

# The Federal Circuit: A Model for Reform?

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Are our federal courts organized suitably to perform their mission of assuring coherent administration of our national law? Maybe not. The senior author of this Article, along with many others, argued to the contrary forty years ago.<sup>1</sup> Now, experience with the United States Court of Appeals for the Federal Circuit tends to confirm that an alternative structure of the federal judiciary could better serve the need for coherent national law, and without serious adverse consequences. Perhaps, therefore, it is now time for Congress to reconsider the matter. We here suggest the possibility that the United States replicate the structure of the appellate courts of the Federal Republic of Germany, which, like the Federal Circuit, are specialized to assure coherent and consistent interpretation of that nation's laws.<sup>2</sup> Advances in technology have greatly reduced the need for the traditional regionalization of the federal appellate process,<sup>3</sup> so that the model supplied by the Federal Circuit may offer new hope that our national law could be administered with substantially greater coherence and efficiency than the present system of conflicted circuits allows.

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<sup>1</sup> AM. BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS (1968) (Carrington served as director of this study.); Comm'n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 204–08 (1975); Study Group on the Caseload of the Supreme Court, *Report*, 57 F.R.D. 573, 577–84 (1972) (prepared for the Federal Judicial Center); see also FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS (1993); Comm'n on Structural Alternatives for the Fed. Courts of Appeals, *Final Report* (1998), available at [http://www.library.unt.edu/gpo/csafca/app\\_comm\\_uscourts\\_gov.html](http://www.library.unt.edu/gpo/csafca/app_comm_uscourts_gov.html) (discussing the way in which courts of appeals can adapt to this new environment).

<sup>2</sup> See generally Daniel J. Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981).

<sup>3</sup> See Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1535–36 (1998).

*Origins of the Federal Circuit*

The Federal Circuit was established through the Federal Courts Improvement Act of 1982<sup>4</sup> as a partial response to fifteen years of agitation over the structure of the federal judiciary.<sup>5</sup> Much of the pre-existing concern pertained to the instability of the national law. The Supreme Court had largely disowned responsibility for resolving conflicts in the interpretation of patent law.<sup>6</sup> The regional courts of appeals were clearly not organized to perform that task; for them, the issue remained a matter of concern.<sup>7</sup>

In 1965, the American Bar Foundation commissioned a study that concluded that there was a need for more effective harmonization of intermediate-court decisions.<sup>8</sup> A contemporaneous study commissioned by the Supreme Court came to a similar conclusion that more centralization of the federal judicial power was in order.<sup>9</sup> Soon thereafter the Senate Judiciary Committee conducted a third study coming to a similar conclusion.<sup>10</sup> But nothing was done, apparently because the requisite political energy was lacking. Advocates of reform were left to meditate on the utterance of Arthur Vanderbilt that “judicial reform is no sport for the short-winded.”<sup>11</sup>

In 1976, the senior author of this Article and others suggested the division of the jurisdictions of federal appellate courts according to subject-matter categories.<sup>12</sup> Despite the benefits of subject-matter adjudication, such as the ability to better accommodate docket growth, those authors cautioned against a strictly specialized court with spe-

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4 Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

5 See, e.g., AM. BAR FOUND., *supra* note 1; Commission on Revision of the Federal Court Appellate System, *supra* note 1, at 204–08 (discussing the burdens on the courts of appeals caused by increased litigation and intercourt jurisprudential conflict); Study Group on the Caseload of the Supreme Court, *supra* note 1, at 577–84 (discussing how the increasing workload of the Supreme Court was compromising the Court’s ability to achieve its essential functions).

6 See HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 155 (1973) (finding it unsurprising that the Court had failed to resolve a significant circuit split over a patent law issue); see also *Graham v. John Deere Co.*, 383 U.S. 1, 18 (1966) (“[I]t must be remembered that the primary responsibility for sifting out unpatentable material lies in the Patent Office.”).

7 See FED. JUDICIAL CTR., *supra* note 1, at 13; Comm’n on Structural Alternatives for the Federal Courts of Appeals, *supra* note 1.

8 See AM. BAR FOUND., *supra* note 1.

9 See Study Group on the Caseload of the Supreme Court, *supra* note 1, at 577–84.

10 See FED. JUDICIAL CTR., *supra* note 1, at 105–21 (examining various proposals without questioning the need for increased centralization).

