁵ During the presidential administration of George W. Bush, an interest in immigration reform led Congress to consider consolidating immigration appeals in the Federal Circuit.²⁶ More recently, Congress weighed removing veterans cases from the Federal Circuit’s jurisdiction,²⁷ and commentators examining various Federal Circuit nonpatent fields have voiced concerns about the current jurisdictional model.²⁸

I am less skeptical than Mr. Quillen that the practicing bar would aggressively oppose limited specialization. To be clear, I am not suggesting that appeals in, say, antitrust matters, be *centralized* in the Federal Circuit.²⁹ Rather, I am proposing that the court hear *some* business-related nonpatent cases (including not only antitrust cases but also securities cases, bankruptcy cases, copyright cases, and even state law diversity cases) so that the court better understands the larger commercial context in which patents operate and patent disputes arise. This proposal

²¹ See Richard S. Gruner, *How High Is Too High?: Reflections on the Sources and Meaning of Claim Construction Reversal Rates at the Federal Circuit*, 43 LOY. L.A. L. REV. 981, 984–85, 994–1001 (2010) (discussing, and disagreeing with, critiques of the Federal Circuit’s high reversal rates and summarizing the leading empirical studies).

²² Quillen, *supra* note 3, at 27.

²³ Gugliuzza, *supra* note 1, at 1477–92.

²⁴ Quillen, *supra* note 3, at 25.

²⁵ See *supra* notes 6–8 and accompanying text; see also Intellectual Property Jurisdiction Clarification Act of 2006, H.R. 2955, 109th Cong. § 3 (similar proposal to enacted 2011 legislation).

²⁶ See Securing America’s Borders Act, S. 2454, 109th Cong. § 501 (2006); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 707(b)(1).

²⁷ See Veterans Appeals Improvement Act of 2011, H.R. 1484, 112th Cong. § 3.

²⁸ See, e.g., *Veterans’ Disability Compensation: Forging a Path Forward: Hearing Before the S. Comm. on Veterans’ Affairs*, 111th Cong. 39 (2009) (statement of Professor Michael P. Allen); Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound’s Structural Solution*, 15 J.L. & POL. 515, 515–16 (1999); Steven L. Schooner & Pamela J. Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors’ Rights to Raise Affirmative Defenses with Sovereign Immunity*, 21 FED. CIR. B.J. 685, 699–702 (2012).

²⁹ Cf. Quillen, *supra* note 3, at 25 & n.9 (arguing that antitrust attorneys and enforcement agencies “would lobby strongly against” a proposal to grant the Federal Circuit jurisdiction over antitrust and business cases and citing commentary “on the possibility of a *specialized* antitrust court” (emphasis added)).

might still be opposed by those who believe that Federal Circuit nonpatent law is overly protective of property rights.³⁰ But a more generalized docket might actually curtail any incentive for the Federal Circuit to exalt patent rights at the expense of other considerations.³¹ Moreover, the Federal Circuit's reimagined patent docket need not be limited to business-related cases; it could include a wide variety of cases currently appealed to the regional circuits, such as criminal cases, habeas corpus cases, and immigration cases, among others.³² The Federal Circuit's judges might support a proposal that allows them to keep their high-profile patent jurisdiction while otherwise remaking the court in the image of a regional circuit.³³

This is not to say that the polycentric model favored by Mr. Quillen would not improve the patent system. It certainly may be that patent law would benefit from the dialogue, experimentation, and competitive pressure imposed by a multi-court appellate model.³⁴ Yet it remains important to recognize that the Federal Circuit's nonpatent cases matter when rethinking the jurisdictional structure of patent litigation. Indeed, if a problem with patent law is its lack of attention to innovation reality and economic policy, and if nonpatent cases might bring those concerns before the court, then nonpatent cases might even be part of the solution to the so-called patent crisis.³⁵

II. DO GENERALISTS MAKE THE BEST SPECIALISTS?

Those who have found flaws in the current jurisdictional structure for patent appeals have offered many different solutions. I have already discussed the limited specialization and polycentric models. In addition, scholars such as Arti Rai have argued for more generalist review of the Federal Circuit, either through aggressive Supreme Court action (which has arguably begun to occur since she wrote her landmark article on this topic) or by adding a layer of generalist review between the Federal Circuit and the Supreme Court.³⁶ Also, John Golden has urged the Supreme Court to act as a "percolator" of Federal Circuit law, periodically disrupting doctrine to force critical reengagement by the Federal Circuit.³⁷ Although these proposals are diverse, they share a common interest in what might be called *appellate pluralism*. That is, the proposals all offer creative ways for involving additional voices in, and bringing

³⁰ See, e.g., 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, 197–98 (1995); Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 ANTITRUST L.J. 913, 920 (2001).

³¹ Cf. Quillen, *supra* note 3, at 25 ("[T]he experience of the Federal Circuit cautions that a *specialized* court may instead promote its field at the expense of public interest." (emphasis added) (quoting Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605, 645 (2010))).

³² See Aronson, *supra* note 2, at 34; see also Gugliuzza, *supra* note 1, at 1499 (weighing whether to grant the Federal Circuit nonexclusive jurisdiction over immigration, criminal, and habeas corpus matters).

³³ Judicial support is likely important to the political feasibility of jurisdictional reform, as an important factor in the Federal Circuit's creation was the support of the judges of the two courts that were being abolished to create it. See Gugliuzza, *supra* note 1, at 1457.

³⁴ Nard & Duffy, *supra* note 4, at 1651–54.

