Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization

Ori Aronson
The Article examines the trend of court forum proliferation through the lens of two episodes: the U.S. military commissions system, which was established following the attacks of September 11, 2001, and endorsed by the subsequent administration and Congresses, and the 2005 controversy over proposed Sharia law family arbitration tribunals in Canada, which culminated in the termination of an existing practice of alternative dispute resolution. In analyzing these seemingly different courts of limited jurisdiction, the Article assesses the virtues and vices of court specialization, discussing whether — and how — such courts may fit into the judicial framework of a liberal democracy. It concludes that, rather than presenting a threat to the rule-of-law ideal, court specialization may promote democratic values, improve access to courts, and deliver more accurate judicial results. The Article further reflects on the role of innovative institutional design in realizing this democratic potential.

Introduction ..................................................................................... 233
I. Two Stories ............................................................................ 235
   A. Military Commissions .................................................. 235
   B. Religious Tribunals ...................................................... 239

* Assistant Professor, Bar-Ilan University Faculty of Law. I am grateful to Bill Alford, Martha Minow, Hila Shamir, Mark Tushnet, Adrian Vermeule, and the participants of the Public Law and Human Rights Workshop at the Hebrew University of Jerusalem and the Harvard Law School Graduate Colloquium for helpful comments. I also thank Barlow Mann and Lauren Simpson of the Virginia Journal of International Law for valuable editing work.
II. Military Commissions and Religious Tribunals: Institutional Commonalities .................................................. 243
A. Episodes Recontextualized: Military Commissions and Religious Tribunals as Instances of Court Specialization ............................................................... 245
   1. Judicial Power .................................................... 246
   2. Court-Like Fashion ............................................ 246
B. Specialization: Four Axes of Court Proliferation .......... 247
   1. Subject-Matter Specialization ............................ 248
   2. Administrative Adjudication ............................. 251
   3. ADR ................................................................... 253
   4. International Tribunals ........................................ 254
III. Democratic Critiques of Court Specialization ....................... 255
A. Rule of Law .................................................................. 255
B. Less Judicial Power ...................................................... 257
C. A Judiciary of Interests ................................................ 258
IV. Democratic Virtues of Court Specialization .......................... 259
A. Deliberation .................................................................. 261
B. Pluralism ...................................................................... 266
C. Access .......................................................................... 268
D. Transparency ................................................................ 270
E. Knowledge ................................................................... 270
F. Summary: Assessing Overall Outcomes ...................... 274
V. Military Commissions and Religious Tribunals Revisited .... 276
A. Military Commissions: War by Judicial Means ........... 276
B. Religious Tribunals: The Challenge of Private Ordering ..................................................... 281
   1. Ex Post Regulation .............................................. 283
   2. Ex Ante Regulation ............................................. 284
   3. State Provision .................................................. 285
VI. Institutional Variations: Optimizing Court Specialization .... 287
A. Models of Cross-Adjudication ................................. 288
   1. Judicial Rotations .......................................... 288
   2. Randomized Case Circulation ........................... 290
B. Critiques and Replies .................................................. 291
   1. Different Laws? ............................................. 291
   2. No Right to Choose? ...................................... 294
   3. Is Concurrence Not Enough? ....................... 295
   4. Down with Specialization? ........................... 296
Conclusion ....................................................................................... 296
INTRODUCTION

A few months after his inauguration, U.S. President Barack Obama presented an outline for his new policy of handling foreign terrorism suspects held by the United States at the Guantánamo Bay Naval Base in Cuba.¹ One of the provisions of the new policy held that the military commissions system — established by executive order shortly after the attacks of September 11, 2001, subsequently shut down by the Supreme Court in 2006, and shortly thereafter reconstituted by congressional act — would remain in existence and retain the power to try at least some of those suspects. Although originally conceived as an emergency measure for wartime exigency, the tribunals have become an institutional reality that seems bound to persist, at least as long as terrorism as we know it remains a threat to the United States.

A few years earlier, in 2005, a very different, yet not unrelated, episode played out in the Canadian province of Ontario. The politics of recognition, multicultural accommodation, and law led the province to amend its arbitration statute to the effect that family matters would no longer be subject to enforceable arbitration by religious tribunals.² The new law was the culmination of a vigorous controversy over the legitimacy of a Muslim institution’s call for Muslim Canadians to resolve their family disputes before a Sharia tribunal, whose decrees would be enforceable under local arbitration law. In that case, an existing practice of adjudication, which was recognized by the government as a form of alternative dispute resolution (ADR), was terminated.

What is common to these two episodes — apart from the post-9/11 culture wars that they reflected and reinforced — is the similar kind of challenge they seem to pose for traditional conceptions of adjudication and of the institution of “courts” in a liberal democracy. Both cases seemed to introduce — with different outcomes, to be sure — a threat to the liberal model of judicial power that is focused on the generalist, independent court as the locus of the protection and promotion of constitutional democracy. Military and religious establishments, two social institutions that do not inherently share the liberal premises of the democratic state, were thought to have attempted to defy the institutional guardian of those premises by assuming to run courts of their own.³

². See Family Statute Law Amendment Act, S.O. 2006, c. 1 (Can.).
In this Article, I propose that these two episodes are as not as extraordinary as they initially seem. I suggest viewing them as part of a broad, ongoing, and pervasive institutional trend of proliferation of court forums, which I term “court specialization.” This trend is evident in the multiple forums of adjudication currently available for dispensation of judicial power: general-jurisdiction courts, limited-jurisdiction (professionally specialized) courts, administrative tribunals, ADR mechanisms, and international forums. The issue of court specialization has been occupying scholars for years, and an analysis that draws upon this body of work can be useful for recontextualizing the controversies over military commissions and religious tribunals, as well as other moves for jurisdictional individuation.

Most treatments of the issue of court specialization so far have focused either on matters of systemic institutional efficiency or on individual justifications for the creation of limited-jurisdiction courts and tribunals in specific fields; these justifications could emanate, inter alia, from specific market needs, political power of interest groups, or the agency of local or parochial activists. In contrast to these previous bodies of discourse, I attempt here to offer an assessment of the vices and virtues of court specialization from the perspective of the liberal democracy, with an eye to the overall design of the judicial system. In other words, I try to track the effects of specialization as a general institutional trend: What do we see when we examine the entire system from a comprehensive point of view? I argue that the reality of court specialization, while indeed subject to some trenchant criticisms, has a potential for promoting several significant democratic values, namely democratic deliberation, political pluralism, access to courts, transparency in the dispensation of judicial power, and more accurate judicial results in the aggregate. What the analysis reveals are a general wariness of overly concentrated judicial branches, on the one hand, and a striving for optimization of the democratic virtues of court specialization through carefully tailored diffusion of power, on the other.

Once we recognize that court specialization has already become a core characteristic of modern judicial systems, and if we accept that this trend can in fact produce beneficial effects supportive of democratic legitimacy, we can reassess controversies such as those concerning the military commissions in the United States and the religious tribunals in Canada. Such reassessment yields some counterintuitive normative implications regarding those seemingly outlier cases. Instead of constituting singular deviations from an otherwise coherent and homogenous judiciary, these episodes appear as recent instances in an already prevalent institutional reality of court diffusion, multiplicity, and competition. Set against this institutional background, political and distributive tradeoffs
can be elucidated, many of which have been largely overlooked in the partisan debates over military commissions and religious tribunals. It turns out that, while these entities do challenge liberal democracy, they may also serve to promote some of its values.

Analytically, the recognition that specialization is both a persistent and a defensible institutional trend entails a shift in the focus of the institutional discourse: Rather than merely questioning (or supporting) the creation and design of one court forum or another, we should devise mechanisms for interaction and mutual influence among the various court forums within our system. In the latter part of the Article, I engage in such an exercise by proposing two mechanisms that would enhance interaction across jurisdictions. These mechanisms are shown to have the potential for enhancing the democratic benefits of court specialization, while also limiting some of the possible downsides of a diffuse judiciary.

Part I briefly tells the stories of military commissions in the U.S. and Sharia tribunals in Canada. Part II brings the two narratives together as comparable episodes that suggest the larger institutional stakes involved in the trend of court specialization. Part III delineates the central critiques leveled against court specialization from the rule-of-law paradigm. Part IV, which is the normative core of the Article, attempts a defense of the systemic trend of court specialization by pointing to its possible benefits for democracy. Part V returns to the cases of military and religious adjudication and reevaluates these stories, looking at them as thought-provoking instances of specialization. Part VI then offers some initial thoughts on the kinds of institutional innovations we ought consider if we are seeking to optimize the democratic virtues of court specialization. A conclusion follows.

I. TWO STORIES

A. Military Commissions

The history of the military commission as the American mechanism of choice for dealing with wartime acts dates back to the eighteenth century. President Obama’s announcement is the latest chapter in the more-or-less notorious American history of the continuation of war by judicial means. In 1780, during the Revolutionary War, a board of officers appointed by General Washington tried a British spy.4 During the Mexi-

can–American War (1846–1848), military commissions, established under the authority of the American military, tried Mexican guerilla fighters acting independently of the Mexican military. Military commissions tried thousands of soldiers, officers, and civilians during the Civil War and its aftermath. When a citizen of a Union state (Indiana) was brought before such a military tribunal, however, the Supreme Court intervened and rejected the tribunal’s jurisdiction where trial by civilian courts was available. Military commissions also tried the colluders in the assassination of President Lincoln. President Roosevelt appointed a military commission to try eight German saboteurs that were captured in 1942 on U.S. soil. The trial took place in Washington, D.C., and six of the defendants — including one U.S. citizen — were executed following the Supreme Court’s summary affirmance of the commission’s jurisdiction.

Since the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, several of its laconic provisions have provided the legal basis for the use of military commissions. Foremost among these provisions is Article 36, which authorizes the President to prescribe modes of adjudicating cases that may be tried by military commissions and requires, “so far as [the President] considers practicable,” that the trial procedures “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” and that they not be inconsistent with the other provisions of the UCMJ.

Then came September 11, 2001. One week after the attacks, Congress authorized the President to “use all necessary and appropriate
force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.14 Nearly two months later, on November 13, 2001, President Bush issued a Presidential Military Order (PMO) concerning “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” in which he decreed that all individuals suspected of involvement in terrorism would be tried by military tribunals, and that such tribunals would be relieved from following normal court procedures because those procedures would be impracticable.15 The military tribunals were to “have exclusive jurisdiction with respect to offenses by the individual,” and, notably, the individual “shall not be privileged to seek any remedy or maintain any proceeding” in any other forum — domestic, foreign, or international.16

On June 29, 2006, however, before any person subject to the PMO was put to trial, the Supreme Court struck down the President’s military commissions system in *Hamdan v. Rumsfeld*.17 The Court held that the military commissions established pursuant to the PMO diverged substantially from the structure of the court-martial, which Article 36 considers as the “prototype” for the design of military commissions.18 Absent explicit congressional authorization, any divergence from the court-martial structure had to be specifically “tailored to the exigency that necessitate[d] it,”19 and a general presidential finding of impracticability would not do. Further, the Court found that the design of the military commissions also violated the provisions of Common Article 3 of the Geneva Conventions,20 which calls for unlawful enemy combatants to be tried by a “regularly constituted court,” affording “judicial guarantees which are recognized as indispensable by civilized people.”21 *Hamdan* concluded that the *ad hoc* nature of the military commissions,

20. Id. at 635.
along with several of their procedural and evidentiary regulations, did not meet these tenets of international law.\(^22\)

Congress, cognizant that the Supreme Court chose not to decide *Hamdan* on constitutional grounds,\(^23\) acted swiftly and produced the Military Commissions Act of 2006 (MCA) four months later. The Act, minus a habeas-suspension provision that the Supreme Court struck down in 2008,\(^24\) became the governing statutory source for the design, jurisdiction, procedure, and legal subject matter of military commissions. Following the election of President Obama and a lengthy halt in the work of the commissions,\(^25\) Congress enacted a revised chapter on military commissions in October 2009,\(^26\) following which the commissions resumed their work, still in Guantánamo Bay.

The jurisdiction of the military commission is to try “alien unprivileged enemy belligerent[s]” (where “alien” is defined as a non-U.S. citizen)\(^27\) for offenses defined by the MCA itself or by the law of war.\(^28\) The commission, as a body, is a jury-like group of at least five commissioned officers from the various armed forces\(^29\) who are appointed by a “convening authority” — the Secretary of Defense or his designee.\(^30\) Their sittings are presided over by a military judge,\(^31\) while military attorneys — a trial counsel (representing the prosecution) and a defense counsel — argue the cases.\(^32\) The commission hears evidence — although classified information remains protected\(^33\) — then deliberates in private, votes by secret paper ballot, and, if the accused has been proven guilty beyond a reasonable doubt, may convict by a two-thirds majority.\(^34\) Convicting and sentencing in capital punishment cases require,
However, a unanimous vote of at least a twelve-member commission.\textsuperscript{35} The convening authority may review determinations of guilt and sentences entered by the commission.\textsuperscript{36} Further, a finding of guilt is subject to automatic appellate review by the Court of Military Commission Review (CMCR), which is comprised of appellate military judges.\textsuperscript{37} The parties may appeal the decisions of the commission and the CMCR to the U.S. Court of Appeals for the D.C. Circuit, which holds exclusive appellate jurisdiction over these cases.\textsuperscript{38} The Supreme Court of the United States may then review the decision by issuing a writ of certiorari to the D.C. Circuit.\textsuperscript{39} Death sentences require further approval by the President.\textsuperscript{40}

Military commissions, then, are once again in action, now backed by the combined statutory approval of two very different administrations and Congresses. While their institutional legacy is yet to be formed, and while criticism is certain to remain, the commissions already exist as a stable mechanism that is worthy of evaluation.

\textbf{B. Religious Tribunals}

Institutions of religious adjudication are practically as old as institutionalized religion itself, expressing and supporting the presumption of many religions to prescribe and enforce a normative order for their members. This does not change when religion encounters liberal democracy; in fact, the issue of religious adjudication has been brought to the forefront by the prevalence of cultural and religious minority groups in industrialized, immigration-absorbing countries. Either explicitly shielded by legal, rights-based protections of conscience, speech, and religious exercise, or merely relegated to the “private” sphere of no overt governmental proscription or regulation, communities of shared religion continue to practice internal adjudication in fields of life that are deemed — often by community elites, if not by consenting parties — to bear significance for the preservation of the normative regime commanded by the religion. The most important field is the regulation of personal status and family matters: These issues determine group membership and therefore hold the central key to the continuation of the

\textsuperscript{35} Id. §§ 949m(b)(2), (c)(1). Exceptions may be made here as well: Where twelve members cannot be convened, as few as nine can be authorized to rule in a death sentence trial. Id. § 949m(c)(2).

\textsuperscript{36} Id. § 950b(c).

\textsuperscript{37} Id. §§ 950b(a), 950f.

\textsuperscript{38} Id. § 950g(a).

\textsuperscript{39} Id. § 950g(d).

\textsuperscript{40} Id. § 950i(b).
community as a discrete cultural unit, as well as to the identity and sense of belonging that group members experience.41

And therein lies the potential for conflict: The state, too, presumes to govern matters of family and personal status. It does so for the furtherance of various values — equal citizenship, gender equality (or domination), enforcement and preservation of prevailing (or receding) public mores or religious traditions, regulation of the labor market, and welfare state legislation. State regulation of family matters is expressed, among other institutional forms, in jurisdictional control over the procedures of family making and family dissolving, as well as in the resolution of disputes that arise out of these procedures. Laws are made to govern relationships, and courts — sometimes, specialized family or probate courts — are authorized to adjudicate related disputes. How are these institutions to deal with the parallel work of religious tribunals, which seemingly seek to control the very same kinds of relationships?