11 NAT’L CONFERENCE OF JUDICIAL COUNCILS, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION*, at xix (Arthur T. Vanderbilt ed., 1949).

12 PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 167–84 (1976).

cialized judges.<sup>13</sup> While they acknowledged that “[p]erhaps too much is made of these feared disadvantages,” specialized courts are more likely to be vulnerable to political manipulation of the process by which the judges are selected, and their judges more likely to “lose sight of the basic values at stake in their decisions.”<sup>14</sup> Contemplating a special patent court, they expressed concern about the potential for capture by powerful research and development interests.<sup>15</sup> Judge Henry J. Friendly, in reflecting on a future patent court, argued that rather than special interests exerting undue influence, the court would likely be dominated by a particular attitude on the patent law.<sup>16</sup>

Despite this combination of enthusiasm and caution regarding specialized jurisdiction, the Justice Department of President Carter, led by Attorney General Griffin Bell and Assistant Attorney General Daniel Meador, crafted the design of the Federal Circuit. This was in part a response to the concerns favoring the restructuring of the courts of appeals.<sup>17</sup> The economic pressures of the 1970s also encouraged special attention to addressing the problems particular to the patent law.<sup>18</sup> The reformers achieved a consolidation of the two specialized national courts responsible for hearing appeals from the Court of International Trade and the Court of Claims. The new court would serve to centralize appeals in intellectual property cases. It had a predecessor of sorts in the Emergency Court of Appeals that had been established in 1942 to centralize appeals in cases arising under wartime price- and wage-control laws that absolutely required national uniformity.<sup>19</sup>

The new Federal Circuit was in part a response to a shared sense that the consequences of conflicting interpretations of federal law were similarly unhelpful when the subject was an issue of the law of

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<sup>13</sup> *See id.* at 168.

<sup>14</sup> *Id.* at 168–69.

<sup>15</sup> *Id.* at 220.

<sup>16</sup> *Cf. FRIENDLY, supra* note 6, at 159 (“[A] specialized court having exclusive jurisdiction over patent litigation might be overly liberal or unduly strict in its attitude toward patents—more likely the former.”).

<sup>17</sup> Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581, 582–88 (1992).

<sup>18</sup> The Honorable Pauline Newman, Circuit Judge, U.S. Court of Appeals for the Fed. Circuit, Remarks at *The Federal Circuit: The National Appellate Court Celebration and Introductory Symposium* (Mar. 18, 2009) (on file with authors).

<sup>19</sup> Transcript of Proceedings at the Final Session of the Court, United States Court of Appeals, 299 F.2d 1, 2–3 (1961). The scheme was used again for the Emergency Court of Appeals when wage and price controls were reestablished in 1971. *See Economic Stabilization Act of 1970*, Pub. L. No. 92-210, §§ 202, 211(b), 85 Stat. 743, 744, 749 (1971).

patents. Special concern about the administration of patent law had been expressed as early as the eighteenth century.<sup>20</sup> Patent law was identified early as an area that would be best served by more uniformity and predictability through centralized adjudication.<sup>21</sup> Patent law was plagued by vague and ambiguous statutory language that provided little guidance for judges and juries.<sup>22</sup> This incoherence became an increasingly acute problem as rails were laid in the nineteenth century and the national economy emerged.

When and where might those investing in patents be confident that their rights would be enforced? Conflicting regional, political, and industry-based interests often led to divergent outcomes among different courts. Until the creation of the Federal Circuit, only thirty-five percent of patents survived a challenge of their validity.<sup>23</sup> For example, in the nineteenth century the interests of Southern planters made it nearly impossible for Eli Whitney to protect his cotton gin invention in Georgia, where the jurymen allegedly “[came] to an understanding among themselves, that they [would] never give a verdict in [Whitney’s] favor” regardless of the merits of the case.<sup>24</sup> And farmers of the Upper Midwest sitting on juries might be damned rather than enforce any patent; their bias was aroused by the threat of patent claims on the prices they paid for windmills or barbed wire. Reportedly, “it was quite clear that there was no such thing as a valid patent in the Eighth Circuit, and the climate in the Ninth Circuit was not much more hospitable. In the Seventh Circuit, on the other hand, patent infringement could get a client into big trouble.”<sup>25</sup>

This lack of uniform treatment of patents among the federal circuits both diminished the value of patents and threatened the fundamental goals of the patent law—namely, encouragement of innovation and economic growth. And the Supreme Court had quite clearly dis-

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<sup>20</sup> See generally Andrew P. Morriss & Craig Allen Nard, *Institutional Choice & Interest Groups in the Development of American Patent Law: 1790–1870* (Ill. Law & Econ. Research Papers Series, Research Paper No. LE07-007, 2008), available at [http://papers.ssrn.com/pape.tar?abstract\\_id=1262970](http://papers.ssrn.com/pape.tar?abstract_id=1262970).

