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The Eleventh Annual Albert A. DeStefano Lecture On Corporate, Securities & Financial Law At The Fordham Corporate Law Center: Are Federal Judges Competent? Dilettantes In An Age Of Economic Expertise

The Honorable Jed Rakoff

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Cover Page Footnote

The lecture herein was held at Fordham University School of Law on April 11, 2011. It was edited on September 4, 2011 to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory materials in respect to certain statements made by the speakers. Constantine N. Katsoris is the Wilkinson Professor of Law at Fordham University School of Law. Constantine N. Katsoris—Biography, <http://law.fordham.edu/faculty/10197.htm>. ** Jed Rakoff, United States District Judge, Southern District of New York. The author wishes to express his gratitude to the Becker Ross law firm for endowing this lecture in honor of its retired partner, Albert A. DeStefano, a much-sought-after counselor in the field of corporate acquisitions, a scholarly adjunct professor at Fordham Law School, a community-minded citizen active in numerous charitable organizations, and a genuine lawyer-statesman. I should mention that the Becker Ross law firm has no cases pending before me and, given the nature of its practice, is unlikely to have any cases before me in the future. I congratulate the firm on its good fortune



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ARE FEDERAL JUDGES COMPETENT? DILETTANTES IN AN AGE OF ECONOMIC EXPERTISE

WELCOME AND INTRODUCTORY REMARKS

Constantine N. Katsoris^{*}
Fordham University School of Law

LECTURER

The Honorable Jed Rakoff^{**}
United States District Judge, Southern District of New York

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WELCOME AND INTRODUCTORY REMARKS

PROFESSOR KATSORIS: Good evening, ladies and gentlemen.

On behalf of the DeStefano family, I'd like to welcome you here tonight. Unfortunately, they could not be with us, but they send their regrets and their best wishes.

For those of you who have never met Al DeStefano, let me briefly describe him to you. He started at Fordham Law School as an evening student, worked during the day, still managed to make the Law Review, and graduated at the top of his class. He then went on to become a partner in the Becker firm, specializing in corporate matters, particularly mergers and acquisitions. In his spare time, he devoted himself to numerous charitable endeavors and, as an adjunct professor on our faculty, shared his enormous knowledge and experience with our students.

In short, Al DeStefano was a symbol of what Fordham Law School was in the past, he is a symbol of what Fordham Law School still is, and he will remain a symbol of what Fordham Law School will be in the future.

Since its inception about a decade ago, the DeStefano Lectures have covered a wide range of timely and diverse topics, such as: the need for market regulation, the demise of Enron and its auditor Arthur Andersen, strengthening the protection for investors, making our capital markets more transparent, the subprime mortgage meltdown, and last year, Corporate Accountability and Governance.

Tonight we are in for another treat.

Our Constitution was founded on the premise of the separation of powers – legislative, executive and judiciary. The only way that works is with an independent judiciary, and a shining example of such independence is our speaker here tonight who will discuss “Are Federal Judges Competent? – Dilettantes in an Age of Economic Expertise.”

Jed Rakoff was born in the City of Brotherly Love, the birthplace of the Declaration of Independence.

He earned his BA in English literature from Swarthmore College with honors, received a Masters in Philosophy from Oxford, and graduated Cum Laude from Harvard Law School – a school at which his younger brother Todd is a faculty member.

After law school, he clerked for the Honorable Abraham Freedman of the Third Circuit, spent two years practicing law at Debevoise, and

moved on to become an assistant U.S. Attorney for the Southern District of New York where he spent seven years, the last two of which he was Chief of the Business & Securities Fraud Prevention Unit. After that he became a partner at Mudge Rose, and then Fried Frank, where he headed both firms' criminal defense and RICO sections.

While learning and honing his legal skills, he nurtured a second career – that of a songwriter. Indeed, the Huffington Post recently – in a feature article – suggested Jed Rakoff should become a member of the Supremes.

Because of his dual interest in the law and songwriting, this caused a lot of confusion, because as you know the Supremes were a most successful female trio singing group with twelve number one records on Billboard's Hot 100 list. Rumor had it he sought to join the trio as its first male vocalist, but negotiations fell through when he refused to shave his beard.

