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Choosing a Court to Review the Executive


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ARTICLES

CHOOSING A COURT TO REVIEW THE EXECUTIVE

JOSEPH W. MEAD* & NICHOLAS A. FROMHERZ**

For more than one hundred years, Congress has experimented with review of agency action by single-judge district courts, multiple-judge district courts, and direct review by circuit courts. This tinkering has not given way to a stable design. Rather than settling on a uniform scheme—or at least a scheme with a discernible organizing principle—Congress has left litigants with a jurisdictional maze that varies unpredictably across and within statutes and agencies.

In this Article, we offer a fresh look at the theoretical and empirical factors that ought to inform the allocation of the judicial power between district and circuit courts in suits challenging agency action. We conclude that the current scheme is both incoherent and, to the extent it favors direct review by circuit courts, unjustified. We conclude that initial review by district courts is, in general, the better option, and a clear divide is preferable to the ad hoc approach that Congress has favored. Along the way, we offer a new analytical framework for deciding which court should review the Executive.

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INTRODUCTION

Judicial review of executive action occupies a unique place in federal jurisprudence. But which court undertakes that review? The Administrative Procedure Act (APA) prescribes a near-universal standard of review of agency decisions, but it says nothing about the proper forum. Instead, litigants must look elsewhere for jurisdiction, and the *United States Code* is replete with thousands of compromises dividing initial review of agency decisions between district and circuit courts.¹

This complex scheme of dividing original jurisdiction between appellate and trial courts has no parallel in any other aspect of modern federal jurisdiction. And while this scheme of split review is familiar to practitioners of administrative law, time has hardly served to iron out the wrinkles. Determining the proper court to review administrative decisions has been the subject of debate since *Marbury v. Madison*² and requires

1. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 309 (1985) (“A recurrent issue of federal jurisdiction is whether judicial review of an administrative agency’s decision may be sought in a federal district court in the first instance or must be sought directly in a federal court of appeals.”).

2. 5 U.S. (1 Cranch) 137, 148 (1803).

frequent Supreme Court intervention to unravel.³

Today's allocation of jurisdiction to review agency decisions is untenable.⁴ Complexity has its costs—for litigants, for agencies, and for the courts themselves. To determine which court has jurisdiction, one is left to sift through more than one thousand statutory provisions sprawled across fifty-one titles of the *United States Code*, enacted piecemeal through more than one hundred years of legislation.⁵ On top of these statutory provisions are decades of judicial interpretations, often pointing in inconsistent directions and further clouding the question of jurisdiction. The ambiguity of this divided system leads not only to deadweight loss in terms of litigating jurisdiction, but it can lead to forfeited claims if a litigant misses a deadline by filing in the wrong court.

The costs of complexity might be warranted if there were strong reasons for favoring one type of review over another in a given situation. Yet one searches in vain for evidence of intelligent design in the current system. Few patterns emerge from the seemingly random distribution of initial agency review between circuit and district courts, and Congress generally, though not always,⁶ declines to explain its choice of forum.⁷ Even a casual survey can find countless examples of similar actions by different agencies being challenged in different courts. For example, decertified airline mechanics proceed directly to circuit court,⁸ while decertified Navy

3. See, e.g., *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2130 (2012); *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012); *Kloeckner v. Solis*, 133 S. Ct. 596, 600 (2012); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147–48 (2010).

4. Over seventy years ago, scholars issued a similar indictment of a far simpler (but still divided) system of judicial review of agency decisions, yet things have only gotten worse. James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1090 (1940) (“It is clear that no one can defend today our variegated scheme for judicial review of administrative action”); Orrin B. Evans, *Historical Jurisdiction of the Federal Courts to Review Federal Administrative Action*, 31 IOWA L. REV. 369, 371 (1946) (“There was, of course, no sense in the dual system of *nisi prius* courts”); cf. ROSCOE POUND, ORGANIZATION OF COURTS 107, 195 (1940) (describing as “anomalous” the nineteenth century system of two courts of general trial jurisdiction).

5. Evans, *supra* note 4, at 376 (“A lawyer seeking light on the question of judicial review of administrative orders cannot turn to any statute or chapter containing a comprehensive code on the subject He must search the statutes relating to the substantive law of his case.”).

6. For example, Congress's concern with dilatory appeals motivated its repeated concentration of review of deportation orders in the courts of appeals. *Foti v. INS*, 375 U.S. 217, 224 (1963).

7. Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980, 999 (1975) (noting the “frequent absence of any apparent legislative purpose for particular jurisdictional limitations”); Evans, *supra* note 4, at 382 (“I have not been able to find any measurable degree of consistency within any classification.”).

8. 49 U.S.C. § 46110(a) (2012).

instructors or body armor manufacturers go to district court.⁹ Horse Protection Act regulations can be challenged in district court, but adjudications go to the circuit court.¹⁰ The rule is flipped for the Department of Energy, where regulations under the Energy Policy Act can be challenged in the circuit court,¹¹ while determinations of entitlement to Energy Star designation are brought in district court.¹² And Congress continues to enthusiastically churn out jurisdictional decisions for agency review each year without any apparent framework, making the problem worse and worse.

Against this backdrop, it is no surprise that scholars and practitioners have wrestled with the jurisdictional difficulties that exist for particular statutory provisions or agency programs.¹³ Determining the proper court for initial review in any given context is obviously important, but the limited nature of such an inquiry makes it difficult to address the real problem: the absence of organizing principles and uniform criteria.

Our analysis proceeds in three Parts. In Part I, we provide a brief background on the historical and modern system of judicial review of agency decisions. We also map out the jurisdictional tests that courts have adopted to deal with the statutory mess and argue that these tests have confused rather than clarified matters.

In Part II, we address the central question—which court, or courts, should review agency decisions? We analyze the issue as it is usually presented—a choice between initial review in the district court or direct review in the circuit court. To conduct our analysis, we consider a number of different factors, including efficiency, especially cost and time to final decision, accuracy of judgment, legitimacy and appearance, litigant

9. See, e.g., *Foster v. Mabus*, 895 F. Supp. 2d 135, 146 (D.D.C. 2012); *Pinnacle Armor, Inc. v. United States*, 2012 WL 2994111, at *5 (E.D. Cal. 2012).

10. 15 U.S.C. § 1825(b)(2), (e)(2).

11. 42 U.S.C. § 6306(b)(1).