<sup>21</sup> FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 178 (1928).

<sup>22</sup> For example, the 1793 Act’s requirement that inventors “distinguish” an invention “from all other things before known.” *Id.* at 9.

<sup>23</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 334 (2003).

<sup>24</sup> Morriss & Nard, *supra* note 20, at 45.

<sup>25</sup> Robert L. Harmon, *Seven New Rules of Thumb: How the Federal Circuit Has Changed the Way Patent Lawyers Advise Clients*, 14 *GEO. MASON L. REV.* 573, 574 (1992).

owned responsibility to resolve conflicting laws of the circuit, even issues of patent law.

On the other hand, there was widely shared concern at the time the Federal Circuit was established that a specialized court would attract the unwelcome political attention of special interests.<sup>26</sup> That concern was derived in part from experience with the Commerce Court that had been established to review cases involving federal regulation of the railroads by the Interstate Commerce Commission.<sup>27</sup> It was widely believed that the Commerce Court was heavily biased in favor of the railroads.<sup>28</sup> On that account, the Commerce Court was abolished only a few years after it was established.<sup>29</sup> Based on that experience, there was concern that those most invested in the law of intellectual property, including the law of patents, would succeed in gaining control of the process by which the judges sitting on the Federal Circuit would be selected.<sup>30</sup>

There was also a concern expressed that specialization would produce a narrow mindset among judges whose duties were narrowly confined. In a 1951 essay, Judge Simon Rifkind argued that “[t]he patent law does not live in the seclusion and silence of a Trappist monastery. It is part and parcel of the whole body of our law. It ministers to a system of monopolies within a larger competitive system.”<sup>31</sup> This view suggested a risk that judges devoting their careers to the law of patents would fail to consider how their interpretations of the law affect innovation and broader economic and social interests.

Despite these concerns, the Federal Circuit was established in 1982.<sup>32</sup>

### *Assessing the Experience*

As many commentators have noted, the Federal Circuit is not a specialized court in the narrowest sense—judges come from diverse

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<sup>26</sup> Cf. Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991).

<sup>27</sup> FRANKFURTER & LANDIS, *supra* note 21, at 162–74.

<sup>28</sup> George E. Dix, *The Death of the Commerce Court: A Study of Institutional Weakness*, 8 AM. J. LEGAL HIST. 238, 243 (1964).

<sup>29</sup> FRANKFURTER & LANDIS, *supra* note 21, at 162, 166–68.

<sup>30</sup> Cf. Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 950 (1994) (outlining the perceived danger that a specialized court can be “captured” by an invested party and citing the Commerce Court as a primary example).

<sup>31</sup> Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425, 425 (1951).

<sup>32</sup> Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

backgrounds and may sit by designation, and the court often reviews non-patent-based claims as well.<sup>33</sup> Patent cases make up only twenty-five to thirty percent of the court's docket.<sup>34</sup> Therefore, judges are not confined to patent cases day after day, but patent law is able to benefit from uniform treatment.

Contrary to the fears at the time of its creation, the Federal Circuit has not openly manifested a bias in favor of expanding intellectual property rights. While it is difficult to establish conclusively with empirical evidence,<sup>35</sup> it is possible that the judges of the Federal Circuit have been especially attentive to the language of controlling legal texts, and especially disinclined to openly express their political preferences. Concerns raised in the 1970s may have encouraged formalistic adherence to precedent in an effort to dispel any appearance of impropriety.<sup>36</sup> Numerous legal scholars have found the Federal Circuit's decisions to be overly formalistic.<sup>37</sup> Former Chief Judge Michel stressed that "we really do not have an agenda; actually it would be very difficult and undesirable to have an agenda."<sup>38</sup> Unlike other federal appellate courts, which do not have to contend with the legacy of the Commerce Court, Federal Circuit judges seem to be "straining to persuade the public that they are not voting their preferences."<sup>39</sup>