After careful analysis, however, it appears that the Huffington Post article intended instead to suggest that he should be appointed to the U.S. Supreme Court.

His judicial career began in 1995 when President Clinton appointed him to the Southern District of New York to replace David Edelstein, a Fordham graduate of the Class of 1932.

Despite an extraordinarily busy judicial career, he has managed to be a lecturer for two decades at a law school some 100 blocks to the North.

A listing of the significant cases he presided over would take all night.

Some of his more notable cases, however, include SEC v. WorldCom, which became a model on the issue of corporate governance reform.

More recently, he initially rejected as inadequate a settlement of \$33 million between the SEC and Bank of America in an action involving the non-disclosure – before the merger – of an agreement to pay billions of dollars in bonuses to Merrill employees. After much discussion and further negotiation, the judge ultimately approved a settlement of approximately \$150 million, almost five times the size of the originally proposed settlement.

Judge, as a stockholder of Bank of America, I do not thank you for your persistence; however, I must reluctantly agree with you – in the privacy of this room – that you did “the right thing.”

As far as agreeing or disagreeing with judges' opinions, Judge Mulligan, my mentor, once wrote that exactly one half of the attorneys that appeared before him agreed with his decisions.

That benchmark holds true for any judge, and Judge Rakoff is no exception.

However, he has one distinction, in that one of his decisions has been universally acclaimed – without a single dissent.

That decision – some thirty-five years ago – was when he decided to propose to Ann Rosenberg a/k/a Ann Rakoff, a/k/a the Director of our Corporate Law Program.

Ann Rakoff works tirelessly and effectively to ensure the success of our Corporate Center; and, for that, we are most grateful.

Bottom line, Judge Rakoff really doesn't need an introduction. His record of outstanding achievements and performance speaks for itself – as an academic, as a jurist and as a practitioner.

I cannot comment on his achievements as a songwriter.

Therefore, without further ado, it is my distinct honor and pleasure to turn the proceedings over to the Honorable Jed Rakoff.

**LECTURE: ARE FEDERAL JUDGES COMPETENT? DILETTANTES IN AN
AGE OF ECONOMIC EXPERTISE**

JUDGE RAKOFF: The title of my little talk here tonight is “Are Federal Judges Competent?” This naturally raises the question of whether I am competent to answer that question. I put this question to myself, and, after careful consideration of both sides of the argument, concluded that I am competent to determine whether I am competent. As H. L. Mencken once said, “A judge is a law student who grades his own exams.”

But the sub-title of my talk – “Dilettantes in an Age of Economic Expertise” – is more revealing of what this talk is about, which is whether generalist judges and courts of general jurisdiction still make sense in an era of ever greater economic specialization. With the advent of the administrative state in the twentieth century, much of the power of both legislatures and courts was ceded to administrative agencies – in the supposed interest of enhanced expertise. But for the most part it was courts of general jurisdiction, and no special expertise, that were the ultimate arbiters of whether the administrative agency had acted fairly and in accordance with its legislative mandate. Over the past some decades, however, there has been an accelerating trend toward creating

specialized courts, that is, courts that specialize in specific subject matters. Although these courts vary widely, they are premised on the common assumption that limiting the subject matter of a court to a particular kind of controversy will bring an increased expertise to the resolution of such controversies.

In New York State, for example, you have the surrogate courts (dealing with probate matters), the housing courts, the family courts, the drug courts, and so forth. Although the trend is less pronounced at the federal level, even there you have the bankruptcy courts, the tax court, the court of international trade, and, of particular interest, two appellate courts that have a semi-specialized jurisdiction: the D.C. Circuit, which has exclusive jurisdiction over many, though not all, administrative appeals, and the Federal Circuit, which has exclusive jurisdiction over patent appeals. In a more diffuse sense, you also have the growth within administrative agencies of administrative law courts that are called upon to adjudicate certain controversies in their specialized areas.