This conflict has engendered different institutional results in various locations and historical episodes. The fairly celebrated case of the swift rise and fall of institutionalized state-enforced Islamic arbitration of family matters in the Province of Ontario42 is instructive in several useful respects. The episode occurred between 2003 and 2005, when the Islamic Institute for Civil Justice (IICJ) — a somewhat obscure advocacy group — publicly announced that it would start to provide Sharia adjudication of family matters for Canadian Muslims.43 The announcement explained that the decisions of the Sharia tribunal (titled “Darul-Qada”) would be judicially enforceable like other arbitral awards, which are enforced by Ontario courts with a consistently high degree of deference pursuant to the province’s Arbitration Act of 1991.44 Finally, Syed

42. The episode unfolded in such scripted progression, and at such a relatively fast pace — a “perfect storm” of sort — that it quickly turned into a favorite test case for scholars of all things feminist, pluralist, and multicultural. See, e.g., Faisal Bhabha, Between Exclusion and Assimilation: Experimentalizing Multiculturalism, 54 McGill L.J. 45, 77–89 (2009); Ran Hirschl & Ayelet Shachar, The New Wall of Separation: Permitting Diversity, Restricting Competition, 30 CARDOZO L. REV. 2535, 2554–56 (2009).
43. For more detailed accounts of the events, see, for example, Bhabha, supra note 42, at 79–80; Pascale Fournier, In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment, 44 OSGOODE HALL L.J. 649, 653–56 (2006).
44. In many legal contexts, U.S. arbitration law has also tended regularly to enforce the awards of religious arbitration panels. For a critical assessment, see generally Michael C. Grossman, Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process, 107 COLUM. L. REV. 169 (2007).
Mumtaz Ali, the person behind the initiative, said that “good Muslims” would be expected to subject their family law disputes to resolution by the Sharia arbitration mechanism, rather than the state’s civil court system and its secular family laws.45

Various advocacy groups, primarily those concerned with women’s rights, promptly objected to the announcement and to its presumed implication — namely, that the government had granted an orthodox Islamic institution the power to adjudicate with finality disputes relating to the family matters of Canadian Muslims.46 A heated public debate ensued, infused by the misled perception shared by many media outlets and public activists, that the IICJ announcement represented a new development in Ontario family law, as well as in the balance of power between cultural groups in Canada.47 Ontario’s government appointed a former attorney general known for her extensive work in feminist activism to review the issue. This review attempted to moderate the emotional debate and put the matter back in the framework of Ontario arbitration law as well as to confront more generally the challenges of a liberal democracy facing a multicultural constituency. It re-emphasized that arbitration law in Ontario had not changed since 1992, and that, since that time, it had regarded arbitral awards of religious tribunals in family matters as being judicially enforceable, to the same extent as any other case of arbitration.48 It further noted that Jewish religious tribunals had been regularly arbitrating family matters under this regime, as had some Christian and Muslim forums.49 The review recommended retaining the law allowing arbitration of family matters, including in religious form, while enhancing some of the protections granted to weakened participants in those kinds of procedures.50

How would a Sharia tribunal function under the review’s recommended arrangement? It is hard to say, because there is no single mold to fit the category (and the IICJ has never presented a clear blueprint for its arbitration plan). In addition to a variety of schools, sects, and traditions, the practices and beliefs of religious communities vary by local, regional, and national culture and custom. In the absence of an authori-

47. See id. at 655–56 (describing the public debate); Hirschl & Shachar, supra note 42, at 2554 n.58 (stressing the fact that the IICJ announcement was premised on a “preexisting legal framework”).
49. Id. at 56–61.
50. Id. at 133–37.
tative institutional hierarchy to dictate and review primary and secondary rules for the adjudication of family disputes, scholars — both religious and secular — diverge widely on the interpretation of sacred texts. Still, some institutional characteristics are likely to be shared by the kinds of arbitration panels that were envisioned in the Ontario controversy and in similar episodes elsewhere.\textsuperscript{51} Muslim courts actively adjudicate cases of various kinds in many countries — some as part of the formal state judiciary, others in the exercise of local community custom — so examples abound:\textsuperscript{52} The religious tribunal is presided over by a person or persons of that religion, usually with an accepted level of acquaintance with the texts and traditions of the religion, to the satisfaction of the community in which the tribunal functions, or at least to the satisfaction of the community activists or elites involved in forming the tribunal. The law governing the case is derived from the body of norms within Islamic tradition to which the members of the tribunal, and normally the parties as well, adhere. And, to comply with the procedural and structural requirements of the state’s arbitration laws, the tribunal maintains written records of arbitral agreements and awards.

Be that as it may, the political uproar was already too polarized to be moderated by a serious assessment of the issues at stake. The Legislative Assembly of Ontario acted swiftly and created an amendment to the Arbitration Act rendering all arbitrations of family matters that are not based on Ontario (or another province’s) law unenforceable in the province’s courts.\textsuperscript{53} Thus, the mere act of publicizing the unnoticed legal status quo in the area of family-dispute arbitration led to its abrupt overhaul — perhaps thanks to overdue public deliberation, but arguably also due to the hyperbolic politics of the post-9/11 culture wars.\textsuperscript{54} The Sharia arbitration controversy serves as an intriguing case of institutional anxiety, whose winners and losers remain unclear.

\textsuperscript{51} Another notable panic arose in England, following remarks by the Archbishop of Canterbury, who called for recognition of the interest of British Muslims in Sharia-based family adjudication. See Ruth Gledhill & Philip Webster, \textit{Archbishop Argues for Islamic Law in Britain}, TIMES (London), Feb. 8, 2008, at 1 (reporting the statement and the heated debate that ensued); \textquote{Sharia Law — What Did the Archbishop Actually Say?}, \textit{THE ARCHBISHOP OF CANTERBURY} (Feb. 8, 2008), http://www.archbishopofcanterbury.org/1581 (providing a statement by the Archbishop).


\textsuperscript{53} Family Statute Law Amendment Act, S.O. 2006, c. 1 (Can.).

\textsuperscript{54} Or indeed a combination of the two elements: As Cass Sunstein has suggested, deliberation over a heatedly contested topic may lead to radicalization, rather than cooperation. \textit{See} Cass R. Sunstein, \textit{Deliberative Trouble? Why Groups Go to Extremes}, 110 \textit{YALE L.J.} 71, 74–75 (2000).
II. MILITARY COMMISSIONS AND RELIGIOUS TRIBUNALS: INSTITUTIONAL COMMONALITIES

The two narratives described in the previous Part seem very different from each other. Each has its own distinct legal, political, and social context. The military commissions case is a story of the evolution of violent modes of fighting terrorism into stable institutional structures. The Sharia tribunal case is a story of the clash between cultural distinctions and democratic institutions. But I believe they share some important aspects that warrant thinking about them in tandem.

Both episodes, as signified by the harsh debates they invoked, reflect a concern for the values upheld by the idea of the “rule of law” — namely, the notion that the force of the state should be dispensed against individuals only through the time-honored, rational, consistent, visible, and reviewable procedures of a constitutionally grounded judiciary. Furthermore, both military and religious adjudications pose an arguably extreme challenge to this concept of rule of law, as military and religious institutions often challenge the premises of liberal democracy more generally. While etiologies and assessments of these two fields of social action within the state abound and differ, the institutions of the military and religion present comparable challenges to the prevailing structure of legal ordering in the post-industrial world of democratic, liberal, secular government.

Two related challenges are at play here. The first challenge stems from a problem of purpose: Military commissions and religious tribunals function in an institutional context that does not share the normative premises of liberal democracy; they have a distinct “institutional role morality,” so to speak. They are not institutionally dedicated to sustaining freedom and following due process because the fields of social action they belong to — the martial and the ecclesiastical — profess societal roles that are distinct from those of liberal democratic govern-


ment. This difference in purpose entails similar distinctions in institutional culture and design. Thus, both military and religious institutions submit, at least to some extent, to an authoritarian and non-deliberative regime of rulemaking and rule applying. Their procedures for appointing judicial officers and preserving the tribunals’ independence submit to fewer accountability checks. They are sometimes exceptionally deferential to the unreviewable discretion of a local adjudicator, as when an officer is authorized to try, convict, and punish a soldier during battle, or when a community’s religious leader becomes the first and last resort for the resolution of complex disputes.

These differences are the basis for the second challenge: As adjudicatory bodies, both military commissions and Sharia tribunals serve an institutional purpose that is distinct from the purposes we are used to attaching to a centralized, hierarchical, deliberative, and rational national (or state) judiciary. Military commissions are an organ of the military, which is institutionally devised to concern itself with the protection of politically designated national interests by violent means; military jurists are still soldiers embedded in this distinct institutional culture. Sharia tribunals are an institutional means for expressing, preserving, and enforcing a body of norms enshrined by Islam as the mandated way of life for its followers. These purposes have no necessary connection to the role of judicial power in a democracy, which is regularly understood as upholding an equal rule of law by enforcing democratically enacted laws and the constitutional structure that underlies them; this is the accepted raison d’être of the core judiciary.57 And while the judicial officers who preside over military commissions and religious tribunals may be fully dedicated to the constitutional order, the institutional context in which they are embedded complicates their field of normative commitments: They may be “judges,” but they are also military officers or members of a religious order or community.

Therefore, the controversies over the creation of military commissions for trying terrorism suspects and Sharia tribunals for arbitrating family disputes of Muslim Canadians both reflect a common sense of anxiety: the fear of submitting the judicial power of government — regularly understood to be handed to the generalist judiciary (under the supervising guidance of a high court) under the best available liberal so-

57. The concept of the “core judiciary” relates to the vertical structure of general jurisdiction courts that encompass the institutional center of judicial power (in the U.S. federal system, for example, the district courts, circuit courts, and Supreme Court). For a pronouncement of the essential democratic mission of core judiciaries, see, for example, Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16, 36 (2002) (arguing the “role of the judge in a democracy is to protect the constitution and democracy itself”).
cial contract\textsuperscript{58} — to the control of institutions that function within an essentially non-liberal and non-democratic setting, one from within government (the military), the other from outside government (the religious establishment). The prevailing concept of “rule of law” seems to be placed under extreme attack from two opposite fronts that appear to coalesce beyond the horizon.

But the combined narrative of the two episodes — the military commissions and the religious tribunals controversies — can also be told in an altogether different manner. This narrative should be seen not necessarily as the threat of illiberal forces to the institutional integrity of democracy’s judicial power, but rather as the embodiment of a much broader institutional reality in the design of court systems: the trend of court proliferation through specialization, on which I elaborate in the following paragraphs.

Seen within this context, the two episodes are set against a background of a broader institutional picture, and, as such, are rendered more complex and perhaps less clearly traceable along familiar ideological lines. Indeed, from the discussion to which I turn next, a revised image may emerge of what the general notion of a “court” — that is, the institutional embodiment of the state’s judicial power — can and should mean in today’s democracy.

A. Episodes Recontextualized: Military Commissions and Religious Tribunals as Instances of Court Specialization

I suggest recontextualizing the two cases addressed here — that of the establishment and persistence of military commissions, and that of the failed attempt to garner recognition and inclusion of religious arbitration — as episodes in the general trend of proliferation of court forums through specialization. The proliferation trend, tracked by scholars of court design for several decades,\textsuperscript{59} is expressed in the breakdown of the single, centralized court — a recognizable institution of limited size and comprehensive jurisdiction — into an array of forums that exercise judicial power in court-like fashion. In the absence of a single physical presence, one must seek the institutional elements that comprise judicial action in order to identify the breadth of a court system. Two elements — judicial power and court-like setting — characterize the institutions that have been created by the proliferation and diffusion of court forums. A brief discussion of each of these two elements follows.

\textsuperscript{58} See John Rawls, Political Liberalism 231–40 (2005).

1. Judicial Power

What constitutes judicial power? The U.S. Constitution, which includes an early iteration of the concept, creates the institutional network that is designated to wield the judicial power of the United States, but the Constitution does not define its meaning. Rather, it pronounces judicial power as an essential element in the structure of government and demarcates its boundaries against the comparable powers of other departments of government. Seeking to explain the nature of judicial power, the Constitution’s most eloquent proponents — the authors of the Federalist Papers — relied on the theoretical and practical force of Montesquieu, “[t]he oracle” who had previously plotted the design for a government of separated powers. For Montesquieu, judicial power is dispensed when a ruler “punishes criminals, or determines the disputes that arise between individuals.” Hence the combination of “judicial” and “power”: An act of adjudication — determining the implication of a legal rule on individual circumstances — is exercised by a social organ whose determinations are binding and enforceable. When that organ belongs to the governmental apparatus, the judicial power is a power of the state.

2. Court-Like Fashion

What constitutes a court? Martin Shapiro captured the institutional essence of “courtness” as “conflict structured in triads,” and noted the universality of such triads in practically all known societies. Lon Fuller defined the “the distinguishing characteristic of adjudication” — in contrast to other modes of social ordering — as the participation accorded to parties in the decision-making process by “presenting proofs and reasoned arguments.” The institutional backbone, then, is a structure that brings together (at least) two disputants and a third party entrusted with rendering a decision regarding the dispute — a decision that is affected

---

60. The Constitution mandates “one supreme Court, and ... such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.
61. See id.
64. See Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601, 1609–16 (1986) (arguing legal interpretation cannot be maintained “without an entire structure of social cooperation” — the social agents of enforcement and acquiescence).
by the parties’ pleadings and bears practical importance to the parties, such that they would have reason to consider obeying it.

But there is more to “courtness” than the triangular structure of argument and decision: It seems useful to be able to distinguish between a public-school teacher resolving a dispute over the possession of a toy and a judge resolving a custody dispute among divorcing parents. As Foucault noted when wondering why a populist movement would choose to replicate such a class-settling device for the exercise of “popular justice,” the concept of the court implies not only a “third element” (the neutral arbiter), but also a “reference to an idea, a form, a universal rule of justice,” an assumption that decisions are made “on the basis of some concept of justice which exists in and for itself.” It is an institution that invokes a certain set of rules and standards that reflect an ideological system. The court, then, is a triad that speaks a certain language — that which we are accustomed to identifying as the language of the law, with statutes, precedents, interpretive methods, fact-determination procedures, and ultimate judgments. Finally, the court is a cultural artifact, sustained by a set of rituals and a more-or-less elaborate etiquette. Uniforms are worn, participants are referred to by titles that signify status or profession, and countless procedural rules channel and regiment all the players’ actions. Institutions that act in a court-like fashion, therefore, combine structure (triad), language (legal), and form (process).

An analytic adherence to the institutional backbone that combines judicial power and court-like settings leads to an inclusive understanding of the court system as an amalgam of diverse modes of adjudication. It leads to the recognition that there are multiple tribunals and forums that can be characterized as courts. A brief typology of the four major trends in judicial forum proliferation follows.

B. Specialization: Four Axes of Court Proliferation

The proliferation of court systems, from condensed units of comprehensive jurisdiction to a multiplicity of units dispensing judicial power through court-like settings, has taken several complementary forms. Four significant processes that account for much of this institutional tra-

67. Cf. id. at 353–54 (discussing adjudication “in the very broadest sense,” including its wholly informal instances).
69. Id. at 27.
70. See Geoffrey P. Miller, The Legal Function of Ritual, 80 CHI.-KENT L. REV. 1181, 1226 (2005) (“Legal proceedings contain many elements of ritual — the robes of the judges, the design of courtrooms, the requirement of formalized respect for the court.”).
jectory are court specialization, administrative adjudication, alternative dispute resolution, and the globalization of jurisdiction. I shall discuss each of the four briefly, with an emphasis on court specialization — a concept that turns out to be capable of capturing the full breadth of the court-proliferation phenomenon, as well as a useful institutional paradigm for reassessing the military and religious adjudication experiments.

1. **Subject-Matter Specialization**

The notion of specialization, a persistent and continuously debated institutional phenomenon in the design of courts systems worldwide, designates, in its most abstract form, the creation of a court with a limited scope of jurisdiction compared to other courts within the system. The specialized court, then, is a court that is designated to adjudicate a certain class of cases that is made “special” by its institutional differentiation into a separate jurisdictional realm; it does not necessarily imply an independent professional expertise on the part of the court’s administrators or adjudicators. Court specialization is often based on distinctions of subject-matter jurisdiction — for example, bankruptcy courts, drug courts, or courts of claims. But it can also distinguish cases according to personal jurisdiction, such as the defendant’s age criterion in juvenile courts, a defendant’s enlistment status in courts-martial, a litigant’s tribal association in tribal courts (in the United States, for example), or a person’s religious affiliation in religious courts (in Nigeria and Israel, for example).