12. *LG Elecs. U.S.A., Inc. v. Dep't of Energy*, 679 F. Supp. 2d 18, 23 (D.D.C. 2010).

13. See generally Allison LaPlante & Lia Comerford, *On Judicial Review Under the Clean Water Act in the Wake of Decker v. Northwest Environmental Defense Center: What We Now Know and What We Have Yet to Find Out*, 43 ENVTL. L. 767 (2013); Shaina N. Elias, Essay, *Challenges to Inclusion on the "No-Fly List" Should Fly in District Court: Considering the Jurisdictional Implications of Administrative Agency Structure*, 77 GEO. WASH. L. REV. 1015 (2009); Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003); Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 BYU L. REV. 461 (1990); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297 (1986); Jonathan A. Schorr, Note, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U. L. REV. 765 (1983); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Note, *supra* note 7; Stephen B. Goldberg, *District Court Review of NLRB Representation Proceedings*, 42 IND. L.J. 455 (1967).

preferences, workload distribution, the benefit of precedent, and the cost of jurisdictional uncertainty. Through this analysis, we find that the case for direct review in circuit courts has little in the way of theoretical or empirical heft. In the context of challenges to agency action, it would appear that district courts are generally as capable—and usually more efficient—than their counterparts at the circuit level.

In Part III, we build on our analysis to make the case for uniform rules. The current scheme drives up the costs for litigants and the courts alike. These costs are not justified by gains in accuracy or otherwise superior decisionmaking. The upshot is two-fold: (1) going forward, Congress should revisit the allocation of judicial power in cases challenging agency action, not in a piecemeal fashion, as has been its tendency, but in a comprehensive manner that applies uniform criteria; and (2) in conducting this review, Congress should give serious weight to a scheme that favors initial review by district courts. Yet, regardless of how the balance is struck—in favor of initial review by district courts or by circuit courts—we desperately need an allocative scheme that is clear and informed by uniform criteria.

In sum, this Article offers a fresh take on the beguiling jurisdictional landscape of judicial review of agency decisions. By deconstructing the status quo and analyzing the issue anew, we identify several factors to guide the inquiry of which court should review the Executive. Along the way, we offer specific guidance to courts and litigants to help make sense of the complicated status quo, and we pave the way for empirical study to address the uncertainties surrounding judicial review by district courts and circuit courts.

I. JUDICIAL REVIEW OF EXECUTIVE BRANCH DECISIONMAKING

In this Part, we provide a brief background on the historical and modern systems of judicial review. Today, judicial review of federal agency decisions is largely governed by the APA.¹⁴ Under the APA, courts review agency decisions under a deferential set of standards that mimic, in many regards, an appellate court's review of the discretionary decisions of a trial court.¹⁵ This review is conducted based on the administrative record,¹⁶ a record that is, at least in theory, frozen in time and unalterable before the court.¹⁷ Although both the standard and scope of review are nearly

14. 5 U.S.C. § 706.

15. *See, e.g.*, *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995).

16. 5 U.S.C. § 706.

17. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (stating the standard should come from the administrative record already in existence).

universal,¹⁸ the court that undertakes this review varies sharply depending on the nature of the agency action and the legal theories of the challenge.¹⁹ Thus, in a departure from the usual model of federal litigation, challenges to hundreds of agency decisions can only be brought directly in the circuit court, bypassing the district court altogether. Whether a case begins in the district or circuit court is up to Congress, and Congress's choice of forum varies seemingly at random from statute to statute, reflecting uncertainty about the ideal forum for challenges to administrative action.²⁰

A. Background on Judicial Review

Historically, the opportunities to obtain judicial review of Executive Branch action were extremely limited.²¹ Individuals claiming injury could bring writs of mandamus,²² habeas corpus,²³ and other prerogative writs whose familiarity has been lost to time.²⁴ These writs were extremely limited in scope—mandamus being limited to “ministerial” duties,²⁵ and habeas corpus requiring the petitioner to be in custody—and provided severely limited opportunities for judicial oversight of the Executive. Alternatively, a citizen might pursue a tort claim—say, defamation or trespass—against an aggrieving officer, but the suit would be limited by the vagaries of state law and falter against the bar of sovereign immunity if the officer acted within the scope of his official duties.²⁶ Today, an individual might also pursue a constitutional tort claim against an officer but must still

18. See 5 U.S.C. § 706. As Aaron-Andrew Bruhl points out, however, it is possible that doctrinal homogeneity masks variation in practice. While invoking the same standard of deference (e.g., *Chevron*), it may well be the case that the Supreme Court, and even the circuit courts, actually afford far less deference to agency calls than district courts. See generally Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727 (2013).

19. See *infra* Part I.B.2.

20. Though there may be some limits on Congress's power to define the jurisdiction of the lower federal courts, split allocation is clearly constitutional. See *Bartlett v. Bowen*, 816 F.2d 695, 704–07 (D.C. Cir. 1987).

21. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1319–20 (2006).

22. See, e.g., Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More “Mile Marker Down the Road of No Return”*, 39 ST. MARY'S L.J. 3, 10–47 (2007) (discussing the development of the writ of mandamus).

23. Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 762–63 (2013).

24. See generally Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523 (1923) (providing a historical background on various types of writs found in the English legal system).

25. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 580 (1838).

26. Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 533 (2013).

overcome various immunities.²⁷

As the twentieth century arrived and the administrative state grew, so too did elaborate statutory schemes providing for judicial oversight of agency decisionmaking.²⁸ In order to prescribe a uniform set of standards, Congress passed the APA in 1946, which dictates the standard of review that applies to the vast majority of challenges to agency action.²⁹ Significantly, as discussed below, the APA does not specify which court will hear the challenge.

Under the APA's approach, challenges to administrative decisions are treated largely like appeals from the agency's decision.³⁰ Like an appeal, the reviewing court considers the agency's decision on the factual record developed by the agency.³¹ Agency factual findings control the reviewing court, be it district or circuit, so long as they are supported by "substantial evidence."³² Agency judgment calls are not reviewed for their correctness or wisdom, but only for whether they are arbitrary or capricious.³³ Although the APA does not explicitly prescribe a deferential standard for reviewing an agency's legal interpretations,³⁴ the *Chevron*,³⁵ *Skidmore*,³⁶ and *Seminole Rock*³⁷ doctrines require significant judicial deference to an agency's view of law. If the court concludes that the agency's judgment was in error, the proper remedy is a remand to reassess, not for the court to decide the

27. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 208 (2013).