The special role of the court as a source of stability in the law of patents is also manifested in its availability to respond to patent law questions certified to it by the regional circuits. The court at first de-

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<sup>33</sup> See, e.g., Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 793–96 (2004); Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 820 (2008) [hereinafter Dreyfuss, *Institutional Identity*]; 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, 611–14 (1989); Andrew P. Morriss, *A Public Choice Perspective on the Federal Circuit*, 54 CASE W. RES. L. REV. 811, 816 (2004); Randall R. Rader, *supra* note 26, at 1006–09.

<sup>34</sup> Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 553 (2003).

<sup>35</sup> See generally Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

<sup>36</sup> Dreyfuss, *Institutional Identity*, *supra* note 33, at 815; see also Pauline Newman, *The Sixth Abraham L. Pomerantz Lecture: Commentary on the Paper by Professor Dreyfuss*, 61 BROOK. L. REV. 53, 55–56 (1995) (noting the growing concern over the inconsistency of patent adjudication among the regional circuits).

<sup>37</sup> See, e.g., Dreyfuss, *Institutional Identity*, *supra* note 33, at 809; Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1644 (2007); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1103–04 (2003).

<sup>38</sup> Dreyfuss, *Institutional Identity*, *supra* note 33, at 818.

<sup>39</sup> *Id.*

nied its authority to answer questions certified under 28 U.S.C. § 1292(b),<sup>40</sup> only to have Congress promptly amend the statute to provide the jurisdiction.<sup>41</sup> Such questions may also be certified by district courts pursuant to Rule 54(b).<sup>42</sup>

Somewhat contrary concern has also been raised about the Federal Circuit's ability to create law that is both "accurate and of high quality."<sup>43</sup> The court's preoccupation with the formalities of intellectual property law for which it has special responsibility may be in part a consequence of the court's engagement with a specialized bar. Some have argued that the court's formalistic approach to the law it interprets is best attributed to the "closed cycle" between the court and patent attorneys.<sup>44</sup> Chief Judge Michel has acknowledged that a combination of the centralized forum and a specialized bar has created a situation in which the Federal Circuit is often merely "talking to itself"—a cycle of briefs echoing past decisions and the court basing its holdings on those briefs.<sup>45</sup>

It is perhaps relevant to that concern that neither the Patent and Trademark Office nor the district courts are particularly well equipped to consider the political or economic consequences of patent law decisions, or to cause the Federal Circuit reviewing their actions to do so.<sup>46</sup>

The Federal Circuit reverses district court decisions at a high rate, placing no greater weight on the decisions made by those district courts with greater patent law fact-finding experience.<sup>47</sup> That fact might be taken to indicate its shared confidence in the interpretations of patent law expressed in its published opinions.

It is possible that beneath the surface commitment of legal formalism, the Federal Circuit may, as early critics of the idea feared, have fostered a greater emphasis on law protecting patents to the detriment of competition and technological development.<sup>48</sup> Empirical studies have shown significant economic costs associated with the prevalence of "low quality" patents for marginal improvements and

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<sup>40</sup> See *Harrington Mfg. Co. v. Powell Mfg. Co.*, 709 F.2d 710, 710–11 (Fed. Cir. 1983).

<sup>41</sup> See 28 U.S.C. § 1292(c) (2006).

<sup>42</sup> See FED. R. CIV. P. 54(b); ROBERT L. HARMON, *PATENTS AND THE FEDERAL CIRCUIT* 1264–68 (9th ed. 2009).

<sup>43</sup> Dreyfuss, *Institutional Identity*, *supra* note 33, at 796.

<sup>44</sup> See *Nard & Duffy*, *supra* note 37, at 1622.

<sup>45</sup> *Id.*

<sup>46</sup> *Rai*, *supra* note 37, at 1036–39.

<sup>47</sup> *Id.* at 1090–91, 1097–98.