Very recently, there has also been a trend in many states to create specialized courts to deal with corporate and business disputes. Part of the impetus for this development comes from the success of the Delaware Chancery Court, which, somewhat ironically, did not begin as a specialized court but has in some sense come to be viewed as one because it deals with so many corporate law issues in a state where most large U.S. corporations are incorporated. (Incidentally, Delaware's hegemony in this regard is now being challenged by such diverse places as Nevada and the Cayman Islands; but over sixty percent of Fortune 500 companies are still incorporated in Delaware.)

In any event, it is widely perceived that part of Delaware's attractiveness to business is not just its pro-business corporate laws themselves, but also the expertise of its courts in interpreting those laws, and the result has been that no fewer than nineteen other states have created specialized business courts. In New York State, for example, this takes the form of the Commercial Part of the New York State Supreme Court, where complex commercial cases are sent for expedited treatment.

While it may be too soon to judge these new business courts, so far they seem to have been well received. But partly this is because the judges who have been assigned to them are often the most experienced and best regarded judges from the courts of general jurisdiction; so it is difficult to tell whether the success is the result of specialization or of simply staffing these courts with the best generalist judges. Still, it has been suggested that even these very good generalist judges, when called

upon to limit their focus to sophisticated business cases, develop an enhanced expertise that makes them better able to understand the financial, economic, and commercial complexities of these cases, and thus better able to render more informed and fairer decisions. If so, the argument goes, would it not make sense to develop a specialized business court at the federal level as well, staffed, perhaps, by judges who by education or experience have particular expertise in complex business, financial, commercial, and economic issues?

The question is a fair one. At present, the jurisdiction of the federal district courts is so broad that no judge readily develops more than a passing expertise in more than a few areas. On any given day, a typical federal judge might have to give some attention to, say, a narcotics case, a securities fraud action, a maritime dispute, a labor controversy, an employment discrimination claim, and a trademark case. By background or experience, the judge may have some special familiarity with a few of these areas; but there may be others that he or she will know little or nothing about. In particular, even if the judge knows the law in each of these areas, the judge may have little specialized knowledge of the factual context in which the law must be applied. So, for example, even a judge who is familiar with patent law in general will frequently be confronted with patent cases that involve obscure technologies that the judge must learn from scratch. Or, again, a judge who generally knows the antitrust laws will often be confronted with antitrust cases involving specialized practices in specialized markets about which he knows next to nothing.

And just who are these federal district judges who are being called upon to judge these complicated disputes (assuming the disputes aren't to be decided by an even less expert jury)? Well, for the most part, we are History or English Literature majors, who spent twenty years or more after law school practicing in some narrow specialty and who got on the court, we like to think, because we were reasonably intelligent and reasonably respected in our profession – although maybe it helped that we knew someone who knew a U.S. Senator. It also might have helped that we had never said or written anything controversial – which was itself a function of our lack of expertise.

Of course, we all came to the court with one area of expertise, in that we had all been experienced litigators. Notice I use the word “litigator,” rather than the words “trial lawyer,” because in an age of fewer and fewer trials, some lawyers are now being appointed to the federal district court with little trial experience. But to be a successful

litigator, even outside the trial context, one must be a “quick study” – because you cannot hope to best your opponent unless you know more than he does about the underlying facts of a case, no matter how complicated. So, as every successful litigator will tell you, you do, for a short time, become incredibly expert in some arcane area – though you may forget it all the day after the case is over.

In theory, one might argue, the former litigator turned federal judge might be able to use this ability to quickly master vast quantities of arcane materials to become an instant expert in any matter brought before her. But this assumes you have nothing else to do, that, like the litigator you once were, you can devote the great bulk of your energies to a single case, at least for a concentrated period of time. But that is not the fate of a federal district judge. If, in actuality, you have a docket of 300 active cases, at least 100 of which are moderately complex and all of which have some call on your attention, how will you ever find the time to become an expert, even in the ad hoc way of litigators? Hence, the argument goes, one must have specialized courts, where judges, who may often be appointed to such a court because of their specialized training, will in any event be confronted with a sufficiently narrow range of subject matters that they can develop the expertise necessary to really understand such cases.

Such arguments, as I say, are not without force. But there are, I would like now to suggest, at least five fundamental reasons why the creation of a federal business court, or, indeed, the creation of any more specialized federal courts than we already have, would be a major mistake.