28. Note, *Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 901 (1957).

29. 5 U.S.C. § 706 (2012).

30. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 828 (2012). Before 1900, judicial review was generally through de novo common law actions and did not follow the appellate model. See generally Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

31. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (noting that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

32. 5 U.S.C. § 706(2)(E).

33. *Id.* § 706(2)(A).

34. *United States v. Mead Corp.*, 533 U.S. 218, 241–42 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite. But it was in accord with the origins of federal-court judicial review.").

35. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (requiring deference to an agency's interpretation of ambiguous statutes).

36. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (requiring a different degree of deference to an agency's interpretation of statutes).

37. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (requiring deference to an agency's interpretation of its own regulations).

issue de novo.³⁸ The APA's standards apply to all judicial review of agency decisions unless another statute expressly prescribes a different standard.³⁹

Although the appellate model applies in many respects to challenges of agency action, they are, both formally and functionally, *not* appeals. As a formal matter, they are new actions, a tenet which reflects the boundary between the Executive and Judicial Branches. Further, the fact that one branch is reviewing the work of another immediately implicates numerous separation of powers concerns. Thus, unlike an appellate court, whose review of lower court action is simply a question of allocation of the judicial power, the proper review of agency action reflects due concern for the allocation of power between the branches. As the Supreme Court said in 1894, when decreeing a particularly deferential standard of review for agency action: "But this is something more than a mere appeal. It is an application to the court to set aside the action of one of the executive departments of the government."⁴⁰

Judicial review of agency action is not without its controversy, at least in non-constitutional cases.⁴¹ A generalist judge reversing the decision of an expert agency strikes some as rather like the pupil correcting the teacher.⁴² Still, proponents of judicial review might argue that court ratification is needed to fulfill the sentiment behind *Marbury's* famous dictum: "It is emphatically the province and duty of the judicial department to say what the law is."⁴³ Indeed, courts are often thought to be superior to agencies in

38. See, e.g., *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657–58 (2007) (noting that the circuit court erred because "it jumped ahead to resolve the merits of the dispute" rather than remanding to the agency).

39. See *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

40. *Morgan v. Daniels*, 153 U.S. 120, 124 (1894).

41. Robert Shaffer, *Judicial Oversight in the Comparative Context: Biodiversity Protection in the United States, Australia, and Canada*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10,169, 10,170 (2013) ("In practice, though, arbitrariness review has proven hugely controversial, generating an array of scholarship examining its impact on the broader policymaking process."); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1251–52 (1999).

42. See Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011) (discussing "[t]he premise that expert agencies are better situated than generalist judges to make policy decisions in light of scientific uncertainty"); *Contact Lens Mfrs. Ass'n v. FDA*, 766 F.2d 592, 599–600 (D.C. Cir. 1985) ("Though CLMA [Contact Lens Manufacturers Association] presses this argument with vigor, we are mindful that in such matters generalist courts see through a glass darkly and should be especially reluctant to upset an expert agency's judgment that a party has failed to adduce sufficient scientific proof of safety and effectiveness.").

43. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see Cross, *supra* note 41, at 1247–48, 1266–68 (criticizing this rationale, noting that it "is almost tautological"). The strength of this rationale loses much of its force in light of doctrines such as *Chevron*. *Id.* at 1278.

ensuring that the rights of individuals are left untrammelled.⁴⁴ Further, federal judges are less susceptible than administrators to “capture” by a particular segment of the population.⁴⁵ Finally, the threat of further review may encourage agencies to be more thorough and careful in their decisionmaking.⁴⁶

But judicial review also introduces significant downsides. Judicial review tends to transfer final decisionmaking power from the Executive Branch officials, who have some measure of political accountability, to judges “who have no constituency.”⁴⁷ Moreover, the specialized subject-matter experts at the federal agency are better equipped than generalist judges to make decisions regarding the technical details of agency policy.⁴⁸

Beyond comparative competence between the branches, there is also a significant cost to subjecting decisions to additional layers of review. Judicial review adds a level of unpredictability and uncertainty about the validity of agency action, which undermines reliance by all interested parties.⁴⁹ Moreover, the availability of judicial review may distort decisionmaking by federal agencies, who may be tempted to be overly cautious *ex ante* based on fears of drawing the “worst case scenario” judge.⁵⁰ This is particularly true in light of the Supreme Court’s standing jurisprudence, which expressly favors plaintiffs who are the target of a regulation over those who experience a more attenuated effect, giving those who would challenge agency action a ticket into court, while denying access to those favoring additional regulation.⁵¹ And, of course, there is the

44. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034–35 (1968) (“Neither the executive nor the legislature is as dependable as the judiciary in making such determinations” of private rights).

45. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 22–23 (2010); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 7 (2009).

46. However, even if there is a lack of judicial review, agencies remain susceptible to presidential or congressional reversal.

47. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

48. Michael C. Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. CIN. L. REV. 839, 856 (2013).

49. *See Cross*, *supra* note 41, at 1249 (“[A] circuit split over the regulations of the Environmental Protection Agency (‘EPA’) on granting Clean Air Act variances kept those rules ‘in limbo for well over two years and led to different treatment of polluters in different parts of the country.’”).

50. *Id.* at 1251–52 (internal quotation marks omitted); *Kendrick v. Shalala*, 998 F.2d 455, 457 (7th Cir. 1993) (“Because these reviewers are selected at random from a large pool, to be *really* safe the ALJ [Administrative Law Judge] must please the most demanding federal judge in the jurisdiction.”).

51. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992); Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After Massachusetts*

substantial financial cost to requiring courts to decide, and for agencies to litigate these lawsuits⁵²—cases which compose approximately 23% of the federal court docket.⁵³

Nevertheless, at least since the adoption of the APA, congressional policy has tended to allow agency decisions to be reviewed by courts, although in recent years there is some movement toward more limited review.⁵⁴ Congressional policy is far more varied, however, when it comes to picking the court that will undertake the review.

B. Choice of Forum

Although the routine federal case begins and ends in district court,⁵⁵ cases involving federal agencies are often different. While the default rule is that administrative challenges begin in district court, Congress has provided innumerable exceptions that allow a case to be commenced directly in the court of appeals, bypassing the district court altogether. These provisions have been enacted piecemeal over more than a century of ad hoc legislating.