Specialization can also derive from seemingly formal jurisdictional delineations, such as district courts in Massachusetts, whose jurisdiction...
is defined by limits on sentencing capacity. Justice Courts in New York, whose (sometimes lay) judges are restricted to adjudicating low-sum civil actions and local misdemeanor offenses, or small-claims courts in California, which are restricted to the adjudication of civil disputes of limited financial stakes. Although such courts may entertain a wide array of cases and causes, their jurisdictional limitations in effect mean that a large share of their docket is dedicated to specific kinds of cases (often the pathologies of low-income city life) and to certain classes of litigants (poor, minority, frequently unrepresented).

Specialization diverges not only by kind, but also by degree. Once the subject matter for specialization is determined and delineated, the relation between the specialized court and the remaining courts within the system — notably, but not necessarily, the court of general jurisdiction — has to be established. The specialized court may enjoy exclusive jurisdiction over the given subject matter, leaving such matters out of the reach of other courts. Alternatively, some degree of concurrence may be established, such that a case, or some of its elements, might be adjudicated both by the specialized court and the generalist court, with some mechanism of competition or coordination (system-run or party-induced) addressing the issue of case-channeling. The degree of specialization is also affected by the design of the vertical axis of adjudication: Review of a specialized court’s decisions may be directed to a generalist court of appeals, as is often the case (for example, bankruptcy in federal courts, probate in most state courts), or to a specialized appeals tribunal, as in the case of U.S. military commissions, or, in Europe, the creation of two- or three-tiered labor court systems. Finally,

76. MASS. GEN. LAWS ch. 218, § 26 (2010) (limiting district courts’ jurisdiction, inter alia, to “all felonies punishable by imprisonment in the state prison for not more than five years”).
77. N.Y. UNIFORM JUST. CT. ACT §§ 105, 202 (McKinney 2010); N.Y. CRIM PROC. LAW § 10.30 (McKinney 2010).
78. CAL. CIV. PROC. CODE § 116.220 (West 2010).
84. See, e.g., CONN. GEN. STAT. § 45a-186 (2009) (providing that probate decisions may be appealed to the Superior Court).
85. These systems include, respectively, Israel and Germany. See Ruth Ben Israel & Hadara Bar-Mor, Israel, in 9 THE INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND
specialization can also appear only at the appellate level, when cases from generalist trial courts are reviewed by high courts of unique jurisdiction: Consider the Court of Criminal Appeals in Texas, or the Court of Appeals for the Federal Circuit, which, among other topics, concentrates patent appeals from all federal district courts.

Specialized courts have existed for some time. Differentiated probate courts were active in several colonies and territories as early as the late eighteenth century. Adjudication of juvenile delinquency was separated from courts of general jurisdiction in some states and counties by the turn of the twentieth century. Federal bankruptcy courts have functioned, in one form or another, since 1978. Today, most state judiciaries, as well as court systems in other countries, are comprised of a variety of court units that exercise judicial power within a matrix of jurisdictional delimitations. Debate over the merits of court specialization continues, however, as do calls for further moves of specialization on the one hand, or for structural consolidation on the other.

The current central arguments for specialization concern systemic efficiency and uniformity: Specialized courts would relieve congested dockets of uniquely complicated or sensitive classes of cases, provide expertise in the institutionally tailored resolution of such cases, and offer legal uniformity. Conversely, detractors fear capture of specialized

86. TEX. CODE CRIM. PROC. art. 4.04 (2009).
93. See Sarang Vijay Damle, Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court, 91 VA. L. REV. 1267, 1275–79 (2005); Dreyfuss, Specialized Adjudication, supra note 92; Stempel, supra note 71, at 95–107.
judges by complementary special interests, judicial identification with
limited professional classes and factions, loss of broad-sighted judicial
experience, and lack of independence with regard to the appointing au-
thorities. They warn against losing the benefits of legal percolation
and cross-pollination that come with a common-law treatment of di-
verse dockets in generalist courts and question the value of legal uni-
formity when compared with such goals as deliberation and innova-
tion. While reform at the federal level is consistently slow —
rendering the federal judiciary a fairly concentrated system of mostly
generalist courts — the reality at the state level, as in many other coun-
tries, is of increasing specialization, with multiple courts and court ses-
sions dedicated to the adjudication of more or less distinct fields of sub-
ject matter.

2. Administrative Adjudication

Partly as an internal development following the expansion of the ad-
ministrative state, and partly as a reactive institutional measure to the
overloaded docket of federal courts, administrative agencies have been
increasingly engaging in adjudication. This well-documented process has
been backed by a series of Supreme Court rulings that order the fed-
eral courts, which are usually entrusted with a residual review power, to
defer to judicial administrative determinations in the absence of an un-
reasonable interpretation of a statute.

Through this process, expansive fields of legal regulation have in
practice been relegated to administrative tribunals that act like courts
and adjudicate, with high degrees of finality (due to scarce appellate in-
tervention), a variety of social matters. Some of the more salient institu-
tions of this type include the administrative law judges who hear chal-

---


immigration judges who adjudicate the status of foreigners seeking admission to the United States. Administrative adjudication encompasses many more spheres of governmental action, however, ranging from disputes over federal support for educational institutions to the enforcement of regulated labor standards. These issues and many others are subject to dispute resolution by administrative law judges, who conduct trials, determine facts (with no juries), interpret and apply the legal framework, and are subject to review both internally (by judicial or administrative review functions within the agency) and externally (by Article III courts). In addition to such formally designed courts presided over by administrative law judges, various governmental agencies, boards, and commissions, such as the Equal Employment Opportunity Commission and the National Labor Relations Board, are entrusted with exclusive jurisdiction over another wide range of disputes. These, too, adjudicate matters in a court-like fashion and may preclude original access to the judiciary’s courts.

These various administrative tribunals are, in a sense, a variation on the institutional theme of court specialization. They exercise governmental power in the resolution of certain sets of disputes and offer the judicial system heightened case-processing capabilities and fewer maintenance costs (among other reasons, because administrative adjudicators are exempt from Article III protections). At the same time, these are institutional entities that are distinct from courts. They operate within the facilities of the executive or the administrative branches, and consequently are less visible and their workings less familiar to the public than in the case of “courtroom courts.” They employ context-specific procedures that do not always conform to the detailed structure of statutory due process guarantees of the Federal Rules of Civil Procedure and they often produce less stylized decisions, often preferring efficient case processing over deliberate reasoning or detailed opinions.

102. Indeed, as Posner notes, “an important method of increasing judicial specialization . . . would be simply to reduce the scope of judicial review of agency action.” Posner, supra note 95, at 247.
103. At the same time, the adjudicatory functions of administrative agencies have been subjected to the more general and malleable constitutional requirement of (procedural) due process. See Mathews v. Eldridge, 424 U.S. 319 (1976).
104. See, e.g., Baum, supra note 94, at 1516–17 (describing the streamlining strategies adopted by the Board of Immigration Appeals).
3. *ADR*

Some of the familiar modes now concentrated under the category of “Alternative Dispute Resolution” have obviously existed since before ADR was theorized as a distinct institutional phenomenon. Disputes have been resolved through negotiation, and with or without mediation, long before governments introduced courts as state-sanctioned dispute resolvers. What turned ADR into an essential element in the matrix of courts is the increasing reliance of court systems on ADR mechanisms for the division of adjudicatory labor and the complementary willingness of the legal system to endorse resolutions reached by privately designed means — notably arbitration — as judicially enforceable results, at least as much as contractual agreements. Many state and federal courts now either offer or mandate an alternative route to dispute resolution in place of court adjudication, and various degrees of institutional symbiosis exist between judiciaries and providers of mediation and arbitration services.

Thus, in many jurisdictions, ADR no longer pertains only to commercial adversaries seeking inexpensive and low publicity dispute resolution. Legislators and judges increasingly channel other kinds of cases to these avenues, including domestic and family disputes, small claims, labor issues, employment discrimination cases, and even criminal proceedings. Many employers and retailers complement this trend with boilerplate contractual provisions mandating arbitration as the exclusive mechanism for dispute resolution. The systemic endorsement of ADR is often explained primarily as a cure for case congestion in the courts, based on the belief that disputes that can be resolved without the costly court process should be solved away from court. This institutional efficiency argument is augmented by moral arguments about the benefits — both consequential and deontological — of negotiation- and agreement-based resolution as compared to the individual and social costs incurred by the binary, adversarial, all-or-nothing nature of court-based adjudication. At the same time, critics abound. They raise concern, most notably, about the loss of visibility of a large share of adjudications.

---


catory events and about the distributive effects of litigation without the due-process guarantees of the national judiciary.109

Like the proliferation of administrative adjudication, the increasing centrality of ADR as opposed to traditional, court-based processes of dispute resolution has widened the institutional scope of adjudicatory spaces in which litigants might find themselves on the way to state-enforced resolution. Some of these spaces, such as formal arbitration panels, act similarly to courts (and are often staffed by lawyers or retired judges), while others, such as the varieties of mediation and negotiation, offer less formal structures for presenting claims and arguments, rendering decisions, or reaching agreements. These, too, when accorded recognition by the legal system, become a part of a litigant’s proliferated court experience.

4. **International Tribunals**

Reaching furthest from the familiar core of general jurisdiction courts, international jurisdictions are evolving as an added institutional layer of adjudication, further complicating the field of court-like structures. Unlike ADR, international tribunals are wholly products of state action. Unlike specialized courts and administrative tribunals, international tribunals are not a product of the state’s exercise of its independent and unilateral sovereignty. However, as in all three other cases, international tribunals are adjudicatory forums where people can find themselves litigating both civil and criminal claims and facing state-enforced consequences. Examples of tribunals of this kind are the International Criminal Court, which is gradually gaining influence and widening the scope of its prosecutions,110 and the European Court of Human Rights, a long-established forum with a comprehensive body of jurisprudence.111

If this depiction of what has happened to the unified concept of the “court” is accurate — a gradual diffraction and proliferation into multiple jurisdictional units with varying degrees of professional or procedural expertise, institutional integrity, and normative and cultural commitments — then the stories of the military commissions and of the religious tribunals might not be as extraordinary within a liberal democ-

---


racy as they may initially seem. Indeed, it may be useful to think about them, and to consider the costs and benefits incurred both by individual litigants and by communities as a whole due to such institutional possibilities, within the general framework of court specialization. As we will see, the central critiques leveled against the general phenomenon of court specialization are similarly applicable to the specific cases of military and religious adjudication. But, as I try to show below, some general democratic justifications for this institutional reality are available, and, at least to some extent, these justifications can also accommodate the military and religious variations on the theme of court specialization.

III. DEMOCRATIC CRITIQUES OF COURT SPECIALIZATION

A decline in the institutional uniformity of court systems is subject to at least three material critiques from democratic theory. They are related to each other and, to an extent, derive from each other: disruption of the rule of law (loss of uniformity, generality, and equality), weakening of the judicial branch, and capture by interest groups. While these critiques are of great weight, I believe that they fail to capture the complete story of the costs and benefits that result for democracy. I will first examine each of these critiques before proceeding to examine the possibly redeeming aspects of the institutional proliferation of adjudication.

A. Rule of Law

The “rule of law” critique is perhaps the most fundamental and is also, in a sense, the most abstract. The argument is that a central premise of the liberal state — the preeminence of an equal, uniform, and general rule of law to which all are subject and which is enforced through independent, impartial, and reason-based adjudication — is thwarted by the delegation of adjudicatory authority to institutions that are disparate in their procedures, their decision-making processes, and sometimes even in their first-order normative commitments (either latent or explicit). The rule-of-law ideal seeks to ensure that the legal system promotes the liberty and the dignity of those subject to it by treating persons as autonomous, rational people who are capable of understanding legal rules and of conducting their lives in accordance with these rules.112 For this goal to be achieved, the rule-of-law ideal calls for legal rules to fulfill a set of familiar conditions: They ought to be practicable, clear, public,
non-retroactive, consistent, and stable. Further, for it to be able to instruct rational behavior and earn legitimacy as a guarantee of liberty, the legal order has to be equally, consistently, and fairly enforced. This is the institutional aspect of the rule-of-law ideal, which arguably ought to affect the structure of the judiciary, as well as various other aspects, such as judicial independence or standards of natural justice. A unified and concentrated court system, in which all courts are similar to each other and adhere to a consistent, visible, and comprehensible procedural and hierarchical order, is capable of providing such institutional integrity.

This integrity is compromised, the argument goes, when the court system transforms into a multiplicity of forums, each professing a distinct institutional conception of how law is to be administered, and with some functioning, to various degrees, like bureaucratic units in a large and obscure administration. While the traditional conception of the rule of law implied, as Roberto Unger noted, an assumption that “the most significant sorts of power can be concentrated in government . . . [to the effect that] the hierarchies of class or role in society fail to affect the basic freedoms of the individual and to tyrannize over the most central aspects of his existence,” court specialization could arguably undermine this “impersonality of power” by reintroducing social and political divisions into the very institutional fabric of adjudication. Thus, the consistency in adjudication would be threatened, and citizens would no longer understand the procedures and reasons used in the enforcement of the law. A court system that splits into multiple obscure units of adjudication is difficult for the uninitiated to navigate and utilize and therefore undermines the premises of generality and equality that underlie the rule-of-law ideal.

Further, by incorporating systems of normative ordering that originate from sub-state or supra-state processes (such as forums of arbitration or of international adjudication) in the state’s judicial power, the limits of the legal order — the very content of the system’s secondary rules of recognition, change, and adjudication — become murky. As the state concedes its monopoly or shares its control over the design of processes of legal enforcement, individuals have less certainty as to

113. For a familiar formulation, see Lon L. Fuller, The Morality of Law 38–81 (rev. ed. 1969); see also Rawls, supra note 112; Raz, supra note 112, at 214–16.

114. Unger, supra note 112, at 178.

115. As Hart points out, jurisdictional rules serve in turn as rules of recognition, inasmuch as courts take part in defining (through interpretation) the content and meaning of laws. H.L.A. Hart, The Concept of Law 97 (2d ed. 1997). Of course, to the extent that courts are capable of altering a settled legal meaning, jurisdiction becomes a rule of change as well.
what institutional forms legal power will take and, as such, are arguably less informed about the legality of their behavior.

The conditions necessary for a legitimate rule of law would thus be substituted for assurances of efficiency, secrecy, and parochialism. This would reduce the legal system to a complex combination of diverse units of dispute resolution instead of a unified mechanism dedicated to guarding liberty and dignity under democracy.

B. Less Judicial Power

The related argument here is that breaking the judiciary into multiple units of distinct jurisdiction, some of them institutionally separated from the core judiciary, weakens the judicial branch as a whole. To serve its purpose of safeguarding democracy and preserving human rights against incursions by the majoritarian branches of government — to balance its proverbial lack of sword and purse — the judiciary should exhibit a unified, coherent voice, embodied in a condensed structure of courts of comprehensive jurisdiction, preferably guided by the centralized leadership of a powerful supreme court. Centralization, the argument goes, renders each court more powerful due to its wide scope of jurisdiction and renders courts across locales similar in power to each other, leaving less room for manipulation through forum shopping or strategic appointments.

Further, the general-jurisdiction court supports an image of the judicial profession as a distinct expertise: The notion that there is something exclusively intrinsic to the practice of judging, a wisdom embedded in institutional and professional traditions that enables judges to face, comprehend, and decide according to the law cases and arguments concerning the full array of social action. Arguably, this image — which likely resides somewhere between fact and myth — strengthens the public stature of the courts and provides needed legitimacy in their competition over power with the other branches of government.

116. See FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944) (stating that rule of law exists where rules “make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances”).