First, judicial specialization tends to obscure what judges are really supposed to do, which is to apply reason, legal principles, and basic moral values to the resolution of controversies. As the great Harvard Law expert on administrative law, Louis Jaffe, stated in explaining why administrative review should ultimately be vested in courts of general jurisdiction: “the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system.”¹

¹ LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 589-90 (1965). He added: “I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built.” *Id.*

This is true even in those instances where judges are appointed or elected to generalist courts on the assumption that they will promote a particular policy or agenda; for in courts of general jurisdiction the great majority of cases to come before such judges will be cases as to which such a policy or agenda is irrelevant, and resort must then be had to what is commonly called “good judgment.” It is by this, and not by any narrow expertise, that judges are ultimately judged to be good or bad judges.

It is also why judges are required to state the reasons for their decisions, so that they can be reviewed on appeal, as well as assessed by the legal community and the general public. But in specialized courts, judges, rather than having to clearly state the reasons for their conclusions, can wrap their decisions in the cloak of expertise, to which appellate courts inevitably give deference. Specialized courts, I submit, quickly develop an impenetrable jargon that makes it difficult, if not impossible, to understand how they reached their decisions. And precisely because of this obscurity, the appellate court, rather than admitting its mystification, defers to the lower court’s supposed expertise. As a former member of my court, the famous judge and lawyer Simon Rifkind, stated to Congress in opposing the creation of specialized federal courts:

[W]hen you are dealing with a matter that concerns the general welfare of the United States, it is not wise to create a small group of men who become, like the Egyptian priests, the sole custodians of a body of knowledge and who sooner or later begin to talk a language that nobody else understands but which is common only to them and the practitioners who appear before them and who drift away from those general principles of equity [and] morality, which pervade the entire judicial system.²

Second, because specialized courts deal with disputes specific to a particular constituency, they tend to be influenced, or even captured, by the interests and biases common to that constituency. Thus, as I will discuss further below, the Federal Circuit, in dealing chiefly with disputes between patent owners and patent challengers, only hears arguments that reflect the shared assumptions and prejudices of patent

² *General Revision of the Patents Laws: Hearing Before the H. Subcomm. No. 3 of the Comm. on the Judiciary, 90th Cong. 175 (1967)* (statement of J. Simon Rifkind).

owners and patent challengers, and eventually comes to share some of those assumptions and prejudices.

Furthermore, where a court deals chiefly or exclusively with controversies involving a limited group of special interests, those special interests are much more likely to play an active role in the selection of the judges to that court. Thus, in the case of New York's housing court, landlord and tenant lobbyists are widely believed to play a dominant role, fueled by campaign contributions, in the selection of judges who are known from the outset to be pro-landlord or pro-tenant.

And even where the selection process is more neutral, a specialized court is much more likely than a generalist court to be affected by the judges' personal ideologies, since, unlike a generalist court, the judges on a specialist court are dealing again and again with the same small set of issues. The fact that those issues may appear complicated, or require a certain amount of expertise to fully grasp, cannot disguise the fact that they usually involve competing values that no amount of expertise can resolve. As Circuit Judge Richard Posner, who certainly possesses a wealth of economics expertise, has written in opposition to a specialized antitrust court:

Antitrust is a forbidding field to the noninitiate. Its practitioners are experts, but are they objective? Antitrust theorists are divided into three warring camps. One camp thinks the most important values that the antitrust laws are designed and should be interpreted to promote are social or political values having to do with decentralizing economic power and equalizing the distribution of wealth. . . . [T]he two other camps . . . are united in believing that the only proper goals of antitrust law are economic . . . [but are divided between] a "Harvard School," [which is] prone to find monopolistic practices, and a "Chicago School," which believes the same practices to be for the most part procompetitive

These cleavages, reflecting deeper and at the moment unbridgeable divisions in ethical, political, and economic thought, would not be eliminated by committing the decision of antitrust appeals to a specialized court. They would be exacerbated. A [particular] "camp" is more likely to gain the upper hand in a specialized court than in the entire federal court system or even in one circuit. This is not only because appointment to the specialized court would inevitably be made from the camps, but also because experts are more sensitive to the swings in professional opinion than an outsider, a generalist, would be. The appearance of uniform policy that would result from the domination of the specialized court by one of the contending

factions in antitrust policy would be an illusion. It would reflect power rather than consensus.³