When a circuit court has jurisdiction under a specific statutory provision, that jurisdiction is exclusive and preempts district court jurisdiction over that claim.⁵⁶ However, in most situations, a challenge that falls outside of a direct review provision can be brought in the federal district courts. Notably, however, the choice of forum does not affect the standard to be applied, as both circuit courts and district courts apply the same APA standard to the same administrative record.⁵⁷

v. EPA, 29 STAN. ENVTL. L.J. 130, 135 (2010) (“The Court has also articulated a separate presumption against standing for individuals who are not the object of the regulation (or lack thereof) they seek to challenge.”).

52. President Roosevelt vetoed a precursor to the APA, explaining “I am convinced that it would produce the utmost chaos and paralysis in the administration of the Government at this critical time. I am convinced that it is an invitation to endless and innumerable controversies at a moment when we can least afford to spend either governmental or private effort in the luxury of litigation.” 86 Cong. Rec. 13,943 (1940); James C. Thomas, *Fifty Years with the Administrative Procedure Act and Judicial Review Remains an Enigma*, 32 TULSA L.J. 259, 281 (1996).

53. United States Courts, *Caseload Statistics 2012*, USCOURTS.GOV, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/B01Mar12.pdf> (last visited Mar. 14, 2015).

54. For example, in recent decades, Congress has expressly barred judicial review of numerous decisions under Medicare and the Immigration and Nationality Act (INA). 42 U.S.C. § 1395l(t)(12) (2012); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546, 3009–586 (1996).

55. See 28 U.S.C. § 1331.

56. *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 161 (4th Cir. 1993).

57. *Seavey v. Barnhart*, 276 F.3d 1, 9–10 (1st Cir. 2001).

1. History

The unusual divide—sometimes one court, sometimes another—is unique to judicial review of administrative law. In part, this reflects a deep and long-running controversy. Indeed, a debate over choice of forum for administrative review set the stage for one of the Supreme Court’s most famous decisions, *Marbury v. Madison*.⁵⁸ After scores of timeless dicta, Chief Justice Marshall held that the Supreme Court could not issue a writ of mandamus in an original proceeding to compel the Secretary of State to deliver a commission to a newly appointed Justice of the Peace.⁵⁹ Instead, the Court found, such a challenge could only be brought in a lower court.⁶⁰

Of course, *Marbury* says nothing about *which* lower court Congress may charge with review of agency action.⁶¹ And Congress has exercised its discretion by providing a myriad scheme of review ever since it first provided for statutory review of administrative action.

The idea of direct appellate court review of agency decisionmaking traces its origins back almost to the beginning of the modern administrative state. When Congress created the Interstate Commerce Commission (ICC) in the late 1800s, it made no allowance for an outside party to challenge ICC’s action.⁶² Instead, the Interstate Commerce Act placed the onus on ICC to come to court to seek enforcement of its conclusions through a “summary” proceeding, “without the formal pleadings and proceedings applicable to ordinary suits in equity,” at which ICC’s findings were intended to be prima facie proof of the facts.⁶³ By 1906, however, judicial scrutiny of and hostility toward ICC decisionmaking led Congress to adopt the Hepburn Act, which made ICC orders self-executing and shifted the burden to an outside party to obtain judicial review.⁶⁴ In 1910, Congress created a special Article III circuit court, the United States Commerce Court, to review decisions of ICC,⁶⁵ but the court lasted only three years

58. 5 U.S. (1 Cranch) 137 (1803).

59. *Id.* at 175–76.

60. *Id.*

61. Although Congress can delegate large amounts of discretion to federal agencies, it is an open question whether Congress can delegate its legislative authority to create Article III courts and control their jurisdiction. *Micei Int’l v. Dep’t of Commerce*, 613 F.3d 1147, 1154 (D.C. Cir. 2010) (noting the “constitutional questions” that might arise if a statute were interpreted to delegate to the President the authority to bestow Article III jurisdiction on a court).

62. Interstate Commerce Act, Pub. L. No. 49–104, 24 Stat. 379 (1887); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189 (1986).

63. Interstate Commerce Act § 16, 24 Stat. at 384–85; see also Merrill, *supra* note 30, at 950.

64. Merrill, *supra* note 30, at 956–58.

65. Mann-Elkins Act of 1910, Pub. L. No. 61–218, 36 Stat. 539 (1910).

before it was widely considered a failure and thus abolished.⁶⁶ In place of the Commerce Court, Congress provided that decisions of ICC would be reviewed *de novo* in the district court by a three-judge panel, with appellate review being available directly to the Supreme Court.⁶⁷

In 1914, Congress first provided for direct appellate court review when it created the Federal Trade Commission (FTC).⁶⁸ The legislative history provides little insight into Congress's motivation for inventing direct circuit review.⁶⁹ The sole rationale given for this approach was that direct circuit court review would provide for "the speediest settlement of disputed questions."⁷⁰ Yet this model would be copied in some, but not all, agencies created in the years to come.

For the next several decades, Congress variously provided for direct circuit court review, for three-judge district court review, or for single-judge district court review. During this era, Congress adopted some of the most prominent examples of direct circuit court review, including for the Securities and Exchange Commission (SEC) in 1933⁷¹ and the National Labor Relations Board in 1935.⁷² Yet despite the significance of these agencies, Congress said very little about its reasons behind its preference for the court of appeals. The little that was said indicates simply that Congress was copying what it had done with FTC.⁷³ At other times, however, Congress provided for district court review,⁷⁴ and it was not always clear why Congress preferred one forum over another.⁷⁵

66. Merrill, *supra* note 30, at 966–67.

67. Pub. L. No. 63–32, 38 Stat. 208, 219–20 (1913). This arrangement exists today only in very limited circumstances related to the Voting Rights Act. 28 U.S.C. § 2284(a) (2012). See generally Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79 (1996).

68. Federal Trade Commission Act, Pub. L. No. 63–203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 41 (2012)). Perhaps not uncoincidentally, the Act also expressly provided for appellate-style review of the agency's decision: the decision would be reviewed only on questions of law, and then only on the record developed by the agency. *Id.*

69. Evans, *supra* note 4, at 372 ("There is nothing in the debate in Congress . . . to indicate that Congress was aware of the significance of the step it was taking, viewed either as a landmark in the development of the techniques of judicial review of administrative agencies or as a curious phenomenon in the framework of the federal judicial system.").