<sup>48</sup> See Dreyfuss, *Institutional Identity*, *supra* note 33, at 788.

the need to acquire and litigate defensive patents.<sup>49</sup> Furthermore, there is a detriment to the objective of furthering scientific progress by discouraging entrants into the marketplace.<sup>50</sup> The Federal Trade Commission has raised these and other concerns, arguing that these “thickets of rights” impose significant burdens on society both financially and in terms of innovation policy.<sup>51</sup> The court may, in short, be “perilously close to breaking technology with law.”<sup>52</sup>

While the Federal Circuit has seen both a number of significant successes and failures in the adjudication of patent cases and the development of the patent law, the experiment with the centralized adjudication of patents demonstrates an important point. Although we may be unable to completely eliminate all negative effects of centralization, such as doctrinal isolation and tunnel vision, these effects can be limited to make centralized adjudication a potentially viable alternative to the traditional regional model in many cases.

#### *A Model To Be Replicated?*

The story of the court’s development thus reopens the question regarding the possible achievement of greater stability and reduction of internal conflict in other fields of national law. Although many of the challenges and benefits of adjudicating patent law in the centralized forum of the Federal Circuit are unique to that area of law, the court has provided meaningful insight into specialized adjudication in general. The Federal Circuit not only helps to illustrate how modern social, economic, and legal realities have affected the arguments surrounding specialized courts, but it also demonstrates that it is possible to make significant changes to federal appellate adjudication in ways that actively take into account past missteps.

Adjudicating other particular areas of law at the federal appellate level in one forum rather than in the regional circuit courts ought to be reconsidered for two reasons. First, the size of the dockets of both the appellate courts and the Supreme Court and the prevalence of unresolved circuit splits<sup>53</sup> call for renewed efforts to increase efficiency and to reduce uncertainty and the resulting forum-shopping among

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<sup>49</sup> *Id.* at 794.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 789.

<sup>52</sup> JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 161 (2008).

<sup>53</sup> For a recent assessment, see Gregory P. Joseph, *Circuit Splits*, NAT’L L.J., Apr. 13, 2009, at 18.



parties involved in federal litigation.<sup>54</sup> Second, specific areas of the law, other than patent law, could benefit substantially from greater uniformity, predictability, and judges with greater familiarity with related complex issues.<sup>55</sup>

Those content with the present structure of the federal courts tend to find comfort in the notion that prolonged and many-sided circuit conflicts will ultimately result in the best possible resolution of uncertainties in the national law. “Percolation” is the term used to describe this vision.<sup>56</sup> Someday, it is thought, any truly troubling issues will be resolved by a Supreme Court informed by the collective wisdom of many circuit court opinions. However, as Dan Meador has observed, “it seems more important that the matter be settled than that it be settled ‘right,’” particularly because what is “right” is ultimately up to Congress.<sup>57</sup> “[T]he lack of any point of authoritative determination” short of the Supreme Court for questions of statutory interpretation was noted by Judge Friendly as one of the most significant problems facing the regional circuit design.<sup>58</sup> To take a homely example, how many lower federal courts should have to face the open question of whether food stamps can be used at fast-food restaurants?<sup>59</sup> Given the clumsiness of the bicameral legislative process saturated with campaign contributions, it is not reasonable to expect Congress to thoughtfully address an enormous range of issues of similar gravity. But the frailties of the legislative process do not excuse a legal system leaving an infinite number and range of issues of statutory interpretation to “percolate.” Either food stamps can be so used or they cannot, and leaving such issues to diverse regionalized resolution calls into question the seriousness of the commitment to the rule of law.

Not only is percolation of limited value for questions of federal law, but the negative effects of the lack of uniformity and predictability are most noticeable in areas of law governed by federal statutes. The types of cases most commonly recommended for centralized adjudication include those involving federal agencies and law. Immigra-

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<sup>54</sup> Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REFORM 471, 484–85 (1983).

<sup>55</sup> Meador, *Challenge*, *supra* note 33, at 621–24.

<sup>56</sup> *Id.* at 633–34.

<sup>57</sup> *Id.*

<sup>58</sup> FRIENDLY, *supra* note 6, at 161–62.