Third, judges in specialized courts, typically appointed for a term of years, have a temptation to look over their shoulders at the impact of their decisions on their future employment outside the specialized court, thus compromising their independence. This is notoriously a problem for administrative law judges, who regularly seek employment at the end of their terms with law firms that have regularly appeared before them. As a result, it is widely believed, though perhaps unfairly, that the decisions made by an outgoing administrative judge near the end of her term will seemingly be affected by the interests of the kind of clients represented by the law firms she would most like to join once her term is over.

This problem is not totally absent even in the case of life-tenured federal generalist judges who, because of the unfortunate state of judicial salaries, are departing the bench with more frequency than in the past (a problem further exacerbated by the recent tendency to appoint relatively younger persons to the federal bench). But if, even now, this presents a threat to judicial independence, it would be considerably exacerbated if such persons were judges on specialized courts, where the divisions are so much more clearly drawn and the threat to independence resulting from the desire for lucrative future employment might well become severe.

Fourth,—and to my mind the most insidious problem with specialized courts—even the best of judges in specialized courts tend to develop a tunnel vision, oblivious to developments in other parts of the law that should impact their decisions. As we all learned long ago, “the law is a seamless web.” The law strives to promote consistency and predictability, not only for their practical importance, but also, in Professor Jaffe’s words, “to affirm the capacity of our society to integrate its purposes.”⁴ Relatedly, judges are repeatedly called upon to balance competing objectives; it makes no sense for the balance reached in the rest of the law to be disregarded, or even overruled, in some

³ Richard A. Posner, *Will The Federal Courts of Appeals Survive Until 1984? An Essay On Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 781 (1983).

⁴ JAFFE, *supra* note 1, at 590.

specialized arena, for no better reason than that the specialized judges are intent on promoting their own narrow interests.

A good example of this problem, I reluctantly suggest, is the Federal Circuit. As noted, the Federal Circuit, while it has partial jurisdiction over a number of subjects, has exclusive jurisdiction over patent disputes and in this respect is a specialized court. Given the importance of patents in a modern economy, the experience of the Federal Circuit may therefore be suggestive of the benefits and detriments of any proposed federal business court.

The Federal Circuit was created in 1982, primarily in response to complaints from the patent bar that patent law was being interpreted by the various circuit courts in radically varying ways, leading to inconsistency in the laws governing one of the more important areas of our economy. The circuit split, crudely stated, was between those circuit courts that favored giving strong protection to existing patents and strong encouragement to new patents in order to incentivize innovation, and those circuit courts that favored narrow interpretation and limited protection of patents, both out of antitrust concerns and because of a belief that too broad patent protection actually de-incentivized innovation.

The real culprits here were the Supreme Court and Congress, either of which could have resolved these long-time splits through judicial decision or legislation. But, instead, they chose to duck the issue: the Supreme Court by refusing to grant certiorari, and Congress by pretending that this circuit split, which really reflected a clash of values, could be better decided by a specialized court that would bring uniformity to patent law. To that end, Congress, while leaving it to generalist district courts to still decide patent disputes in the first instance, created, in 1982, a single appellate court, the Federal Circuit, to decide all patent issues on appeal.

This solved the immediate problem in that it guaranteed that the circuit split would be resolved, at least at the circuit level, by the creation of this specialized court. But no one should have been under any illusion that it meant that the split would be resolved by the application of some special expertise. The split was one of policy, and, in operational terms, it was largely a split between the objectives promoted by patent laws and those promoted by antitrust laws. By creating a court that had exclusive power over the patent laws and had nothing to do with antitrust laws—a court that heard disputes between members of the patent bar and rarely if ever heard from the antitrust bar—a court that was largely staffed by judges who, though almost

uniformly excellent, were frequently drawn from a patent law background—Congress guaranteed, wittingly or unwittingly, that the split would be resolved in a pro-patent fashion. And, indeed, over the next fifteen years or so, the Federal Circuit created a protection for existing patents and receptiveness to new patents that went well beyond anything previously seen.