70. H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.).

71. Securities Act of 1933, Pub. L. No. 73–22, § 9(a), 48 Stat. 74, 80–81 (1933).

72. National Labor Relations Act of 1935, Pub. L. No. 74–198, § 10(e), 49 Stat. 449, 454–55 (1935).

73. STAFF OF S. COMM. ON EDUC. & LABOR, 74TH CONG., COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.) 7 (Comm. Print 1935), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 at 1319, 1329 (1949).

74. See Note, *supra* note 28, at 905–06 nn.529–30 (collecting statutes).

75. See Evans, *supra* note 4, at 382 (noting that the author could not discern any

By the middle of the twentieth century, review provisions were scattered over a dozen different statutes in several different fora.⁷⁶ The adoption of the APA four years earlier had standardized many practices relating to administrative review (including, notably, the standard and scope of review), but the APA said nothing about the court in which those decisions would be reviewed. Scholars began to criticize Congress's ad hoc decisionmaking. For example, in 1940, Harvard Law Professor James Landis—who had previously spent time heading several agencies with direct review provisions—announced that “[i]t is clear that no one can defend today our variegated scheme for judicial review of administrative action.”⁷⁷ As set forth below, we wholly agree with Professor Landis and argue that the problem has grown exponentially worse since he wrote.

The closest that Congress ever came to devising a uniform system was with the Administrative Orders Review Act in 1950, which placed initial review of specified agency orders with the circuit courts.⁷⁸ The Administrative Orders Review Act, also known as the Hobbs Act,⁷⁹ was the product of a years-long commission to study the administrative review procedures then in place. The primary driver for the legislation, however, appears to have been concern for the Supreme Court's workload, and not an effort to harmonize and improve the process for *initial* review. This is underscored by the fact that the Administrative Orders Review Act applied only to a small number of agency decisions, all of which had previously been reviewed under the ICC model of a three-judge district court with direct review to the Supreme Court.⁸⁰ A common criticism was that voiced by Chief Justice Stone: the appeals of right to the Supreme Court in agency review cases had burdened the Court with numerous appeals of minor importance and merit.⁸¹

Given the overriding concern with the Supreme Court review aspect of pre-existing procedure, relatively little was said in the legislative history about why circuit courts were chosen to serve as the initial forum for

consistency in Congress's classifications).

76. H.R. REP. NO. 81-2122, at 3 (1950) (“The method of review of most of the judicially reviewable orders of the agencies involved . . . [wa]s prescribed by many provisions scattered throughout different statutes”); Evans, *supra* note 4, at 376 (discussing the lack of any comprehensive code of judicial review of administrative orders).

77. Landis, *supra* note 4, at 1090; *see also* Evans, *supra* note 4, at 371 (“There was, of course, no sense in the dual system of *nisi prius* courts . . .”).

78. 28 U.S.C. § 2347(a)–(b) (2012).

79. Pub. L. No. 81-901, 64 Stat. 1129 (1950). Not to be confused with the other, perhaps more famous Hobbs Act, dealing with racketeering and corruption. 18 U.S.C. § 1951 (2012).

80. *See* Breck P. McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 CALIF. L. REV. 129, 131–32 (1940).

81. H.R. REP. NO. 81-2122, at 2 (1950).

agency challenges.⁸² The bulk of the specific history argued that assembling a three-judge district court was clumsy and that district courts were too busy to be bothered with reviewing the actions.⁸³ However, the House Committee boldly proclaimed that the procedure of initial circuit court review with discretionary Supreme Court review was “the more modern method and [wa]s generally considered to be the best method for the review of orders of administrative agencies,”⁸⁴ because it eliminates duplicative proceedings in the district court and the court of appeals.⁸⁵ Chief Judge Orie Phillips of the Tenth Circuit, principal drafter of the Administrative Orders Review Act, identified a different concern: that entrusting review to three-judge district courts without any right to appeal would be unseemly.⁸⁶

Yet despite the House Committee’s confidence in its work, the Administrative Orders Review Act was not universal, applying instead only to a limited list of agencies.⁸⁷ Excluded agencies could be reviewed under the terms of their organic statute or, absent a jurisdictional provision, in the federal district courts under the APA and general federal question jurisdiction.

2. Today

Over the last sixty years, the number of regulatory decisions subject to challenge has sharply increased, leading to a commensurate increase in

82. See generally *id.*

83. *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470, and H.R. 2771 (80th Cong.) and H.R. 2915 & H.R. 2916 (81st Cong.) Before Subcomms. No. 3 and No. 4 of the H. Comm. on the Judiciary (80th Cong.) and Subcomm. No. 2 of the H. Comm. on the Judiciary, 81st Cong. 65 (1949) [hereinafter *Hearings*]* (statement of Harold I. Baynton, Special Assistant to the Att’y Gen. of the United States) (“We feel that the three-judge court as presently constituted is somewhat disrupting in the district courts. As you know, most of the district courts are busy courts. They have ample business before them.”).

84. H.R. REP. NO. 81-2122, at 4 (1950).

85. *Id.* (“The submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice.”).

86. See *Hearings, supra* note 83, at 112. As Judge Phillips put it:

We felt that there should be one review of the right in an appellate court. That is one reason why we provided for a review in the court of appeals rather than in a three-judge district court. Not that the three judges of the district court would not do as good a job as the court of appeals—they might do a better job, in fact—but we thought it was sort of traditional that there should be one review of right; and, if we were going to take away appeals of right, there ought to be hearings by the court of appeals.

Id.

87. McAllister, *supra* note 80, at 131–32.

congressional choices of forum. And Congress's choices have varied dramatically—without apparent rhyme or reason—from statute to statute, year to year, and even within particular legislation. As a leading treatise puts it, “[A] startling array of specific statutory provisions establish court of appeals jurisdiction to review actions of agencies that range from the major independent regulatory agencies to a large number of executive officials.”⁸⁸ The treatise authors share our estimation that “[c]omplete enumeration of the statutes probably would be impossible at any given moment, even with the aid of sophisticated computer searches.”⁸⁹

Indeed, by our rough count, there are more than a thousand statutory provisions sprinkled through fifty-one titles of the *United States Code* that direct agency cases to a particular court.⁹⁰ Most of these provisions direct litigants to a regional circuit court, to the D.C. Circuit, or, in limited instances, to the Federal Circuit.⁹¹ Thus, for example, Congress has channeled to the circuit court most challenges to Environmental Protection Agency (EPA) decisions under the Clean Air Act and Board of Immigration Appeals decisions under the Immigration and Nationality Act, yet preserved some decisions in the district court under each statute.⁹² There are still further oddities within these provisions. For instance, one statute, the Federal Election Commission Act, provides that constitutional challenges to the election laws proceed directly to the en banc D.C. Circuit, rather than the typical three-judge panel.⁹³ In addition to these provisions, an untold number of agency decisions are left to the default route of initial district court review.