117. Discussing the limits of judicial expertise, Adrian Vermeule has distinguished between autarkic and nonautarkic cases, the former being cases to which a “legal right answer can be found solely through the resources of legal texts, history, precedents, and interpretive maxims” — that is, by an inward-looking reference to materials which are at the core of the lawyer’s professional expertise — and the latter being cases which require the input of extra-legal fields of knowledge. ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 134–35 (2009). A tendency toward court specialization can be seen to reflect the growing share of nonautarkic cases in the modern judiciary’s docket. As such, it may harm the perception of the judicial profession as relevant and applicable to the varieties of human experience.
All these virtues of a centralized judiciary are arguably hampered by increased court specialization, by greater deference to administrative adjudication, and by the gradual trickling of cases to out-of-court resolution. With these processes, the identifiable institutional core of the judicial branch is being gradually replaced with a murky combination of adjudicatory forums of varying degrees of institutional clout and influence. Powerful and sophisticated litigants — whether within or outside of government — can more easily strategize through the system and reach preferable forums, thus weakening the judiciary as an independent branch subject to law alone.

C. A Judiciary of Interests

The third kind of critique of the proliferation of judicial forums is premised on the fear that separated units of adjudication, each dedicated to a specific set of social concerns, are more amenable to capture by professional guilds, interest groups, political parties, or social classes than are generalist courts, which cater to diverse constituencies and employ a variety of ideologies. Courts of specific jurisdictions tend to be filled with judges of a related expertise or background — this is, after all, one of the main reasons for their creation. These judges may have ongoing affinities with certain classes of litigants (to which they might have belonged or which become familiar repeat players in the forum). They may also have prior attachments to certain sets of beliefs, ideologies, or methodologies held by the groups relevant to the specific subject matter.

For instance, an institutional symbiosis of sorts may evolve between a court for corporate matters and the business community, to the exclusion of the labor sector; a juvenile court may become ideologically, emotionally, and functionally invested in goals of treatment and rehabilitation, while pushing aside the demands of retribution, deterrence, and prevention; and an administrative immigration court may develop an affinity with the immigration policy of a presiding administration or Congress, or indeed attempt to block evolving popular sentiments. The point made by this critique is not that differentiated courts have a specific political tendency, but rather that, because of their limited scope of view on certain social phenomena that often implicate contexts more likely to

---


119. See Neil K. Komesar, Imperfect Alternatives 145 (1994) (“[S]pecialized courts substituted for general courts are more likely to be subject to long-term influence by information provision and even by replacement than general courts. Courts become more attractive targets for special interest groups as their jurisdiction is narrowed.”).
be recognized in generalist courts, limited-jurisdiction courts may submit to skewed understandings of the legal questions presented to them and may end up tending to serve parochial interests rather than the general welfare.120

Further, the critique goes,121 an increasing individuation of courts and court-like forums may also harm the quality of adjudication by introducing institutional incentives that are foreign to the agreed-upon purposes of the legal system. Thus, for example, courts of limited jurisdiction may be inclined to broadly interpret their jurisdictional empowerments in order to maintain a continuing flow of cases and thereby to justify their existence and perhaps garner more attention, respect, funds, and judgeships. Limited-jurisdiction courts are in charge of a finite class of cases and therefore cannot be utilized to tackle irregular caseload surges in other areas of the law, nor to compensate for drops in their own caseloads — a characteristic that, apart from its efficiency implications,122 may lead judges to artificially enlarge their dockets or delay resolution of simple cases to avoid boredom, lethargy, or the perception of laziness. Similarly, institutions and individuals that provide arbitration services often have financial interests in mind, in addition to the core purpose of dispute resolution. This may affect case selection (through professional specialization or pricing) as well as case treatment (in preference of repeat customers, for example). The arguable systemic result of court proliferation is a divided judiciary, which transforms the legal regime into an assemblage of islands of dispute resolution, each with its distinct professional, ideological, and institutional allegiances, and none (or very few) concerned with upholding the premise of an equal and general rule of law.

IV. DEMOCRATIC VIRTUES OF COURT SPECIALIZATION

Having stacked the deck with arguments decrying specialization and diffusion of judicial forums, what remains, from the point of view of democracy, to be said in favor of this ongoing process? I believe that there are possible benefits of court-system diffusion that do not rely merely on measures of case production, docket reduction, or court management. Indeed, most justifications of specialization focus on the benefits that would incur for a specific field of social action (corporate governance, gun control, real estate transactions, drug abuse, familial

120. See, e.g., Dreyfuss, supra note 94, at 25–52 (examining the Court of Appeals for the Federal Circuit).
121. See, e.g., Posner, supra note 95, at 251–52 (reviewing critiques of the parochial effect of specialization).
122. See id. at 256–62.
relationships) or a specific group of constituents (workers, children, stockholders, regulators) by allotting special political, material, and human capital to their institutionalized legal regulation.\(^{123}\) But the question here is whether a case can be made for court proliferation in the abstract; that is, whether there are identifiable general social benefits that could result from splitting the judicial branch into a multiplicity of units of varied jurisdictions.

I believe there is an argument to be made along these lines. I follow Joseph Raz in positing that it would be a mistake to require adherence to the rule-of-law ideal at any cost. Other social goals should be balanced against it;\(^{124}\) we might lose the ideal, but we may reach a more sustainable structure, ultimately supportive of a more realistic notion of rule of law. Indeed, while the costs outlined above for the sustenance of a uniform concept of rule of law are not negligible, a diffuse system of courts, when considered as a whole, may at the same time contribute to the promotion of several valuable democratic ideals, including support for deliberative modes of weighing and deciding the meaning and relevance of legal norms; advancement of pluralist treatments of competing visions of the good in heterogeneous societies; and facilitation of varied avenues of access to, and participation in, effective legal action by individuals and social movements. In addition, two kinds of truth-related achievements may be understood to result from the systemic proliferation of court forums: First, the political stakes involved in various disputes and in their legal resolution are given enhanced visibility; and second, at least to some extent, the disruption of institutional coherence and uniformity may produce epistemically superior legal outcomes in areas that enjoy the shared input of several forums — an effect that may contribute to democratic legitimacy.

These are all significant virtues that are worth recognizing and pursuing. Of course, just like the rule-of-law ideal, in order to be realized they cannot be maximized, rather merely optimized in light of the constraints imposed by the negative effects of court specialization. Under changing circumstances, some of these virtues may undermine each other, and specialization could sometimes be shown to promote a certain virtue on one level while weakening it on another. The real challenge, then, will be to identify the institutional designs that will best equilibrate these risks with the argued benefits of court proliferation. I take on this challenge in Part VI, below. But first, the analysis turns to each of the dem-

\(^{123}\) See, e.g., Baum, supra note 94, at 1507–21; Dreyfuss, Forums, supra note 92, at 11–14; Rottman, supra note 71, at 22–23.  
\(^{124}\) See Raz, supra note 112, at 229.
ocratic advantages drawn from the phenomenon of court specialization.\footnote{In the discussion that follows, I use the concept of “specialization” to incorporate the full panoply of court forum proliferation.}

\noindent \textbf{A. Deliberation}

Many theorists of governance share the vision of deliberative democracy, both as a condition for political legitimacy and as a model conducive to knowledge-based policymaking.\footnote{\textit{See}, e.g.\textit{,} Diana C. Mutz, \textit{Is Deliberative Democracy a Falsifiable Theory?}, 11 Ann. Rev. Pol. Sci. 521, 535 (2008) (“It is difficult to exaggerate the current enthusiasm for deliberation. The amount of time and money invested in it by governments, foundations, and citizen groups is staggering relative to virtually any other current social science theory.”).} Deliberation is the process of reasoned decision making through discussion.\footnote{\textit{See} Amy Gutmann & Dennis Thompson, \textit{Why Deliberative Democracy?} 1–39 (2004); Jon Elster, \textit{Introduction, in Deliberative Democracy} 1, 8–13 (Jon Elster ed., 1998).} It prescribes the creation of rational, open, and accessible avenues for arguing over and presenting reasons for social policies among constituents, policymakers, and state officials. Deliberative democracy warrants legitimacy because many stakeholders get a fair chance to be heard in the process of considering a policy and thus have an opportunity to materially affect its outcome. This substantiates the ideal of self-governance, as all participants have a conceded share in the resulting policy. In addition, deliberation enables constituents to comprehend the rational bases for a chosen rule or policy. This ensures the availability of critical review of the reasons for an action, as well as the capability to assess the success of the action in reaching its professed goals.\footnote{\textit{See Joshua Cohen, Deliberation and Democratic Legitimacy, in Deliberative Democracy: Essays on Reason and Politics} 67–91 (James Bohman & William Rehg eds., 1997); James D. Fearon, \textit{Deliberation as Discussion, in Deliberative Democracy, supra note 127, at 44, 55–58.}}

Further, deliberative democracy is considered a preferred mechanism for reaching knowledge-based policy choices for three reasons.\footnote{\textit{See} David Estlund, \textit{Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority, in Deliberative Democracy: Essays on Reason and Politics, supra note 128, at 173–204; Fearon, supra note 128, at 45–52.} First, it enables the aggregation of information about the regulated subject matter from multiple sources with varied points of view.\footnote{\textit{See}, e.g.\textit{,} Seyla Benhabib, \textit{Toward a Deliberative Model of Democratic Legitimacy, in Democracy and Difference: Contesting the Boundaries of the Political} 67, 71 (Seyla Benhabib ed., 1996) (discussing the capacity of deliberation to facilitate a public exchange of information).} An inclusive discussion preceding decision, which accepts the input of all parties involved, is bound to generate more information regarding the underlying facts and the possible effects of a policy than decision-making processes that limit access to only a few similar functionaries and resort to voting
on the basis of private knowledge alone. This can often raise the quality of policy outcomes because it requires decision-makers to confront preexisting beliefs, ideologies, and biases with added information prior to finalizing a position. 131 Second, inasmuch as democratic governance has to do with reflecting or fulfilling public preferences, beliefs, or sentiments, then deliberation serves as a mode of fleshing out those values through both rational argument and emotional resonance. Third, deliberation, properly designed, can serve to counter the adverse effects of groupthink, in which groups of relatively few members of like-minded institutional allegiance tend to embrace evolving consensuses and screen out countervailing arguments, thus neglecting plausible challenges to conventional wisdom. 132 Structured deliberation can ensure that opposing voices and competing visions are heard and considered and prevent groupthink dynamics from prevailing.

In the design of legal-judicial processes, deliberation takes various forms. It is worth noting the three most salient fields of deliberation that are structured into the very design of the common-law system of courts, including, for example, the U.S. federal judiciary. 133

(a) The trial. The format of the adversarial trial is designed as a stylized discussion among (at least) two parties, with the mediation of a third party (the judge), who is sometimes also the ultimate decider and at other times the mere facilitator of a deliberative process that is presented to an observing jury for decision. 134 The premise of open court, the structure of argument and rebuttal, of interrogation and cross-interrogation, as well as the right of parties to introduce competing evidence and the power of the judge to hold conference and mediate settlement — all serve to engender participation, interaction, argumentation, and the production of information, as well as the reaching of a rational decision, or at least the semblance thereof.

(b) Reasoned opinion and appeal. A second deliberative axis runs along the vertical hierarchy of court systems, between trial judges and appellate judges. In unelected judiciaries, trial-court accountability runs, at least formally, mostly upward — to the reviewing panels of courts of appeals and supreme courts. In the federal court system of the United States, for example, trial judges write opinions, explaining in rational terms their decisions for appeals-court judges to review and (mostly) affirm or (rarely) amend. Similarly, court-of-appeals judges produce rea-

131. See, e.g., GUTMANN & THOMPSON, supra note 127, at 11–12.
132. The seminal formulation of this idea is IRVING L. JANIS, VICTIMS OF GROUPTHINK (1972).
133. A fourth, highly significant, deliberative arena exists in many state judiciaries in the United States — judicial elections.
134. See Elster, supra note 127, at 2.
sioned opinions that serve as a basis for review by the Supreme Court. The signals sent by higher judges are then processed by lower courts, which react, interpret, apply, distinguish, disregard, and send reactions back up the hierarchical ladder regarding the quality of the superior instructions.

(c) The judicial panel. Rarely in trial courts, but normally in circuit courts and on the Supreme Court, judicial panels are constituted in groups of more than one, and the members of these panels thus enjoy the institutionalized opportunity to deliberate with their peers prior to reaching a collective decision. Although this appears to be the most classic deliberative setting of the three, it is paradoxically probably the least deliberative, at least at the Supreme Court level: With the escalating politicization of its makeup and the gradual increase in 5-4 splits along ideological lines, \(^{135}\) the U.S. Supreme Court often seems like a pure voting mechanism, and not so much a forum for discussion and persuasion. \(^{136}\)

Finally, the horizontal proliferation of court forums — splitting subject-matter jurisdiction among units of competing institutional structures and norms and creating various degrees of specialization — can also play a role in inducing deliberative modes of lawmaking and law-applying. Some horizontal deliberation is practically inherent to a judicial system that consists of more than a single judge or a single panel: As different judges come to adjudicate similar cases, especially cases whose resolution is not clearly derivable from superior-court precedent, they are regularly called upon by lawyers to look sideways and take account of prior treatments and proposed solutions. Over time — again, especially when high courts reserve judgment or produce vague, minimalist rulings — a conversation may develop among courts of parallel institutional levels (for example, state supreme courts, federal district courts, or, prominently, federal circuit courts). Through this discussion, judges elucidate and critique arguments, assess the effects of prior decisions, and track trends and trajectories in adjudication.

The court system, then, is re-imagined as a vehicle of democratic deliberation. While the judiciary is not a representative body, \(^{137}\)

---


\(^{136}\) In this respect, the Supreme Court resembles a jury panel: Juries do not produce explanatory opinions and are not institutionally required to engage in deliberation (nor even the semblance thereof), and so may resort to decision by mere voting. The Supreme Court, of course, invests much effort in opinion-writing and in back-and-forth jousting, but its outcomes on politically laden issues have become consistently reflective of mere numbers.

\(^{137}\) I set aside the case of elected judicatories, which complicate this account. While the
The judiciary thus becomes a structure for airing (through arguments) and for effectuating (through decisions) multiple legal understandings. Following the methodological tradition of the common-law system, a judge in one case is encouraged to make use of relevant judicial knowledge produced in other cases and to engage with that knowledge in deciding the issue at hand — by way of incorporation, rejection, distinguishing, or the various other interpretive strategies available to judges in a multi-focal system of adjudication. Through this process, more and better knowledge is produced. But perhaps more importantly, through this process, a variety of constituents who would otherwise lack the opportunity to converse with each other regarding the character of the legal order get to participate in such an ongoing deliberation. Through court proceedings, constituents can affect the legal views produced in localized adjudication, which in subsequent cross-court interaction inform other units of adjudication and policymaking.

Thus, while each court concludes the specific case it happens to adjudicate with a finalizing decision, it simultaneously adds a piece of information, argumentation, ideology, bias, or experience to the various relevant discussions conducted by courts and their constituents — for example, on the proper procedure for settling a certain issue, on the interpretation of a vague constitutional or statutory provision, or on the treatment due to a certain class of litigants. This is the deliberative potential embedded in diffuse court systems. The aggregate results of such deliberative dynamics — if noticed and acted upon — can lead to more informed and more democratically legitimate overall social choice.
es made by such centralizing functions as legislation, constitutional amendment (or other modes of constitutional reform), and, to the extent that it embraces strategies of percolation and deference, Supreme Court resolution.

If one accepts this account, then introducing institutional heterogeneity into the court system can further induce the deliberative dynamic that evolves from the mere multiplicity of similar judicial forums—that is, the idea of specialization. If deliberation benefits from multiple voices offering comparative views on common social matters, then the institutional corollary in the design of court systems would tend toward diversifying the kinds of judicial forums that participate in the process. Specialization is a way of reaching this diversity: It injects into the overall output of the judicial system a spectrum of voices and perspectives that are maintained in their separate clarity by keeping them in different judicial institutions. Courts that serve separate constituencies, or that submit to unique procedural norms or to distinct professional and methodological assumptions, are more likely to bear differently on common questions, thereby enriching the deliberative process.