<sup>59</sup> Cf. Paul D. Carrington, *United States Appeals in Civil Cases: A Field and Statistical Analysis*, 11 Hous. L. REV. 1101, 1108 (1974) (listing this as an issue “[a]ppealable to Courts of Appeals”).

tion, internal revenue, telecommunications, and antitrust have all been cited as areas of the law where the benefits of uniformity, efficiency, and predictability far outweigh those of percolation or regional treatment.<sup>60</sup> As discussion about the need to incorporate competition policy analysis into patent decisions suggests, centralization of further areas of federal law would provide unique opportunities to prevent some of the downfalls associated with specialized courts by combining subject matter in a way that maintains diversity of the court's docket while encouraging judges to avoid doctrinal isolation.<sup>61</sup>

Moreover, the benefits of regionalizing the federal appellate process have steadily diminished. As the number of judges has increased, the size of dockets has enlarged, and law clerks and central staff have taken over many of the lesser tasks, the process is very different from what it was as recently as the late 1960s.<sup>62</sup> Oral argument is no longer a common feature of the federal appellate process.<sup>63</sup> Neither is the published opinion of the court.<sup>64</sup> The process is, in these respects, losing the transparency that is an important means of gaining public trust.<sup>65</sup>

This loss of transparency in federal appellate courts is associated with the judges' frequent preoccupation with making "the law of the circuit" as expressed in their published opinions.<sup>66</sup> But that form of judge-made law, perhaps inevitably in a universe of nontransparency, commands limited attention in lower courts or future cases. It is often merely material for percolation.

This Federal Circuit experience suggests the benefits of a system directing appeals presenting issues of national law to a specialized forum capable of gaining respect as the authority in its field. Just as

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<sup>60</sup> Meador, *supra* note 33, at 621–24.

<sup>61</sup> See Seamon, *supra* note 34, at 582; see also Meador, *supra* note 17, at 589, 602.

<sup>62</sup> See Meador, *supra* note 54, at 471–73.

<sup>63</sup> MICHAEL E. TIGAR & JANE B. TIGAR, *FEDERAL APPEALS: JURISDICTION AND PRACTICE* 480–83 (3d ed. 2008) (noting that oral argument was granted in only 40.1% of cases decided in the courts of appeals in 1997); see also Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 732–34 (1983) (describing the "Loss of Orality"); cf. Baker, *supra* note 30, at 961 (proposing "greater orality" in the courts of appeals).

<sup>64</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 529 (2004); Judith Resnik, *Courts: In and out of Sight, Site and Cite*, 53 VILL. L. REV. 771, 803–09 (2008).

<sup>65</sup> Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1483 (2004) (citing Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 768 (1983)).

<sup>66</sup> RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 160 (1999).

Federal Circuit judges sit occasionally on other circuits, so other circuit judges could be assigned to sit on a panel having exclusive appellate jurisdiction over a specified class of cases. Again, the now-forgotten Emergency Court of Appeals provides an additional example and model.<sup>67</sup> Its judges were summoned from their regular duty in the regional courts to sit on a panel having national jurisdiction over a specified class of appeals.<sup>68</sup> Such assignments were not full-time employment; that court's judges continued to sit on their regional courts.

We note that immigration, internal revenue, telecommunications, and antitrust have all been cited as areas of the law where the benefits of uniformity, efficiency, and predictability far outweigh those of percolation or regional treatment.<sup>69</sup> In its struggle to take account of public policy concerns such as innovation in its decisionmaking, the Federal Circuit has demonstrated the fact that different areas of federal law often require individual attention to ensure that the law is both precise and accurate.<sup>70</sup> The creation of courts having exclusive nationwide jurisdiction over such classes of appeals could materially improve the quality and evenhandedness of our national law. We might even be enabled to pay the same taxes as our fellow citizens in distant circuits.

We note that modern technology, far advanced since 1979, enables a national court to conduct oral argument and judicial conferences electronically. As most federal appellate courtrooms are now sparingly used, it should not be difficult to find convenient venues for occasional conferences and hearings by the panel of judges assigned to exercise such jurisdiction. We do not presently suggest that circuit judges sitting part-time on such a court should be appointed by the President and confirmed by the Senate. We envision that the duty would be assigned in some reasonably random manner, perhaps designed by the Judicial Conference of the United States.

In these ways, we stop short of a prescription to cure all the problems. But we celebrate the success of the Federal Circuit in serving as additional evidence that Congress, when well advised, can design and approve structural changes in the federal judiciary that will better serve the public interest.

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<sup>67</sup> See Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23.

<sup>68</sup> See *id.* § 204(c), 56 Stat. at 32.

<sup>69</sup> See *supra* note 60 and accompanying text.

<sup>70</sup> See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 68-69 (1989).