The most recent major expansion of the administrative state came with the 2010 creation of the Consumer Financial Protection Bureau (CFPB). Except for a few narrow categories of actions which may be challenged directly in the court of appeals,⁹⁴ including challenges brought by other

88. 16 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3941 (3d ed. 2012).

89. *Id.*

90. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 377 (noting the “large number of new statutes which explicitly provided for direct court-of-appeals review of rulemaking”).

91. For a collection of provisions just referencing the D.C. Circuit, see Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131, 154–55 (2013).

92. See, e.g., Clean Air Act § 307(a)–(b), 42 U.S.C. § 7607(a)–(b) (2012); Legomsky, *supra* note 13, at 1311–12 (discussing the INA).

93. 2 U.S.C. § 437h; see also *Wagner v. FEC*, 717 F.3d 1007, 1014 (D.C. Cir. 2013) (discussing § 437h).

94. E.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 748, 124 Stat. 1376, 1742 (2010) (codified as amended at 7 U.S.C. § 26(f)(2)) (stating that the decision regarding who gets an award of funds can be challenged in the court of appeals).

federal agencies,⁹⁵ Congress left CFPB review in the federal district courts.⁹⁶

Few patterns emerge from the seemingly random distribution of initial agency review between circuit and district courts, and Congress generally, though not always,⁹⁷ declines to explain its choice of forum.⁹⁸ Even a cursory survey can find countless examples of similar actions by different agencies being challenged in different courts. Thus, for example, though complex economic models are of critical importance to both, regulations of the Federal Energy Regulatory Commission (FERC) can be challenged directly in the circuit court,⁹⁹ while challenges to regulations of the Governors of the Federal Reserve System go to the district court.¹⁰⁰ Review of orders of the Export-Import Bank takes place in district court,¹⁰¹ while challenges to SEC orders go to the circuit court,¹⁰² though both regulate sophisticated trading markets. Postal rates can be challenged in the circuit court,¹⁰³ but Medicare reimbursement rates are reviewed by a district court.¹⁰⁴ Decertified airline mechanics proceed directly to the circuit court,¹⁰⁵ while decertified Navy instructors or body armor manufacturers go to the district court.¹⁰⁶

Even within an agency or a program, it is not clear why one set of decisions go to one forum or another. Horse Protection Act regulations can be challenged in district court, but adjudications go to the circuit court.¹⁰⁷

95. *Id.* § 712, 124 Stat. at 1643–44 (codified as amended at 15 U.S.C. § 8302(c)(1)); § 718, 124 Stat. at 1652–54 (codified as amended at 15 U.S.C. § 8306(b)). These provisions are likely unconstitutional. *See generally* Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217 (2013).

96. *See, e.g.*, *Neighborhood Assistance Corp. of Am. v. CFPB*, 907 F. Supp. 2d 112 (D.D.C. 2012); *First Premier Bank v. CFPB*, 819 F. Supp. 2d 906 (D.S.D. 2011). For another recent example of Congress providing for different types of review in the same legislation, compare 47 U.S.C. § 1442(h) (district court has jurisdiction over disapproval of a state plan), with 47 U.S.C. § 923(i)(7) (court of appeals has jurisdiction over decision of dispute resolution board).

97. The INA is an exception. *See Foti v. INS*, 375 U.S. 217, 224 (1963).

98. Note, *supra* note 7, at 999; Evans, *supra* note 4, at 382.

99. *E.g.*, 15 U.S.C. § 766(c).

100. *E.g.*, *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, 958 F. Supp. 2d 85 (D.D.C. 2013).

101. *Air Transp. Ass'n of Am. v. Export-Import Bank of the U.S.*, 878 F. Supp. 2d 42 (D.D.C. 2012), *rev'd on other grounds sub nom Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974 (D.C. Cir. 2013).

102. 15 U.S.C. § 78y(a)(1), (b)(1).

103. 39 U.S.C. § 3663.

104. 42 U.S.C. § 1395oo(f).

105. 49 U.S.C. § 46110.

106. *Foster v. Mabus*, 895 F. Supp. 2d 135 (D.D.C. 2012); *Pinnacle Armor, Inc. v. United States*, 2012 WL 2994111 (E.D. Cal. July 20, 2012).

107. 15 U.S.C. § 1825(b). There are many similar circumstances that would likely exist,

The rule is flipped for the Department of Energy, where regulations under the Energy Policy Act can be challenged in the circuit court,¹⁰⁸ while determinations of entitlement to Energy Star designation are brought in district court.¹⁰⁹ FTC rules that purport to *amend* trade regulations go to the circuit court, while FTC rules that *interpret* trade regulations go to the district court—although both have the same practical effect on regulated parties.¹¹⁰ If the government prevents you from boarding an airplane, your forum depends on whether the Transportation Security Administration or the Federal Bureau of Investigation placed you on the no-fly list.¹¹¹

Sometimes, Congress provides for circuit court review only for particular types of litigants. For example, Department of Health and Human Services (DHHS) decisions regarding the approval of Medicaid state plans can generally be challenged only in district court, but a state may challenge an adverse approval decision directly in the court of appeals.¹¹² And sometimes Congress has even given the litigant the option: electing circuit court review after a lengthier administrative appeal, or proceeding to district court after exhausting fewer than all of the administrative remedies available.¹¹³

Still other times, the proper forum for challenging an agency's decision might vary from year to year, or even day to day. For example, litigants who wish to challenge the Department of Commerce's actions under the Export Administration Act must determine whether their challenge comes at a time when the statute, including its circuit court review provision, is in effect, or whether its rules have simply been extended by Executive Order, which would shuttle cases to the district courts.¹¹⁴

The seeming randomness of the division of initial review fora provides scant evidence of an intelligent design.¹¹⁵ Only rarely do legislative

but for the judicial interpretation of “order” in direct review provisions to include “regulations.” See *infra* notes 136–139 and accompanying text.

108. 42 U.S.C. § 6306(b)(1).