Almost from the outset, the district courts saw this as one-sided and unbalanced. But the Federal Circuit began overruling the district courts to a virtually unprecedented degree. District courts suffered a forty percent reversal rate in the Federal Circuit, compared to a less than five percent reversal rate in all other circuits. Was this because, as proponents of specialized courts might argue, the district courts lacked the specialized expertise that the Federal Circuit brought to bear? Or was it because the Federal Circuit, oblivious to the kind of balancing of values that is the everyday concern of generalist courts, was off on a frolic of its own?

The answer was supplied by the United States Supreme Court. Beginning in 1996 and continuing through 2010, the Supreme Court began reversing the Federal Circuit at a rate unmatched by any other circuit court, even the much maligned Ninth Circuit. Moreover, eight of these reversals were unanimous and none was by a bare 5-4 vote. Many were couched in harsh language, and nearly all suggested, at least by clear implication, that the Supreme Court believed that the Federal Circuit was using the cover of “expertise” to interpret the law differently from how it had been uniformly interpreted in other contexts. So much for the supposed benefits of specialization.

A comparison with another so-called specialized court, the Delaware Court of Chancery, is also instructive. Although Delaware law as a whole reflects a pro-corporate tilt, many observers, including this one, find the decisions of the Delaware Court of Chancery, and the Delaware courts generally, very well-written and remarkably free of jargon or cant. But although proponents of specialized business courts frequently point to this high quality as evidence of what a specialized business court can achieve, in fact I think it is substantially wrong to view the Delaware Chancery Court as a specialized court, at least in the sense of a court of limited subject matter jurisdiction. In actuality, the jurisdiction of the Delaware Chancery Court is very broad, comprising the extensive equity jurisdiction that marked the reach of the English High Court of Chancery back in the days when the courts of England were divided between the courts of law and the courts of equity. If, then,

the Delaware Court of Chancery speaks with the clarity and vision of a generalist court, it is because it really is, fundamentally, a generalist court. Because, however, its jurisdiction includes so much of Delaware corporate law, and because so many large corporations are incorporated in Delaware, its decisions have a huge impact on the development of corporate law everywhere.

In much the same way, because Wall Street is located in the Southern District of New York, more cases involving high finance are brought in my district than in any other federal district and so our decisions frequently have impact in this area; but this does not mean that we are a specialized court, or that our decisions require the exercise of some supposed expertise unobtainable by district judges in other districts, or that we do not pay a lot of attention to what other districts, and circuits, say about these issues. Like all generalist courts, and unlike truly specialized courts, we are the beneficiaries of cross-fertilization. And you don't need Darwin or Mendel to tell you that cross-fertilization is a good thing.

Fifth, and finally, I would go so far as to suggest that a judge's lack of specialized expertise is frequently a benefit, rather than a detriment, in reaching the right decision. Because what does a good judge do if he doesn't understand some complexity in some abstruse area? He requires the lawyers to explain it to him, in language he can understand. And the result, almost always, is that he comes to appreciate that the dispute before him cannot be resolved by the exercise of any supposed expertise but only by the careful weighing of competing interests and values well familiar to every judge. After many years on the bench, this is what Justice Holmes had to say on this subject:

Having to listen to arguments, now about railroad business, now about a patent, now about an admiralty case, now about mining law and so on, a thousand times I have thought that I was hopelessly stupid [but] as many times have found that when I got hold of the language there was no such thing as a difficult case.⁵

I am not sure I could say it any better than that; and, even if I could, when you have Oliver Wendell Holmes on your side, it is time to sit down. So, let me simply conclude by giving my answer to my original question: Are federal judges competent? Competent to appreciate every

⁵ Letter to John C.H. Wu (May 14, 1923), in JUSTICE OLIVER WENDELL HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 163-63 (Harry C. Shriver ed., 1936); Posner, *supra* note 3, at 787 (quoting *id.*).

nuance of every jargon-filled specialty? - perhaps not. But competent to judge, well and with understanding, the essential disputes brought before us in every area of our jurisdiction? - you bet!