Consider, for example, the legal regulation of the distribution of home-tending labor within households, among household members, and among (often migrant) care and cleaning workers. Multiple fields of legal regulation apply to this situation: labor and employment law, immigration law, and family law, in addition to the background rules of contract law and constitutional law. The optimally just regulation of this nexus of interests is a matter of intense deliberation in many contemporary democracies, and courts have no choice but to take part in the debate. In this context, the combined input of, and interaction among, family courts (determining the distribution of wealth between spouses with a sensitivity to familial concerns), the EEOC (specializing in the treatment of weakened groups in the workplace, plausibly including workers with home-care obligations, as well as care workers employed by temp agencies), immigration judges (familiar with the realities of a migrant workforce and with applicable governmental policies), and lo-

139. There are various venues of popular constitutionalism: see, for example, Bruce Ackerman, _We the People: Foundations_ (1991); Reva B. Siegel, “Dead or Alive: Originalism as Popular Constitutionalism in Heller,” 122 Harv. L. Rev. 191 (2008).

140. This model does not necessarily self-execute. In order to optimize its performance, certain institutional moves could arguably be required, such as limiting the role of the Supreme Court in reviewing certain kinds of inferior-court decisions, notably those that would benefit from unhindered inter-court deliberation. I pursue such an argument in the context of constitutional adjudication in Ori Aronson, “Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts,” 43 U. Mich. J.L. Reform 971 (2010). Additionally, inter-court interaction may sometimes require institutionalized facilitation. See infra Part VI.

eral generalist or small-claims courts (facing the myriad street-level civil and criminal disputes arising out of the friction of class and gender) offers the promise of amounting over time to informed insights and revealing harmful biases. These achievements might be drowned out within a single judicial institution that lacks the functional and ideological diversity of such varied institutions.  

While specialization induces deliberation by diversifying the processes of jurisdictional cross-pollination on matters of common interest, it is at the same time an act of institutional division and individuation. In this sense, specialization also presents a challenge to deliberation. As different courts grow apart, they develop idiosyncratic procedures and vocabularies, and their products may become less accessible, less appealing, and less relevant to the work of other courts. Indeed, the diversification of judicial institutional culture promotes deliberation, but diversification can also undermine the success of deliberation. The interest in democratic deliberation therefore serves both as a justification for specialization and as a basis for checking specialization’s extent and for designing mechanisms to maintain open avenues of communication among specialized forums. A few such mechanisms are explored in Part VI of this Article.

B. Pluralism

The recognition that practically all contemporary democracies are composed of individuals and groups holding divergent visions of the good and having multiple points of allegiance is, by now, widespread.  

As indigenous peoples, former slaves, immigrants, religious groups, and ethnic and national minorities have gained recognition as rights-bearing members of the general constituency and as bearers of valid conceptions of moral life, the prominent political theory of liberal democracy has

142. This dynamic does not compel a single party to litigate and re-litigate disputes in multiple forums in order to fulfill its deliberative potential. The deliberative mechanism rests on the assumption that multiple disputes implicating similarly situated individuals (for example, migrant care workers) regularly arrive at the various courts. Information produced in one case and in one forum therefore becomes available in others. Still, it is true that specialization, in general, may entail redundant court processes. But the cost for an individual litigant may be balanced by the benefit for the legal system as a whole. See infra Part VB(4). See generally Robert M. Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, 22 WM. & MARY L. REV. 639 (1981) (identifying the American court structure as “a form of redundancy” and presenting several systemic justifications for such a form).

143. See, e.g., Martha Minow & Joseph William Singer, In Favor of Foxes: Pluralism as Fact and Aid to The Pursuit of Justice, 90 B.U. L. REV. 903, 906 (“[I]n a free and democratic society, such as we aspire to in the United States today, . . . values pose irreconcilable conflicts that cannot be cleanly disposed of by reasoned argument.

come to incorporate a condition of equal respect for all reasonable competing value systems. 145 Political-value pluralism, then, is the ideal of the coexistence of several culturally dependent moral visions within a single political community. 146 Minimally, pluralism entails respect for and accommodation of competing worldviews and cultural contexts in the design of the public sphere, in the allocation of resources, and in the processes of deliberating these policy choices. 147 Optimally, pluralism calls upon individuals and groups to communicate with, and learn from, other such groups, so as to enrich contextual and relational resources of moral reflection within groups, 148 as well as to facilitate the availability of choices of exit and entry for individuals who seek to shift allegiances and memberships.

In the institutional design of courts, specialization can serve several pluralism-enhancing goals: expressing the pluralist nature of multicultural societies (expressive-symbolic function); accommodating the institutional needs and demands of social, cultural, and professional groups (substantive function); and facilitating an overt exchange of moral perceptions and legal visions through the products of diverse judicial forums (deliberative function). The combined product of generalized courts, family courts, business courts, community courts, administrative panels, religious tribunals, and courts-martial, to name several forums, emerges as the composed content of the common law, with its share of distinctions, contradictions, and convergences. Because the institutional idiosyncrasies of each kind of court produce, in effect, distinct forms of legal experience, and because very few of the decisions of these various forums — especially those that are institutionally distant from the core hierarchy of general-jurisdiction courts — are subject to effective, unifying review by a centralized high court, judicial output under a specialization model maintains a diverse character to the legal order, and as such constitutes a field of state power that recognizes, expresses, and facilitates coexistence among multiple visions of social welfare.

Importantly, these virtues appear when one adopts an aggregated view of judicial output — a shift of focus from the distinct outcomes of specific cases to an overall evaluation of court-system results. Thus, while an internal assessment of any single case under a proliferated regime would regularly find particularistic tendencies, as each court expresses the ideological biases inherent to its area of jurisdiction, an

---

145. See Rawls, supra note 58, at 144–50.
overview of the system as a whole would recognize the aggregate mosaic of institutional and normative variations upheld by the specialization model.

The shift to an overall evaluation of systemic outputs (greater pluralism in the aggregate) implies an underlying institutional tradeoff. On the one hand, generalized courts offer greater protection from parochial capture, but they risk crowding out exceptional voices and outlier positions, which would be dwarfed by mainstream adjudication. On the other hand, specialized courts are more prone to individual instances of bias, but at the systemic level they ensure that multiple normative visions are active and visible at all times. From a pluralist point of view, this kind of institutional exceptionalism is pertinent to the maintenance of multiple and diverse judicial forums.

C. Access

Access to courts — the opportunity to bring a grievance of illegality before a court, combined with the possibility of having the claim garner judicial redress — is regularly considered a staple of constitutional adherence to the rule of law. The interest in maintaining an open avenue to a judicial forum is often treated as an individual right (of some level, constitutional or other), which either stands independently of other “substantive” rights (as an aspect of the right to petition the government, as a due process-based guarantee, or as a dignity-based right to a hearing of sorts) or as ancillary to them (and hence contingent upon the merits of the underlying claim). An alternative perspective designates the issue of access as an assurance of the separation of powers: Because the judiciary cannot initiate action and is passive unless petitioned to intervene, it requires open avenues of access if it is to be an effective institutional counterpart in the dispensation of state power. Finally, to the extent that the court is viewed as a forum for democratic deliberation, access is a mechanism of civil participation in legal and political discourse.

150. See, e.g., Bounds v. Smith, 430 U.S. 817, 828 (1977) (holding that prison authorities must provide assistance for prisoners in the preparation and filing of legal papers due to the “fundamental constitutional right of access to the courts”).
From these moral views of the importance of access arise various normative implications. A right of access to court often entails limitations on the fees that the state can collect for providing the service of court hearing, especially when there is no other accessible mode of treating the grievance and when the person seeking judicial redress has limited resources.\footnote{155. See, e.g., Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that due process prohibits a state from denying individuals seeking a divorce access to the courts, even if they cannot pay court costs).} A right of access can lead to the provision of legal advice and representation for those who cannot afford them.\footnote{156. See Gideon v. Wainwright, 372 U.S. 335, 339–43 (1963) (holding that the Sixth Amendment’s right to counsel in criminal prosecutions extends to state prosecutions through the Fourteenth Amendment).} Similarly, the importance of access justifies allowing non-represented litigants to present their claims, even if they fail to adhere to the intricate procedures that are the attorney’s expertise or to pay the required court fees.\footnote{157. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (noting that \textit{pro se} pleadings are held to a less stringent standard than the formal pleadings of lawyers); Andrew Scherer, \textit{Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings}, 23 HARV. C.R.-C.L. L. REV. 557, 579–80 (1988).} The principle of access to the courts can serve to limit the power of other branches of government to strip courts of jurisdiction and thus block some kinds of grievances from reaching judicial consideration.\footnote{158. See Giovanna Shay & Johanna Kalb, \textit{More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)}, 29 CARDOZO L. REV. 291, 320–328 (2007) (reflecting on the detrimental effects of jurisdiction-stripping on the right of access).} Indeed, it may also serve as a basis for the judiciary itself to broaden its jurisdiction, by minimizing the scope of filter doctrines such as standing, justiciability, and political questions.\footnote{159. See generally Cass R. Sunstein, \textit{What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III}, 91 MICH. L. REV. 163 (1992) (positing that \textit{Lujan} is a “misinterpretation of the Constitution” and discussing the issues in proving standing that will arise in light of the decision).}

To some extent, the proliferation of court units by way of specialization can provide a structural reinforcement to the goal of access. By incorporating a measure of diversity in the design of the court system, certain parties and matters that otherwise might not have found their way to court are accommodated through institutional variations. The structure of the core judicial proceeding — the one typical of general jurisdiction courts — can be daunting or otherwise alienating to some classes of potential litigants: Consider the member of a religious community who is wary of bringing her claim at secular court, perhaps for fear of social sanctions by members of her own group. Similarly, the nature of the paradigmatic court process is sometimes viewed as foreign to the characteristics and demands of certain kinds of cases: Consider the military
commander who adamantly objects to the adjudication of terrorist suspects in open civilian court, perhaps for fear of divulging classified information on surveillance or interrogation methods.

The important thing to note in such cases is that the justifiability or reasonableness of the apprehension of the “regular” judicial forum is irrelevant to the issue of access: If the path to a general-jurisdiction court is firmly blocked for whatever reason (effective peer pressure, political resistance, etc.), then the institutional choice that remains is either a specialized court of sorts — which would ensure at least some degree of access to a judicial forum — or no court at all. In that sense, more specialization can sometimes serve to expand judicial power rather than diminish it, as one of the critiques outlined above maintains. If one believes that greater access to judicial forums whose formation and functioning are subject to at least some degree of democratic accountability is a worthy purpose, then specialization could be conducive to that end.

D. Transparency

Another democratic virtue to be considered is the visibility of the political stakes that are inherent to all legal contexts, court processes being no exception. Because any judicial action, and even more so judicial actions aggregated according to one criterion or another, are in effect exercises in the distribution of power among individuals, groups, classes, and institutions, an institutional design that renders the mechanisms of power allocation more transparent promotes greater accountability, as well as accessibility for those seeking to effect social change through the courts.

The move to specialization reflects the reality that very different things are happening — different individual and social interests are at stake — when a court decides disputes between sophisticated corporations, between a corporation and a consumer or a shareholder, between family members, or between the government and a citizen or an immigrant or an alien combatant. A diversity of court forums — each dedicated to certain subject matter and each developing its own distinct procedural norms — renders visible and comprehensible the many facets that comprise the legal regime and defies the illusion that “the law” enjoys some inherent coherence that is attainable by institutional means. To the extent that not everything is generalizable in the legal order — that there are at least some essentially contextual aspects to how legal power is invoked, utilized, and dispensed — then generalist courts

160. See supra Part III.B.
161. See, e.g., Paul W. Kahn, Freedom, Autonomy, and the Cultural Study of Law, in
serve to cloak this recognition and specialized courts bring it to the fore. By dividing adjudication into separate and distinct units of jurisdiction, specialization makes visible the doctrinal, institutional, and ideological divisions and distinctions that pervade the legal order.

This view may not present the legal order in the best possible light, indeed, it seeks to demystify the judicial role by linking it to the specific classes of events or individuals with which it interacts and among which it allocates power. A specialized view of adjudication thus undermines the abstract concept of the “court” as a locus of obscure knowledge and methodology that is detached from, and independent of, the subject matter that it faces.

Institutional design that seeks to reveal the multiple political stakes involved in different kinds of adjudication serves a democratic purpose. Such institutional transparency allows constituents to know more — not everything, to be sure, but more than in an inclusive generalist court — about how government functions, and specifically what types of political forces influence and are influenced by judicial action in its various forms. Inasmuch as administrative obscurity serves as a source of arbitrariness and a shield from scrutiny, then institutional divisions along subject-matter lines — somehow (rationally) defined — may counter these effects. Furthermore, a clearer understanding of the political stakes of various court processes can benefit activists who seek to effect change through legal means: Institutional biases that may evolve within specialized units can be utilized by those favored by the court, but at the same time these biases also provide visible targets against which to mount attacks, in and out of courts.

There is, of course, a fine line here, since a forum can be rendered so inaccessible — for example, by way of secrecy or deference to obscure expertise — that the potential for greater visibility through individuation would be lost, and a preference for empowering familiar generalist courts would prevail. But this concern can be dealt with by designing specialization in a way that would institutionalize avenues of interaction and oversight among the various court units, thus preventing one court or another from falling completely “off the grid.” I discuss such possibilities in detail below.

CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM 154, 163 (Austin Sarat & Jonathan Simon eds., 2003) (“[T]here is no law in the abstract. There is only a field of social relationships organized, in part, through assertions of law.”).

162. Cf. DWORKIN, supra note 55, at 52 (“[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong . . . . [T]he history or shape of a practice or object constrains the available interpretations of it . . . .”).

163. This is not, in itself, necessarily a bad thing — this depends on the politics of the court and of the evaluator.
E. Knowledge

An active consequentialist strand in legal-institutional design scholarship seeks to identify institutional arrangements that would attain epistemically superior decisions.\(^{164}\) In other words, the question asked is how lawmaking institutions should be designed so that the decisions they produce will be as “correct” as possible, according to an exogenously applied criterion. Thus, if one assumes that there is truth to be tracked concerning the correct interpretation of a statute or a constitutional provision, institutional design ought to first and foremost facilitate reaching this truth.\(^{165}\)

Notably, this is not a democracy-based endeavor. Its goal is more truth and greater accuracy (however those are defined) in the making and application of law — not the achievement of liberty, equality, or self-governance. However, as an empirical matter of discursive fact, perhaps the two most prominent theories of legal interpretation in the past few decades have attached epistemic assumptions to legitimacy-oriented considerations. These are originalism,\(^{166}\) on the one hand, and Dworkinian integrity-based interpretivism,\(^{167}\) on the other. Both theories state as their goal the attainment of an exogenously existent answer to questions of legal interpretation — the public meaning of textual norms at the time of enactment in the originalist case,\(^{168}\) or the result that would best fit and justify a coherent political theory embedded in the law over time in Dworkin’s formulation. And each theory believes that judges who pursue its goals would support and legitimate democracy (by deferring to the public will of majoritarian or super-majoritarian representatives\(^{169}\) or by giving substance to the moral undercurrents of the constituency\(^{170}\)). Therefore, at least in the context of these two prominent theories, epistemically sensitive institutional design can promote democratic ideals as well.


\(^{165}\) See, e.g., Vermeule, supra note 117, at 7–9.


\(^{167}\) See, e.g., Dworkin, supra note 55, at 225–75 (proposing a theory of “law as integrity,” which posits that “legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative”).

\(^{168}\) See, e.g., Adam M. Samaha, Originalism’s Expiration Date, 30 Cardozo L. Rev. 1295, 1329–31 (2008).


\(^{170}\) See Dworkin, supra note 55, at 186–216 (arguing for the virtues of integrity for democratic legitimacy).
The prevailing paradigm in the institutional analysis of epistemic competence follows Condorcet’s Jury Theorem, which predicts that the aggregated opinions of the majority of a group of decision makers, whose members are on average more likely than not to get an answer right and vote independently of each other’s position, will approximate the truth with greater accuracy as the size of the group grows.171 A central factor in the viability of the theorem is the existence of uncorrelated biases within the group’s members. In a large enough group, biases that pull in contrasting directions are expected to wash each other out, leaving the deciding votes to members who are free from truth-skewing biases.172 Applied to the design of decision-making mechanisms, the interest in preserving uncorrelated biases can help to justify institutionalizing diversity — for example, by appointing non-lawyers to the Supreme Court (to counter the correlated biases that plague a bench composed of members with relatively similar professional backgrounds).173

Viewed in aggregate, the multiple decisions of trial courts on a similar question can be understood, in jury theorem terms, as votes by members of a group on a matter of general legal import. Thus, for example, the correct interpretation of a commonly invoked constitutional clause can become the subject of multiple opinions by trial courts sitting in diverse cases over time and throughout the country. This multiplicity is epistemically beneficial, since it enables the aggregation of diverse information produced in the numerous proceedings, and, if a majority (or even a plurality) emerges from the views of the various courts, then that may point to the more accurate answer to the question at hand.