109. LG Elecs. U.S.A., Inc. v. Dep't of Energy, 679 F. Supp. 2d 18 (D.D.C. 2010).

110. Funeral Consumer Alliance, Inc. v. FTC, 481 F.3d 860 (D.C. Cir. 2007).

111. Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983 (9th Cir. 2012).

112. Compare *Newton-Nations v. Betlach*, 660 F.3d 370, 377 (9th Cir. 2011), and *Miss. Hosp. Ass'n v. Heckler*, 701 F.2d 511, 516 (5th Cir. 1983) (both discussing appeals of non-state litigants who initially challenged Medicaid determinations in district court), with 42 U.S.C. § 1316(a). See also *Del. Div. of Health & Soc. Servs. v. U.S. Dep't of Health & Human Servs.*, 665 F. Supp. 1104, 1109–10 (D. Del. 1987) (“Before tackling the important constitutional and statutory issues raised by a denial of Medicaid funding, the Court must slice through a thicket of seemingly incomprehensible rules that accompany federal transfers to the poor . . . [including] Byzantine jurisdictional standards.”).

113. 25 U.S.C. § 450m-1.

114. *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1152 (D.C. Cir. 2010).

115. *Evans*, *supra* note 4, at 382.

histories shed any light on intent. As one might expect, legislative debate over new agency programs tends to dwell on things other than judicial review procedures.¹¹⁶ At best, this unusual and unpredictable divide appears to be driven by historical circumstances, committee idiosyncrasies, or legislative compromises. Or perhaps the existence of a direct circuit court review provision is simply the product of which piece of prior legislation a particular staffer happened to use as a template. In any event, although there may be compelling reasons for the placement in one forum versus another, it appears that Congress has not given the matter much thought.

Today, it is unknown whether the majority of agency actions are reviewed by circuit or district courts. Commentators have variously assumed both circuit and district courts to have the upper hand.¹¹⁷ We tend to think that most agency decisions end up in the district court as the default rule. And we're in good company: according to the 1990 Federal Courts Study Committee, "administrative law experts estimate that there may be five to eight times as many of these cases [beginning in district courts] as there are direct appeals."¹¹⁸ Although hundreds of agency actions are expressly channeled to the circuit courts, district courts remain the default choice for the seemingly infinite number of agency decisions for which no forum is specified.¹¹⁹ Regardless, the bottom line is that the modern statutory scheme oscillates between initial district court review and direct circuit court review in what often feels like an arbitrary fashion.¹²⁰

116. *Id.* at 374, 376 ("Throughout the history of statutes providing for administrative action, the provision relating to the machinery and procedure of administrative action has been subordinated to the provisions relating to the policy for which administrative regulation was established.").

117. Bryan C. Bond, Note, *Taking it on the Cheney: Should the Principles of Cheney I Apply in Social Security Disability Cases?*, 86 NOTRE DAME L. REV. 2157, 2170 (2011) (circuit court); Jens H. Hillen, Note, *The Court of Appeals for the Federal Circuit: Independent Review of Patent Decisions and the Constitutional Facts Doctrine*, 67 S. CAL. L. REV. 187, 210 (1993) (circuit court); Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 225 n.142 (1990) (circuit court); *Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1148 (9th Cir. 2009) (district court).

118. Fed. Courts Study Comm., *Report of the Federal Courts Study Committee*, 22 CONN. L. REV. 733, 810–11 (1990).

119. *E.g.*, *NetCoalition v. SEC*, 715 F.3d 342, 347 (D.C. Cir. 2013) ("Unless the Congress has . . . expressly supplied the courts of appeals with jurisdiction to review agency action directly, an APA challenge falls within the general federal question jurisdiction of the district court and must be brought there ab initio.").

120. WRIGHT ET AL., *supra* note 88, at § 3941.

3. *Judicial Gloss*

Given the complexity and lack of any discernable organizing principle of this divided scheme, the Supreme Court regularly resolves jurisdictional disputes involving review of agency action. For the last several years, an average of one such jurisdictional case has appeared before the Court each term.¹²¹

And if the lower courts struggle with deciphering Congress's jurisdictional puzzle, it is no surprise that litigants are often unsure of where they should bring their challenge. Litigants who guess incorrectly face the prospect of losing out on very short deadlines, often sixty days, for bringing an action,¹²² unless they are able to convince a court to transfer the case to the proper forum.¹²³ Cognizant of the risks to litigants, courts openly advocate for challengers to agency decisions to bring their actions in both circuit and district courts, lest they guess wrong.¹²⁴ Scholars too have noted the difficulty of identifying the proper forum.¹²⁵

To deal with this statutory mess, courts have experimented with jurisdictional tests to ease the confusion.¹²⁶ However, many of these approaches relied more on the preferences and assumptions of the judges than on any direction from Congress.¹²⁷ For example, in the 1980s, the Supreme Court suggested that direct circuit court review should be presumed based on what it described as “the sound policy of placing initial APA review in the courts of appeals.”¹²⁸ But the Court made little effort to defend, or even articulate, its view of policy—a policy often at odds with Congress's, as reflected in statutory language—and recent decisions have substituted the usual tools of statutory construction for these naked policy preferences.¹²⁹

For their part, the circuit courts have their own view of “sound policy.” Sometimes, circuit courts read in *exceptions* to statutory circuit court review

121. See *supra* note 3.

122. There are perhaps hundreds of statutes which require a petition for review to be filed within sixty days. See, e.g., 7 U.S.C. § 2149(c) (2012); 15 U.S.C. § 45(c) (2012).

123. See *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1155 (D.C. Cir. 2010).

124. See *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 272 (D.C. Cir. 2012).

125. See *supra* note 13 and accompanying text.

126. For a discussion of the early judicial efforts at interpreting these provisions, see generally *McAllister*, *supra* note 80.

127. *INS v. St. Cyr*, 533 U.S. 289, 334 (2001) (Scalia, J., dissenting) (arguing that “courts have distorted plain statutory text in order to produce a ‘more sensible’ result” when interpreting statutory review provisions).

128. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985); accord, e.g., *Jaunich v. U.S. Commodity Futures Trading Comm'n*, 50 F.3d 518, 521 (8th Cir. 1995); *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986).