³⁵ See generally DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* 21–33 (2009) (summarizing current problems in patent law).

³⁶ Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1124–25 (2003).

³⁷ John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 700–09 (2009).

additional perspectives to, the appellate process. These voices and perspectives might come from sources external to the court, such as through Supreme Court percolation or more active amicus participation by interested administrative agencies,³⁸ or from internal sources, as when patent cases are directed to courts that must also engage in diverse legal areas.³⁹

Limited specialization is an example of the internal approach. As Professor Aronson notes in his response, the theory behind the internal approach “is that to be a good specialist, you must also be a pretty good generalist.”⁴⁰ Although this might be viewed as an empirical assertion, the difficulties of testing it—at least in the context of judicial decision-making—are immense.⁴¹ Yet there is much support for his statement if we simply look around the legal community in general and the patent community in particular.

For example, despite the American ideal of the judge as generalist, Edward Cheng has shown that, on the federal courts of appeals, significant numbers of “generalist” judges specialize in writing opinions in particular subject areas.⁴² As for patent law specifically, the model of generalist-as-specialist is increasingly being followed in Federal Circuit litigation. The court’s patent cases are no longer dominated by specialized patent lawyers.⁴³ Significant Federal Circuit cases are regularly argued by prominent Supreme Court advocates,⁴⁴ and large law firms are developing Federal Circuit-focused practice groups that will bring generalist experience to even more Federal Circuit cases.⁴⁵

These examples reinforce the observation made by Professor Aronson that limited specialization accounts for the often-superficial distinctions between legal fields. Under the legal realist model, typified by Holmes’s “bad man,”⁴⁶ an economic actor is concerned not about doctrines but about the legal consequences of his actions. Likewise, to the extent that economic activity is regulated by many doctrinal fields outside of patent law, then the judges who decide patent cases should be familiar with those fields so as to better understand the full impact of their decisions on economic activity.⁴⁷ A generalist judge who specializes in patent cases will appreciate the consequences of a particular decision on the patent system while also being more likely to situate the decision within a broader context of promoting economic competition and encouraging technological innovation.⁴⁸

³⁸ See Rai, *supra* note 36, at 1124; see also Arti K. Rai, Essay, *Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 DUKE L.J. 1237, 1274 (2012) (exploring the role that non-PTO executive-branch actors might play in developing patent policy).

³⁹ See Nard & Duffy, *supra* note 4, at 1623–24.

⁴⁰ Aronson, *supra* note 2, at 33.

⁴¹ Cf. J. Frank Yates & Michael D. Tschirhart, *Decision-Making Expertise*, in THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE 421, 422 (K. Anders Ericsson et al. eds., 2006) (analyzing the “significant impediments to progress in research on decision-making expertise”).

⁴² Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 526 (2008).

⁴³ 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, 850 (2011).

⁴⁴ Golden, *supra* note 37, at 684.

⁴⁵ See, e.g., *Federal Circuit & IP Appeals*, JONES DAY, http://www.jonesday.com/federal_circuit_ip_appeals (last visited Oct. 5, 2012); *Our Practice: Patent and Intellectual Property Rights Appeals*, SIDLEY AUSTIN LLP, http://www.sidley.com/patent_ip_appeals (last visited Oct. 5, 2012).

⁴⁶ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

⁴⁷ See Aronson, *supra* note 2, at 34.

⁴⁸ Cf. Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 896–97 (2012) (noting that “generalism” might “serv[e] as an antidote to some of the more severe pathologies that might afflict the law under a regime based more on specialization”).

The idea that generalists might make the best specialists is not new. As a selling point for the Federal Circuit, Congress repeatedly stressed that the Federal Circuit was “not a ‘specialized court’” because of its nonpatent jurisdiction.⁴⁹ The mistake might have been that the nonpatent fields over which the Federal Circuit was given jurisdiction were not general enough. In other words, the architects of the Federal Circuit correctly recognized the value of appellate pluralism, they simply misjudged the optimal quantity of diversity. Congress can fix that mistake, and a model of limited specialization is one way in which it might do so.

CONCLUSION

The Federal Circuit is an appellate court like no other. This structural singularity likely explains the copious scholarship analyzing the court and its decisions, and any institutional critique should not be viewed as a blight on the judges staffing the court. I find the court fascinating simply because it is a functioning judicial experiment, operating against a control group of generalist appellate courts. By studying the Federal Circuit from both doctrinal and functional perspectives, we can glean important insights about how institutional structure shapes judicial decision-making and substantive law.

In my article, I showed that the Federal Circuit’s relatively narrow nonpatent docket might be an institutional flaw. Rather than abandon appellate centralization in patent law, I offered the more modest possibility of altering the Federal Circuit’s nonpatent jurisdiction, based on the notion that a plurality of doctrinal perspectives might improve Federal Circuit patent law, keep it uniform, and provide a better forum for the court’s nonpatent litigants. The potential benefits of limited specialization are reinforced by examples of private ordering that embrace a similar model of generalist-as-specialist, although more work could be done to confirm this intuition. Indeed, there likely are flaws in the concept of limited specialization, and it is probably impossible to definitively prove its superiority to any other jurisdictional model. Still, I hope to have further percolated an ongoing and important conversation about institutional structure because, to paraphrase Professor Aronson,⁵⁰ rethinking the Federal Circuit’s institutional design might be the best way to alter its normative commitments.

⁴⁹ *E.g.*, H.R. REP. NO. 97-312, at 19 (1981).

⁵⁰ Aronson, *supra* note 2, at 29.