There are several possible agents of aggregation in this model — that is, institutions that have the capacity to “tally the vote” by tracking trial court trajectories and acting upon emerging results. Foremost is the Supreme Court, which enjoys an overview of lower-court practices and can notice robust voting results over time and across jurisdictions. Of course, the epistemic advantage that emanates from the aggregate information produced by multiple courts can be readily stifled if appellate judges disregard accumulated trial-court knowledge and replace discernible majorities in trial-court decisions with their independent discre-


173. See, e.g., VERMEULE, supra note 117, at 137–42.
tion. This may justify a greater degree of deference than the one practiced currently by high courts vis-à-vis inferior courts, as well as a heightened sense of independence, activism, and responsibility on the part of trial courts. Lawmaking institutions — legislatures as well as forums for drafting constitutional amendments — can also make use of accumulated trial-court knowledge in order to achieve epistemically superior rules.

Assuming the aggregated information produced by trial courts can be put to beneficial use, court specialization can serve as a source of diversity within the voting body, such that biases that emanate from the particular institutional characteristics of one class of courts could be balanced by those of other courts. If generalist judges tend to exhibit, to some extent, similar biases — for example, because selection mechanisms bring into institutions people who are similar to those already in them, or because institutional norms and culture affect political commitments and modes of reasoning — then a system that breaks down generalized adjudication into separate units of specialized adjudication (each with its own institutional biases, to be sure), is more likely overall to produce results in which uncorrelated biases are neutralized and more accurate outcomes emerge.

Notably, this epistemic benefit of institutional diversity can accrue only when different kinds of courts get to decide similar questions. This might justify opting for concurrence rather than exclusiveness when designing the jurisdiction of specialized courts. Be that as it may, some kinds of questions would regularly require resolution by diverse courts, even under a regime of exclusive subject-matter jurisdiction. Many constitutional standards, for example, are likely to come up in various, unrelated cases, such as the interpretive challenges invoked by the due-process clauses of the Fifth and Fourteenth Amendments, which apply in similar ways to practically every court in the system.

F. Summary: Assessing Overall Outcomes

I have argued, so far in the abstract, that although some traditional tenets of liberal democracy — rule of law, judicial power, and unbiased adjudication — may be threatened by the move toward court specializa-

174. See id. at 50–51.
175. See generally Aronson, supra note 140 (arguing for a model in which the federal district courts, not the Supreme Court, exercise judicial review).
176. This entails a rejection of passivism-inducing theories such as the prediction model of lower-court adjudication, which calls for trial judges to decide legal issues by reference to how they predict a reviewing court would act. But see Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 TEX. L. REV. 1 (1994) (arguing for the “proxy,” or prediction, model).
tion, a set of other democratic values and ideals — deliberation, pluralism, access, transparency, and knowledge — can actually be promoted by greater diffusion and diversity of court forums. Notably, this set of arguments from liberal democracy cannot serve to legitimate automatically any imaginable specializing move. Indeed, in contrast to the typical sorts of justifications for court specialization, which focus on the optimal institutional treatment of a certain legal subject matter or a certain human activity or a certain group of stakeholders, the current discussion is concerned with overall systemic outcomes.

This shift in the point of view is material: When considered from the perspective of a certain subject matter, court specialization is regularly understood — and defended — as a means for greater concentration and coherence in a given field of legal ordering. In contrast, when thought of as a measure of general institutional diffusion, the merits of court specialization are revealed to lie precisely in the diffraction and proliferation of adjudication — in introducing more diversity and less coherence to judicial power as a whole. Specialization in this view is understood as a mechanism for splitting up the unified institutional concept of the “court,” and this Part has tried to show that this mechanism warrants — and is capable of accommodating — a theoretical appraisal that is abstracted from the contextual realities of the various proposals for, or experiences with, specialized adjudication.

While each case still requires a dedicated assessment, with outcomes reasonably varying according to specific merits, and while specialization also comes with its share of systemic difficulties and challenges, it turns out that there is an available set of arguments from within the theory of liberal democracy that supports the general trend toward breaking up institutional judicial coherence by way of specialization. Indeed, the most concrete normative implication of this finding is arguably a wariness of intense concentration of judicial power: We might not yet know the optimal number and the optimal jurisdictional spectrum of specialized courts in a given system, but a situation in which all judicial power is in the hands of a tightly structured judiciary is a reason for concern. And, importantly, this is true for the very reasons that are often used to argue for greater concentration of judicial power.

Democratic theory, therefore, is shown to provide substantive arguments for both proponents and opponents of court specialization. Rather

177. See, e.g., Dreyfuss, Specialized Adjudication, supra note 92, at 378, 408–20.
178. The discussion of the disputes over military and religious adjudication resumes below; see infra Part V.
179. For a discussion of institutional variations for mitigating these costs, see infra Part VI.
180. That is, the legitimating premises of the liberal democracy: equal respect to all members of the political community and free participation in the political process.
than an all-or-nothing choice between democracy-related justifications on the one hand and institutional efficiency or group identity-based justifications on the other, the discussion of trial-court system design can be conducted on a more leveled discursive field: The kinds of arguments that are often used to justify a solid, centralized, homogenous, hierarchically controlled judicial structure are revealed to be available as well to those supporting a diffuse and diverse judiciary. With this in mind, I turn to the question of how this change in perspective plays out in the context of the different-yet-similar cases of military commissions and Sharia tribunals.

V. Military Commissions and Religious Tribunals Revisited

Having retold the story from the perspective of the general institutional trend of court specialization, and having laid out the possible democratic-theory justifications for specialization, I now suggest that the anxieties related to the creation of military commissions in the United States and the possibility of enforceable Muslim arbitration in Ontario ought to be reexamined. In this Part, then, I build on the general theoretical framework developed above in an attempt to assess freshly the impact that these bodies of adjudication may have on the democratic system. The renewed analysis reveals that, in both cases, some democratic virtues may arise even from these most extreme institutional challenges to the liberal foundations of our legal order. Military commissions are shown to promote the transparency of the political stakes implicated by adjudication, as well as a measure of access, exemplified in this context by the enduring framing of the relationship between the court and the defendant as one of ongoing military hostility. At the same time, state accommodation of religious tribunals is revealed to have the capacity to further pluralism in political discourse, as well as to provide access to a judicial forum for weakened members of religious communities. The virtues of knowledge and deliberation have the potential to be enhanced by both types of specialized courts.

A. Military Commissions: War by Judicial Means

After centuries of ad hoc use as a haphazardly available tool of warfare, military commissions have lately become a fixed, statutorily designated, judicial institution. This institutionalization was formally a result of a Supreme Court directive, which probably reflects the Court’s reckoning with evolving conceptions of the laws of war and the politics of rights that these laws have engendered, leading to newly recognized limitations on executive wartime powers. More mundanely, the recognition that “unlawful combatants” are here to stay — in other words, that
the declared “war on terror” is likely to go on well beyond the foreseeable future — can also serve as a rational reason for establishing a permanent institutional structure for the convening of military commissions.181

Some have decried this reality as a failure of constitutional democracy — the United States already has federal district courts that are capable of trying criminal defendants for the severest of offenses within a system whose (arguable) competence as a guardian of liberties has been forged over its own several centuries of jurisprudence.182 For the rule of law to be worthy of its praise, it should prevail exactly in cases like this, in which political will prefers to keep some persons away from the purview of the powerful judiciary, sending them instead to be tried by a branch of the executive’s armed forces (and, at least thus far, on a literal and figurative island, expressive of the state of exception applied to them). Military commissions, even under the more stringent MCA regime, and unlike the time-honored institution of the court-martial, are still subject to political involvement at several important junctions — most notably, prosecutorial discretion and rule-making procedures.183 They are perceived to be more tolerant of evidence confidentiality and interrogation transgressions,184 and they are not only inherently incapable of allowing defendants to be tried by a jury of their peers, but they instead designate to the jury box members of the armed forces — people who are normatively expected to engage violently with the likes of the defendants.

But herein is an important recognition that, to some extent, has eluded most previous assessments of the new military commissions system: It is, in fact, a new and separate court system. Although they go by the name of a mechanism familiar from previous wars and emergencies, the military commissions constituted by the MCA are no longer an available tool for commanders or politicians to utilize in an ad hoc manner in response to either genuine military exigency (such as during active warfare operations, as part of a military government in an occupied territory, or when an internal emergency renders civilian courts inoperable) or to varieties of political expediency (such as the need to conceal an intelligence blunder). The combination of detailed congressional enactment with a seemingly endless state of war has made the military commis-

sions an institutional fixture that is, in essence, a specialized court for terrorism suspects.

Indeed, several authors have noted with dismay and with varying measures of disapproval the various differences between military commissions and courts-martial. The putative personal jurisdiction of military commissions extends to civilians (including non-citizen U.S. residents) as well as combatants; their subject-matter jurisdiction encompasses offenses that are not closely tethered to the traditional concerns of military justice, and various procedural aspects in their design have significantly diverged from the familiar procedures of courts-martial. But these findings remain striking only if one clings to the view that the new military commissions are, and ought to remain, merely the latest reincarnation of the institution of yesteryear — a court-martial for special cases. As I have argued, this is no longer the case: Military commissions have become an enduring fixture within the U.S. judicial system.

In a parallel vein, other scholars have suggested that the United States establish a specialized Article III “national security court” of sorts, in place of the military commissions. Such a court, it has been argued, would be capable of dealing with some of the concerns that led to the rejection of regular federal courts as the forums of choice for terrorism cases (heightened security clearance and relaxed evidentiary and due-process guarantees), and at the same time would enjoy greater independence and legitimacy, primarily in dealing with the extensive detention of terrorists. However, once the military commissions are recognized as a specialized court system of its own merit, the specific need


189. See, e.g., Glazier, supra note 5, at 2092.


191. See Goldsmith & Katyal, supra note 190; McCarthy & Velshi, supra note 190, at 24–36.
for a different specialized court might seem questionable. As we have
seen, the federal system is replete with courts, tribunals, and other judicial forums that do not enjoy Article III grounding and are often embedded in one or another branch of the administrative state. Military commissions are but one more element in this pervasive institutional reality, and in this context it is not clear that their jurisdiction is the first that ought to be taken over by a specialized Article III court, if indeed any ought to be. One could plausibly argue, for example, that immigration courts — which process scores and scores of cases, mostly involving non-citizen civilians, and whose actions en masse amount to what many regard as egregious human-rights violations (for example, prolonged detentions) — present a more pressing need for institutional reform than the few dozen cases currently subject to the jurisdiction of military commissions. Whatever the merits of this issue, the point is that such a comparison can only be made once military commissions are put on the same analytic level as other specialized forums of adjudication.

The recognition that military commissions are in fact another court system within the contemporary proliferated reality of specialized adjudication does not provide, in itself, a justification for the system as it has been designed, and plausible critiques abound. But it does suggest that a more productive evaluation of the matter can be achieved when one considers the position of military commissions within the general framework of modern adjudication, rather than as an issue devoid of institutional context and background. In a system of multiple court forums with diverse normative underpinnings, organizational cultures, and procedural commitments, military commissions emerge as yet another such forum with its own set of pressing democratic deficiencies but, perhaps, with some benefits as well.

Does, then, the specialized court for terrorism suspects — the military commissions system — exhibit any of the benefits for democracy outlined in the previous Part? When one takes into account the plausible alternatives, some aspects of democratic theory can accommodate a version of this “generally misunderstood court.” Most of all, the persistence of the military commissions as the forum for trying terrorism sus-

---

192. See supra notes 96–104 and accompanying text.


195. MacDonnell, supra note 4, at 19.
pects provides an effect of institutional transparency: Given the prevailing agreement among politicians, military officers, and jurists that the terrorism defendants warrant a special judicial treatment — one with more security and fewer rights — it is arguably better that this treatment be handled by a specialized court rather than by existing generalist courts. In this way, the few trials of these defendants are not drowned out by the masses of cases managed by the regular federal courts as part of their regular dockets. These cases have a dedicated judicial forum that can draw the separate attention of lawyers, activists, politicians, and scholars. While it is often more difficult to know what happens in the military commissions than in regular courts — their location at Guantánamo Bay is highly obstructive in that sense — the very existence of this black box makes them at the same time more noticeable. If indeed the best place to hide a politically charged activity is in plain sight (for example, on the federal bench’s docket), then establishing military commissions does make this practice somewhat harder to conceal and ignore. Observers of the U.S. judicial system are made to realize that it includes a unique class of cases, to which a political determination has been made not to afford the full rights of detainees and defendants currently available in generalist courts. This determination is taken away from the discretion of generalist courts, which have at their disposal multiple strategies for discriminating among classes of cases, and presented as an overt political choice.

Further, trying terrorism suspects in a military forum expresses the state of war that persists between the state and the defendant. Like other types of court specialization that reflect the multiple roles taken up by the state — for example, the therapeutic or welfarist missions of domestic violence or neighborhood courts — military commissions serve as a legalized forum for the exercise of armed hostilities. Here, the idea of access to court plays an interesting part: Terrorism suspects, who on the battlefield, which is where most military commission defendants were captured, are generally legitimate targets for summary killing, are given access to a less violent mode of warfare in the guise of military commissions. Importantly, insisting on military adjudication in these cases is more than a mere symbolic gesture.

196. Consider, for example, the amount of time allotted for briefing, interrogation, and argument in various kinds of cases.


198. Unlike, for example, the man who attempted to bomb the Christmas 2009 flight to Detroit, who was apprehended on U.S. soil and shortly thereafter indicted before a (civilian) federal grand jury. See Charlie Savage, *Nigerian Man is Indicted in Attempted Plane Attack*, N.Y. TIMES, Jan. 7, 2010, at A14.

199. Symbolism should not be summarily discounted, either. Consider the struggles —
between the state and the terrorism suspect on the level of war embraces as well the applicable international laws of war.\textsuperscript{200} While the defendant enjoys no political membership in the institutions that try him — none of the typical democratic legitimacy assumptions regarding state judicial power apply here — he is kept in the status of a belligerent in an international conflict, rather than being rendered an alien criminal offender under the purview of internal law enforcement. And although international human-rights law has been found capable of protecting individuals that are subject to internal violations of rights,\textsuperscript{201} this is a much younger and weaker form of protection than that guaranteed to individuals subject to military force.

B. Religious Tribunals: The Challenge of Private Ordering

As in the case of military commissions, the institution of the religious court predates modern liberal thought and, also as with military adjudication, is likely to remain in existence for the foreseeable future. Religious (often immigrant) communities throughout the world, even those embedded in secular political environments, have persistently maintained various internal mechanisms of norm-making and norm-applying as central modes of sustaining differentiated cultural identities within the national unit. The rise in political thought of the tenets of equal respect for all members of a polity regardless of varying beliefs or perceptions of the good, and subsequently of liberal multiculturalism, has provided the moral and intellectual underpinnings for the political arguments in support of state recognition and accommodation of such practices of religious legalism.

At the same time, state accommodation of religious adjudication, which can take various forms, may be understood to threaten the legitimacy of liberal democratic rule by entangling the state with a deep regulatory involvement in religious institutions, practices, and beliefs;\textsuperscript{202} and, more importantly for present purposes, by having the state enforce illiberal community norms in contravention of the civil rights guaranteed to all members of the polity. Because religious adjudication in countries with a reasonably functioning private law system often concerns, at its core, the legal regulation of the family, it regularly impli-

\footnotesize{including serial, suicidal, hunger strikes — of IRA prisoners in the 1980s to be treated by the United Kingdom as political captives rather than as criminal inmates.}


\textsuperscript{201} See, e.g., Ryan Goodman, Humanitarian Intervention and Pretexts for War, 100 Am. J. Int’l L. 107 (2006) (finding that legalizing unilateral humanitarian intervention — an idea that may be gaining international support — should discourage “pretext wars”).

\textsuperscript{202} Cf. Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding two state statutes unconstitutional because they entangled the state with the church to an excessive degree).
icates typical rights-related fault lines, most notably in the gendered division of power and resources. This is perhaps the greatest challenge for policies of multicultural accommodation directed at local religious communities. Indeed, this is the challenge that animated the heated dispute in Ontario, a dispute that culminated in an unlikely backlash to the politics of recognition.

In this tension between fulfilling the interests related to group membership and those of individual liberty and equality, which are all too often borne by the same person, the state has to choose a regulatory strategy that will effectively balance these opposing interests. It would seem that three main regulatory avenues are available: prohibition, privatization, and accommodation-regulation. First, prohibition: the state can give systemic precedence to universal concerns of individual liberty and equality by introducing a prohibition on religious adjudication, for example, backed by criminal sanction. This strategy, derived perhaps from dominance ("radical") feminism, implies a view that because many historic religions were founded on premises of male dominance, most current instances of religious adjudication merely replicate these premises. If the liberal state is to break free from such power structures, it ought to eliminate these kinds of practices and treat identity-related arguments regarding the benefits multicultural accommodation provides for weakened members of religious groups as being shortsighted, if not based on the harmful effects of false consciousness. While the prohibition option seems quite extreme and indeed in contrast to the right of the free exercise of religion and the interests of membership, it is worth remembering that states do make use of this option from time to time: Consider the widespread criminal prohibition on polygamy in liberal democracies, or — in a different context — the partially successful governmental attempts in the United States to prohibit the use of psychoactive substances in religious ceremonies.

Second, privatization: The state can choose formally to disregard practices of religious adjudication but decline to prohibit them outright. Following the typical formulation of the separation of church and state in the secular republic (France being a typical example, and to a similar extent the United States), religious acts, including adjudication within community forums, are allowed and tolerated, but only when relegated to the private spheres of the family and the community. Adjudicatory acts of religious tribunals under this regime enjoy as much power and enforceability as the members of the tribunals’ constituencies choose to

204. See id. at 12–14.
award to them. The state plays no role in designing, funding, overseeing, or enforcing the acts of religious institutions. However, in effect, the ostensibly “neutral” state sets the background rules that grant effective power to community elites. Those who make the rules and run the tribunals can utilize internal community sanction systems, as well as the unavailability of practical (state-backed) exit routes, to ensure the obedience and cooperation of systemically weakened members. This model seeks to fulfill the interests in preserving a plurality of normative systems, as well as enabling the free exercise of religious custom and supporting the benefits of group membership for those who have access to them. But it does not make room for political recognition of the normative diversity of multicultural societies, nor does it take account of the costs borne by the weakened members of religious groups.

Third, accommodation-regulation: Accommodation with varying degrees of regulation is a midway strategy that is available to the state in the face of the dilemma of religious adjudication. Here, the practices of religious adjudication are recognized by the state in the sense that they are rendered legally effective: Religious courts become part of the judicial institutional matrix that produces decrees enforceable by state power. The accommodation strategy can be distinguished along three separate tracks — ex post regulation, ex ante regulation, and state provision — to which the discussion now turns.

I. Ex Post Regulation

In an ex post regime, the state lends its judicial-enforcement mechanisms to the execution of orders handed out by a religious tribunal. This is the typical relationship between courts and arbitration panels — non-state judicial forums that act much like courts and whose awards are recognized and enforced through the state judiciary. The state regulates these forums of adjudication only at the stage of enforcement — it

206. See Martha Minow, Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod, 40 CONN. L. REV. 1287, 1296 (2008) (“If anything, foreclosing public recognition of private family arbitration only pushes use of informal mediation, remote from secular legal guarantees, further from oversight of government authorities or public knowledge.”).

207. See Ayelet Shachar, Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies, 50 MCGILL L.J. 49, 73–77 (2005) (proposing several “re-designs” of the Canadian Sharia arbitration model along these lines, within a framework of “joint governance”).

208. See, e.g., Ginnie Fried, The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts, 31 FORDHAM URB. L.J. 633 (2004) (examining the relationship between beth din panels, which arbitrate using Jewish law, and civil courts); Michael G. Weisberg, Note, Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments, 25 U. MICH. J.L. REFORM 955 (1992) (considering how much deference civil courts should show to decisions reached by religious judicatories, and proposing a framework to protect the state’s interests, the rights of religious groups, and individual liberty).
does not prescribe how arbitrations should be conducted or what outcomes they should reach, but it requires that parties consent to arbitral jurisdiction, and that some limited procedural and substantive conditions be met for the state to mobilize its enforcement powers. These conditions seek to tackle some of the illiberal biases that might affect religious adjudication. The Ontario legal regime prior to the Sharia tribunal ordeal was that of *ex post* regulation. It allowed for religious arbitration panels to adjudicate family matters and it provided access to the province’s courts for prevailing parties seeking enforcement, limited only by commonplace due-process and unconscionability restrictions.

*Ex post* regulation is a genuine attempt both to respect the rights of group members to recognition and accommodation and to protect weakened group members who systemically fall behind in the processes of community law. However, because state regulation under this model comes into play only after the religious tribunal decides the case, its potential to have a transformative effect on community members and officials is limited. Further, the *ex post* regulatory model relies on the capacity of parties to assume agency and to openly claim before the civil-civilian court that the religious tribunal acted improperly. But the very same power structures that animate the initial concern about the risks of multicultural accommodation of religious adjudication are likely to inhibit systemic losers from seeking vindication outside of the group for fear of internal sanctions.

2. **Ex Ante Regulation**

A more invasive method of accommodating religious adjudication while attempting to affect court dynamics is by setting regulatory requirements for those who wish to engage in this practice.209 Similar to the regulation of practitioners in professions such as law or medicine, the state could impose licensing requirements of training and education on religious arbitrators, which would include primers on egalitarianism and fairness. State enforcement of arbitral awards of religious forums would be contingent upon fulfillment of these requirements by the adjudicators, as well as on the confirmation by state regulators that the forum has satisfied predetermined conditions for legal validity (similar, for example, to reviews of educational institutions seeking public financial support). In place of the private enforcement model envisioned by the *ex post* regulation option (that is, parties claiming violation during the enforcement procedure), the *ex ante* regulatory scheme hands the responsibility for enforcement to the state, potentially overcoming the risk

---

209. This was essentially the path taken by the Boyd Report in the Ontario Sharia tribunals episode. *See* Boyd, *supra* note 48, at 133–37.
that parties would be wary of reporting deviations by their own community’s institutions.

The model of *ex ante* regulation, therefore, brings the state in more direct contact with the processes of religious adjudication; it recognizes these forums as both socially significant and precarious, and therefore warranting regulation and oversight. As such, it combines respect and accommodation with suspicion and concern. The model facilitates avenues of exchange and exposure between the secular normative order and the adjudicatory elites of religious communities, but it does so at the risk of alienating community members who might oppose such extensive intervention in internal institutions and rituals. This could tend to move the more extreme religious communities away from any contact with the state, as such groups would prefer to give up state support altogether and rely solely on internal enforcement mechanisms.210

3. State Provision

Finally, the state may also choose to take over the practice of religious adjudication altogether. Notwithstanding concerns of church–state division,211 the state could, in theory, cooperate with religious communities in establishing a joint source of legal authority for matters in which communities demand recognition of separate normative worlds: a governmental religious court.212 The state would determine — in legislation reflective of a negotiated settlement between group representatives and general lawmakers — the jurisdiction of the court (no longer “tribunal”) and would appoint its judges (no longer “arbitrators”), who would be members of the relevant community. The court would apply the legal norms of its respective religion but it would be required to ensure the prominence of due process and equality in conducting its trials, and it would be subject to a scheme of appellate review that would place it on par with other forums of limited jurisdiction. Optimally, the creation of a religious court would entail elimination of internal community

210. Consider the social costs related to underground dispute resolution in criminal or semi-criminal circles, or the ambivalent accounts concerning internal, trade-specific dispute-resolution schemes, which require participants to practically opt out of state-provided legal redress mechanisms.

211. It is worth noting that church and state concerns did not prevent U.S. sponsorship of tribal courts, which by some accounts verge on the religious. See, e.g., David Bogen & Leslie F. Goldstein, *Culture, Religion, and Indigenous People*, 69 Md. L. Rev. 48, 63–64 (2009).

tribunals, or at least strong incentives to use the “public option” (for example, by subsidizing the cost of the legal process), such that community elites would find it difficult to force group members to opt out of the governmental religious-court scheme.

State provision of religious adjudication is reasonably perceived as the most intrusive of the accommodation options: It not only regulates the legal effects of religious adjudication, but it fully takes over the process. Like \textit{ex ante} regulation, this is sure to raise objections by members of communities who want to enjoy both autonomy, to design the legal structures as they will, and recognition, to have their determinations enjoy legal effect. But these concerns are balanced, to some extent, by the unprecedented degree of recognition that the state-provision model expresses. Establishing state-sponsored religious courts not only expresses respect for the internal practices of religious communities, but it also calls upon them to contribute to — and to become part of — the general system of adjudication. State religious courts accommodate “the other,” but they also seek to interact with it on the same institutional level.

All three modes of the accommodation-regulation strategy are best understood as moves of court specialization. They diffuse (and arguably enlarge) judicial power by having it dispensed through an added court unit — the religious tribunal or court. The system of courts becomes more diverse, increasing the likelihood of the possible democratic effects outlined above: Different courts interact with each other (in arbitral enforcement procedures, in appeals, or in litigations that involve multiple jurisdictional heads), enhancing the deliberative effect of adjudication. More normative visions are incorporated in the processes and outcomes of adjudication, and thus, the legal system accommodates greater value pluralism. Constituents who were absent from core judicial forums because of cultural delimitations or communal sanctions may achieve new avenues of access to judicial power by utilizing the regulatory schemes described — each with its comparable tradeoffs between group autonomy and individual agency.

In the dispiriting case of the Ontario Sharia tribunals, the system collapsed in the exact opposite direction.\textsuperscript{213} Instead of looking for alternative models of institutional design — such as \textit{ex ante} regulation or, indeed, even state provision — the system completely withdrew from the promise of recognition and accommodation through specialization and turned instead to the privatizing, “hands-off” strategy of leaving religious adjudication out of the purview of direct legal engagement. In a prisoner’s dilemma-like scenario, mutual suspicion has possibly led

\textsuperscript{213.} For an account of this story as an instance of a general tendency of liberal democracies to prevent the evolution of multicultural sensitivities to concession of state sovereign power, see generally Hirschl & Shachar, \textit{supra} note 42.
many of the stakeholders to come out worse off than they could have under several of the alternatives: religious community elites lost the minimal political recognition that they enjoyed through the now-defunct arbitration law; members of religious communities who are too weak to exit or to opt out of the religious legal system now lack any prospect of making it to any kind of state-backed court; and the general constituency has lost the opportunity to use the complex structure of proliferated court systems for greater engagement, conversation, and cross-pollination among groups and their normative visions.

I have argued that, once understood as particular instances of the theme of court specialization, the cases of military commissions and religious tribunals evoke justifications and critiques that can be located within the general institutional discussion on specialization and trial court proliferation. In this discussion, some arguments from democracy can accommodate specialization, even in fields of social action that seem to challenge liberal assumptions, such as the military and religious establishments. The question that then emerges is whether some of the tradeoffs for democracy that are involved in the proliferation of court design can be mitigated or controlled. I turn to this question next, with two sketches of possible models for institutional innovation.

VI. INSTITUTIONAL VARIATIONS: OPTIMIZING COURT SPECIALIZATION

If, indeed, court specialization can serve to benefit prevailing democratic values to an extent that justifies — perhaps when combined with the familiar efficiency-based justifications — its preservation even in the face of objections from the rule of law, then the challenge for the institutional designer is twofold: first, how to arrange the system of specialized courts in a way that would optimize the benefits it engenders for democracy; and second, how to mitigate the costs that are arguably incurred for democracy by the effects of proliferating judicial forums on the rule of law. These two challenges require a balancing act of sorts. Sometimes they lead in contrasting directions; at other times, they might converge. In this Part, I offer two models of institutional variation on the theme of court specialization that attempt to confront both of these challenges.

Both models considered below reflect a common idea: The system ought to include institutionalized — mandatory — interaction, oversight, and cross-pollination among courts of different kinds. On one hand, this will allow specialization to be most beneficial, primarily with respect to promoting deliberation among courts and constituents, fostering an effective pluralist effect and facilitating effective transparency.
On the other hand, this will allow specialization to avoid escalating to an extreme of unchecked, outlier islands of judicial power. The challenge is to get courts to “talk[] to one another,” so to speak, and in this way to produce more generally shared knowledge about what happens in the various court units. This dialogue would also serve to open the minds of court agents and constituents to the variety of possibilities for conducting judicial proceedings, as well as to competing normative visions, as they are projected through the court process.

For this purpose, I envision two possible models of institutional variation on the theme of court specialization, captured by the notion of cross-adjudication: judicial rotations among courts and randomized circulation of cases among courts.

A. Models of Cross-Adjudication

1. Judicial Rotations

The idea is to have judges from specialized courts serve designated terms on generalist courts and to have generalist judges occupy temporarily the bench of specialized courts. This is a familiar institutional characteristic in the federal judiciary: District judges, circuit judges, and judges of specialized federal courts regularly sit “by designation” on panels of courts of appeals; circuit judges are authorized to hold trial by designation in districts within their circuit; and Supreme Court justices, who used to ride circuit before the courts of appeals were fully established and manned, may still after retirement sit in on a session of one of the inferior federal courts. The designation of district and spe-

215. Notably, I do not include here appellate review, which in most pyramid-like systems tends to be more centralized and generalist and therefore provide a level of oversight on flagrantly deviant courts. But the generalist bottleneck of the appeals court also dilutes the various democratic virtues that attach to court proliferation. See generally Aronson, supra note 140, at 990–93 (noting the detrimental effects of the focus on the Supreme Court as “the single embodiment of judicial review”); Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,” 80 B.U. L. REV. 967, 973–92 (2000) (discussing the “appropriate relationship” between the Supreme Court and inferior courts); Sanford Levinson, On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation, 25 CONN. L. REV. 843 (1993) (examining the relationship of the Supreme Court to inferior courts in their interpretation of the law).
cialized judges to sit on circuit courts is primarily meant to assist the courts of appeals with managing their growing dockets. But some interesting effects may ensue: Appellate judges enjoy the input of judges who regularly adjudicate actual trials, thus offering useful insights into the complexities of evidence evaluation, jury instruction, and trial management more broadly. Conversely, district judges get to experience adjudication on an abstracted, generalized level as they participate in the efforts of panels of the courts of appeals to reach clarity and uniformity in circuit law. Finally, the horizontal rotation of circuit judges enables regional courts of appeals to enjoy the input of parallel judicial experiences from different geographical contexts.

The horizontal axis of the trial-court level — that of court specialization — can similarly benefit from the rotation of judges among the various units. Specialized judges (for example, a religious judge in a state-sponsored tribunal or the judge of a community court) sitting by designation on a generalist court would be regularly exposed to the model of core adjudication that is still considered to express generally accepted conceptions of due process, litigants’ rights, and rational decision making. Shifting between institutional norms, vocabularies, and procedures, the specialized judge would be encouraged to internalize the diversity that permeates adjudication, and thus perhaps limit the effects of parochialism and capture that attach to limited jurisdictions. One can think of this process as similar to exercising the use of a second language: The intimate familiarity with the structural backbones of another culture (in our case, a normative-institutional culture) opens up avenues of reflection and comprehension that could be missing from closed and detached institutions.

The generalist court, accustomed to an institutional ethos of the generality of law, would benefit from the input of judges who experience the legal order from a distinctly specific point of view. A community court judge or a small-claims judge sitting in a large commercial dispute on a generalist bench is likely to introduce an understanding of class effects that may evade the perceptions of generalist judges who are used to “high-stakes” cases. A religious court judge sitting in a constitutional case concerning free-exercise claims would likely contribute a novel point of view to those provided by regular generalists. Both in panel formations where these exist and in the aggregate judicial product of a generalist court, specialized judges can introduce uncorrelated biases that would improve the quality of generalist adjudication.

Generalist judges, sitting by designation in specialized courts, would experience firsthand some of the legal fields that have been separated from the court of general adjudication but are nonetheless part of the overall legal regime. They, too, could learn about social realities that rarely arrive at the generalist court and experience adjudication in forums that are often less dedicated to the formal adversarial process or that express alternative understandings of the demands of due process. Some of the hierarchical perceptions about the generalist court as superior in importance to the specialized courts would also be relaxed once generalist judges begin to frequent their counterpart forums regularly. Finally, the presence of generalist judges in specialized courts can be used not only as a means of deliberative exchange, but also as a mechanism of transparency and supervision: For those who are wary of outlier courts that break away from rule-of-law conventions in the shadow of limited jurisdiction, generalist judges on rotation can be exposed to the institutional culture that evolves in such courts and can serve as a balancing force if need be.

2. Randomized Case Circulation

A related institutional possibility is to rotate cases rather than judges. Here, a randomly designated set of cases is transferred from the docket of the specialized court to that of the generalist court. Suppose, for example, that five percent of all cases filed in business court, or prosecutions in a military commission, over a given period of time are summarily removed to adjudication before a general jurisdiction court (state or federal, as the matter may require). Because the parties initiating the litigation do not know whether their case will be selected for transfer, and since the probability of transfer is quite low, forum-shopping effects are contained. The result is a randomly selected “control group” of sorts, which reveals how a generalist court would manage cases that are thought to warrant the treatment of a specialized court.220

This again serves as both a check on extreme deviation by a specialized court and a resource for cross-fertilization and deliberation among members of diverse court units. As similar cases are institutionally differentiated, different methods of legal analysis and resolution can

evolve, and specialized courts can benefit from ideas, arguments, and viewpoints that may be otherwise silenced due to institutionalized biases or capture. And, if noticeable disparities emerge between the comparative treatments of similar cases, this may signal a need to tinker — within available constitutional bounds — with the jurisdictional design of the specialized court or its personnel makeup.

It is worth noting that in the military commissions context, a related experiment is, in a sense, already underway. The choice of the Defense and Justice Departments to prosecute several of the most prominent terrorism suspects in federal district court, rather than in military commissions, may engender some of the cross-jurisdictional exposure the case circulation model envisions. Of course, the difference is that here, the government gets to forum-shop, with no guarantee that the democratic virtues of court specialization are central in its considerations. Randomization is therefore an element necessary for precluding such strategic behavior.

B. Critiques and Replies

The two models sketched here in the broadest of brushstrokes — the ideas of judicial rotations and case circulation — are an attempt to illustrate how imaginative institutional design can be employed to facilitate interaction among court forums as well as to contain adverse rule-of-law implications of court specialization. These models obviously evoke various critiques and objections, the four most central of which I will address in turn.

1. Different Laws?

How can judges on a religious tribunal, for example, whose expertise is limited to the body of law to which they subscribe, adjudicate a civil trial? What if they decline to sit on a panel with female judges? Alternatively, how would a general-jurisdiction judge manage a case governed by religious law and procedure? And what law (for example, on evidence admissibility) would apply to a case transferred from a military commission to a civilian court? These are questions that imply both practical and conceptual concerns.

As a practical matter, some specialized judges deal in such unique areas of the law that they might find themselves completely ignorant when facing cases from the central core of adjudication. They might be unfamiliar with both the content of the legal field and the legal culture

that underlies it. Similarly, some specialized courts are so contained in their own field of expertise and their cultural and institutional idiosyncrasies that a generalist judge would be at a loss trying to decide specialized kinds of cases every once in a while.

It is true that judicial rotations and circulation of cases could sometimes pose real challenges to the orderly handling of a trial as we know it. This is primarily so when the replacements take place among courts that are profoundly distant from each other in their institutional and normative commitments. The implication is, first, that these practical concerns are less pronounced, and plausibly manageable, with rotation and circulation among courts that are not so heavily disparate in their ethos and practices — we have seen this with the designation of specialized federal judges to sit on the regional circuit courts,222 and we can imagine this happening with small-claims, probate, or domestic-violence judges and cases removed to generalist courts, and vice versa. These courts apply commonly shared sources of law and often submit (at least formally) to a single hierarchical review structure. Their distinct institutional contexts hardly seem incommensurate. What the implicated cases or panels might lose in field-specific expertise, they would gain in fresh outlooks and uncorrelated biases.

The challenge is greater with courts that are institutionally more distant from the core structure of judicial power, such as religious and military forums. In such cases, judges and parties from one sphere may find it difficult to accustom themselves to the “language” of another. But even in many such cases, the regularities of the trial process and of the judicial role constitute enough of a common ground to begin a conversation and experiment in cross-adjudication; recall that the starting point of the Article’s argument was a discussion of the institutional characteristics that are arguably essential to “courtness.”223 Indeed, many legal systems incorporate one or another form of lay adjudication in their design of judicial power. The jury is perhaps the most extreme case, although its authority is often, at least formally, limited to determination of factual issues. But variations of actual lay adjudication abound: Several states in the United States employ laypersons as judges in the lower levels of their court systems, as do various other countries;224 high courts around the world sometimes are designed to express the political nature of appellate or constitutional adjudication by employing a share of lay

222. Such as judges of the Court of International Trade; see 28 U.S.C. § 293.

223. See supra Part II.

Justices; and labor courts in Israel sit in panels that include lay representatives of labor and capital. The justifications for this phenomenon vary, but they all reflect a perception of adjudication that, while premised on professional expertise in the legal subject matter, also accommodates a degree of non-expert input for the furtherance of added values.

Furthermore, under most choice-of-law doctrines, judges often find themselves applying foreign legal norms in local disputes. The U.S. federal system regularly confronts federal judges with the intricacies of state law in cases of diversity jurisdiction, and state courts habitually interpret and apply the laws of other states when the choice-of-law rules direct them there, following a contractual clause or an event’s locus. The same is true for the laws of other countries that might govern litigation in a domestic court and, public policy and constitutional bars notwithstanding, even for religious laws, which may also be compelled upon a civilian court if a contractual choice-of-law provision so stipulates, as it sometimes does.

On top of that, institutional arrangements can be devised in order to contain the impact of this concern. Thus, for example, panel adjudication can be utilized in order to assure that specialized cases are heard by at least one judge who belongs to the relevant court, even if at another forum. Optimally, this would serve as a mere transitional arrangement, until generalist judges become accustomed enough to cases and procedures that are beyond their judicial “comfort zone.”

As a conceptual matter, the claim is that some fields of law belong, so to speak, in different courts: Disputes submitted to resolution according to religious law assume both substance and form, and these cannot be separated; criminal prosecutions of terrorism suspects are intrinsically military in nature, and therefore cannot accommodate civilian intervention. Rotating judges or circulating cases, the argument goes, would result in recurrent conflicts of choice of law and procedure that are inherently irresolvable.

I believe this kind of objection fails to follow the conceptual shift offered in this Article: The various court forums that dispense the judicial power of the state are not merely separate institutional entities that act

---

225. See Vermeule, supra note 117, at 128–130.
226. See supra note 85.
227. The federal court–state court nexus is actually one in which an institutional mechanism of inter-court communication — a method of cross-adjudication of sorts — has been established: the procedure of certification, in which a federal court certifies a question concerning the interpretation of state law to the relevant state’s supreme court.
228. See, e.g., Zeiler v. Deitsch, 500 F.3d 157, 168 (2d Cir. 2007); Lindsey E. Blenkhorn, Note, Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women, 76 S. CAL. L. REV. 189, 224–26 (2002).
independently of each other and are located on different points along the private–public continuum. Rather, by enjoying access to judicial power, they all “bring[] the state . . . in,”229 and thus become parts in the judiciary’s general institutional framework. And, just as participation in the process of dispensing judicial power may entail certain constitutional constraints, so it may require a reimagining of the forms of religious, military, or other spheres of adjudication. Members of the relevant “nomos” groups — members of specific “normative universe[s]”230 — thus are likely to have an interest in playing along with the kinds of institutional variations offered here: They enjoy access to state power, as well as recognition as a group warranting such access. At the same time, the state has an interest in forming and reforming its judicial institutions in ways that would be more receptive and accommodating to the demands of competing normative systems: It stands to gain the various benefits to democracy that emanate from the proliferation of (interconnected) court forums, as well as to keep a measure of control over outlier groups and normative visions. The point is that there is an equilibrium to be reached here by way of institutional give and take.

2. No Right to Choose?

A willingness to rotate cases or judges implies that, as a general matter, neither litigants nor judges retain a guaranteed right to have a specific case adjudicated in a specific forum or before a specific judicial officer. This may contrast some conceptions of the right to due process and some understandings of the notions of personal agency and group autonomy. While these values play a central role in the initial policy of diversifying the court system and accommodating multiple forums of adjudication, they do not enjoy complete precedence to the exclusion of all other considerations. Indeed, the central kind of interest envisioned by this Article as worth protecting is primarily access to a judicial system that, as a whole, maintains a degree of institutional diversity conducive to important democratic values. Again, the normative focus is on overall systemic effects: Persons are perceived as holding a legitimate interest not in having their case adjudicated before their court of choice, but rather in being subject to a judiciary that is infused with the input of that court.

229. See Theda Skocpol, Bringing the State Back In: Strategies of Analysis in Current Research, in BRINGING THE STATE BACK IN 3–37 (Peter B. Evans et al. eds., 1985).

3. *Is Concurrence Not Enough?*

It would seem that a primary jurisdictional method for getting courts of different kinds to interact or to make use of comparative input on shared issues is by constituting courts with concurrent (overlapping) jurisdictions — a mechanism that supposedly renders judicial rotation and case circulation unnecessary. Is that the case?

As I suggested above, if several kinds of courts get to adjudicate the same legal questions, then the democratic virtues of court specialization can more readily be achieved — deliberation is facilitated, the pluralist effect is more visible, avenues of access are more varied, and the epistemic advantage of uncorrelated biases voting on common matters is more pronounced. But concurrence comes with its share of difficulties: As institutions vie for power and precedence, attention and resources could be diverted from realizing the benefits of concurrent adjudication and instead lead to wasteful efforts of coordination, competition, and delimitation. Further, because courts are passive normative actors (in that they spring into action only once a case is filed), the beneficial potential of concurrence depends heavily on the agency of litigants — on their capacity to strategize and bring relevant cases in different jurisdictions. But some parties lack this kind of agency: Weakened members of religious groups and enemy combatant defendants are clear examples of this class, as they have little choice as to where to have their cases adjudicated and are in effect subject to forced centralization. At least in such cases, interaction among courts has to be entrenched by way of institutional design, which would ensure that at least some of those cases are treated by a diverse judicial order.

---

231. *See Dreyfuss, Specialized Adjudication, supra* note 92, at 436 (“Consideration of similar issues by both generalized and specialized courts would prevent intellectual isolation and give each bench the benefits of the other’s thinking.”).


233. Israel provides an illustrative example of the agency challenges posed by concurrence of jurisdiction: There, religious courts and family courts have concurrent jurisdiction over the monetary and custody arrangements that follow divorce, and choice of forum is regulated by a version of a rule of comity, which stipulates that the court where a case was first filed wins jurisdiction. This rule has engendered what is known as a “jurisdictional race,” in which spouses with divergent jurisdictional preferences (usually for unsurprising reasons of religious patriarchal traditionalism) have incentives to act swiftly and file early at the court of their choice. In familial contexts in which the man has an advantage in resources and initiative, concurrence ends up discriminating against women. *See, e.g.*, Yuval Merin, *The Right to Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 B.C. INT’L & COMP. L. REV. 79, 134 (2005).
4. **Down with Specialization?**

Yet another critique to be considered is that the move toward cross-adjudication substantially dilutes the effectiveness of specialization as an institutional means for promoting the democratic virtues enumerated earlier. Arguably, if judges from different jurisdictions become too comfortable with the practices of other courts, and if cases of different classes of subject matter lose their jurisdictional distinctness, the result would be a large, convoluted, and redundant system of multiple quasi-generalist courts. This might create a senseless waste of resources, and furthermore would undermine the very democratic virtues that were here shown to emanate from the disruption of institutional uniformity and coherence.

The reply to this critique is twofold. First, even mere redundancy can serve at least some democratic functions that full institutional consolidation cannot achieve. As Robert Cover has shown, jurisdictional redundancy can facilitate the endurance of legal innovation in the face of conservative centralization and can counter the power and influence of national elites by sustaining competing interests and ideologies on the local level. And while Cover spoke of geographical redundancy, the current discussion adds another dimension — that of court specialization.

Second, and more to the point, it would require more than the occasional judicial rotation or the sample case circulation to undermine the institutional peculiarities that distinguish specialized courts from one another. The matter is one of degree. As mentioned earlier, the models of cross-adjudication outlined here are intended to optimize benefits from the trend of court specialization by supporting diffusion while checking the risks of complete institutional alienation. How intense judicial rotations ought to be, or how many cases ought to be circulated, are questions to be explored over time and through accumulating experience. An equilibrium that mandates cross-jurisdictional interaction while maintaining specialization can likely be reached, or at least approximated. Drawing the contours of this equilibrium is the challenge to be pursued next by scholars and designers of judicial power.

**CONCLUSION**

The persistence of military commissions in the United States and the backlash against religious tribunals in Canada present comparable test

---

cases for the actual and possible effects of trial-court specialization. They are very different, and relatively recent, stories, and as such are yet to be evaluated with due perspective. But in both cases some observers perceived that the institutions presented unique challenges to liberal democracy’s rule-of-law ideal. They were both claimed to “contaminate” the traditional concept of judicial power with normative commitments that are foreign to its moral underpinnings. I have tried to show that, when viewed in a broad institutional context, these two stories are not as singular as they might seem: Modern court systems are already diverse institutional structures with various units and degrees of specialization, each challenging the ideal-type of the court in its own way, including through the relaxation of formal, rights-based modes of adjudication.

Viewed this way, what initially seemed like a pair of special challenges to prevailing beliefs about how courts look and what they do turns out to be merely particular episodes in a meta-story of the institutional evolution of court systems — that of court specialization — that sheds new light on the stakes, risks, and values attached to court system design. The concept of the “court” as a solid, identifiable, coherent, and persistent institutional entity is revealed to be obsolete. What most states and countries have, in fact, is a profusion of courts — multiple, diverse, and continuously changing devices of legal ordering and dispute resolution. And this multiplicity, I have tried to show, can serve some useful purposes in the promotion of democratic values: It may invigorate deliberation on the content of the legal regime, induce political value pluralism in the public sphere, open up novel avenues of access to state power, render the machinations of judicial power more visible, and enhance knowledge-based development of the law over time.

Within this framework, seemingly outlier episodes such as the cases of military commissions and religious tribunals require a reevaluation. None of what I have argued here necessarily means that these specific specializing moves are the best possible institutional treatments of the important societal matters involved; specialization is not the only game in town. But given the realistic recognition that military commissions and claims for recognition and accommodation of religious adjudication are here to stay, an assessment of these two cases and others like them should benefit from a contextualized understanding of their broad institutional surrounding and its implications for democracy.

The challenge then becomes one of harnessing the potential of court specialization for the benefit of the ideals and values of liberal democracy. This might require delicate balances in the jurisdictional delimitations of specialized courts and, as I have briefly tried to show, the development of mechanisms that would enable courts — and through the
courts, us, their constituencies — to converse with one another on the content and meaning of legal norms.

It is time to stop lamenting the decline of the “court,” since such an abstraction no longer signifies a real-life institution (if, given the inherent diversity of locales and persons, it ever did). In this Article, I have attempted to offer a new footing for the institutional analysis of judicial power, an analysis that is sensitive to the profound effects of specialization and to the potential that specialization creates for rethinking court design, inter-court relationships, and the role of the judiciary in a liberal democracy. The controversies over military commissions and religious tribunals — both yet unresolved, both highly contentious — may already serve as a resource for rethinking the contemporary institutional forms of judicial power.