129. See *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012).

based on the nature of the claim, particularly constitutional or pattern-or-practice challenges to agency actions,¹³⁰ or the likely thoroughness of the administrative record.¹³¹ Other times, while simultaneously groaning about crushing dockets,¹³² circuit courts enthusiastically assume original jurisdiction based primarily on their own policy preferences and only loosely, and as an afterthought, on statutory language.¹³³ Most egregiously, circuit courts occasionally assume direct review jurisdiction for themselves despite the lack of *any* statutory basis.¹³⁴ Rather than clarifying matters, these occasional presumptions simply add another layer of indeterminacy upon an already uncertain jurisdictional terrain.¹³⁵

Another interpretive approach requires closer examination. Many direct review statutes—particularly those adopted before 1950—provide for direct review of “orders.”¹³⁶ Does this allow for direct circuit court review of regulations, or other types of agency action?¹³⁷ In the 1950s, the courts interpreted “order” narrowly to exclude rulemaking.¹³⁸ Beginning in the 1970s, the circuit courts started interpreting “order” in direct review

130. *E.g.*, *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994).

131. *City of Rochester v. Bond*, 603 F.2d 927, 932 (D.C. Cir. 1979).

132. *E.g.*, 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, 761–62 (1983) (citing increases in dockets and case load).

133. *E.g.*, *Cal. Energy Comm’n v. Dep’t of Energy*, 585 F.3d 1143, 1148 (9th Cir. 2009) (“[C]onsiderations of efficiency, consistency with the congressional scheme, and judicial economy may be employed to determine whether initial review in the circuit courts best accomplishes the intent of Congress”); *Natural Res. Def. Council, Inc. v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004); *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 910 (D.C. Cir. 2004); *WRIGHT ET AL.*, *supra* note 88, at § 3940.

134. *Clark v. Commodity Futures Trading Comm’n*, 170 F.3d 110, 114 (2d Cir. 1999) (“[T]he statute governing judicial review in the matter before us is ambiguous, since it provides for judicial review but fails to specify the court in which such review will take place. This alone favors the location of jurisdiction in this Court.”).

135. *Jaunich v. U.S. Commodity Futures Trading Comm’n*, 50 F.3d 518, 520 (8th Cir. 1995) (“While the analytical framework for determining whether initial review should proceed in the court of appeals or the district court appears somewhat simple, it is often complicated by confused case law standards or poorly drafted and ambiguous statutory language.”).

136. Note, *supra* note 7, at 989–92.

137. On the one hand, “order” generally is a limited, case-specific type of directive. The APA, for example, defines “order” to be a final disposition “other than rule making.” 5 U.S.C. § 551(6) (2012). Yet the statutory use of “order” may not say much by way of legislative intent to limit direct review: these provisions might be anachronisms of the pre-APA era when the scope and nature of review varied widely depending on the type of agency action, or they could reflect a lack of congressional foresight into the varying ways in which agencies would choose to act. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 158–59 (1965) (describing possibilities and suspecting “an oversight”).

138. Note, *supra* note 7, at 989–92.

provisions to apply to pretty much anything that the agency does—rulemaking, manual, or any other final agency action.¹³⁹

The expansion of “order” can lead to some awkward results because many of the direct review provisions also contain short time windows, commonly sixty days, in which a suit must be brought. The short time period might make sense when dealing with an adjudication leveled against a readily defined individual, but it makes less sense when dealing with a broad regulation. For example, there may be instances where no one has an imminent injury from a new regulation because its application to any particular situation is speculative. This is often the case with ambiguous regulations, the real upshot of which cannot be grasped until the agency moves to enforce. Moreover, even if a challenge might meet the strictures of Article III, a regulated party may wish to choose to see how the regulation is going to be implemented or applied to it before immediately filing suit. The expansion of “order” to cover any and all agency action not only stretches statutory text, but it can also hamper the efficient administration of justice.

The recent trend, however, is to follow the language of the direct review provisions more literally and to interpret “order” narrowly, leaving challenges to other actions to the district court.¹⁴⁰ Although courts may have sought to provide clarity, departing from the text of the statutory provisions has introduced more confusion and disparities between similarly worded statutes. The upshot is that simply identifying a statutory provision is not enough for litigants to find a home for their challenge; they also must determine how the relevant courts have interpreted that particular provision.

In recent years, the Supreme Court has charted a new path, favoring clear dividing lines and easy tests for determining where an action belongs, rather than the unpredictable analysis of the nature of the claim. For example, in *Elgin v. Department of Treasury*, the Supreme Court held that *any* personnel action cognizable under the Civil Service Reform Act—even a constitutional claim for injunctive relief against a statute—can only be brought directly to the Federal Circuit.¹⁴¹ This was a clear improvement over decades of circuit case law that instead scrutinized the nature of the claim before allowing some to proceed in district court.¹⁴² As the *Elgin* Court emphasized, the discarded claim-based jurisdictional rule “would

139. *See, e.g.*, *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598–600, 604 (D.C. Cir. 2007) (holding that a Federal Aviation Administration (FAA) advisory circular is an “order” for purposes of a statutory review provision); *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309 (8th Cir. 1981) (collecting cases).

140. *E.g.*, *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013).

141. 132 S. Ct. 2126 (2012); *see also* *Kloeckner v. Solis*, 133 S. Ct. 596 (2012).

142. *See, e.g.*, *Spagnola v. Mathis*, 859 F.2d 223, 229–30 (D.C. Cir. 1988) (en banc).

deprive the aggrieved employee, the [agency], and the district court of clear guidance about the proper forum for the employee's claims at the outset of the case."¹⁴³

In sum, despite the courts' efforts, the *United States Code* remains a complicated maze for would-be challengers of agency action, largely providing for judicial review but varying unpredictably the forum in which the review will take place.

II. WHICH COURT(S) SHOULD REVIEW THE EXECUTIVE?

Congress may not carefully consider its jurisdictional choices, but that need not stop us from giving the question a close look. In this Part, we catalog the various arguments that have been or might be offered to support a particular jurisdictional scheme. Given the frequency with which circuit courts are charged with direct review of an agency decision, we would expect that the benefits of direct review would be well established. But they are not.¹⁴⁴ To fill the gap, we utilize and expand prior scholarship on the structure of judicial hierarchies, and we ask which jurisdictional system achieves the optimal balance between accuracy and cost, while also taking into account other factors that may be relevant to the design of the ideal system. We ultimately conclude that broad claims in favor of initial circuit court review are unsupported at present.

We identify several arguments that could be raised in favor of direct circuit court review: the need to distribute workload, the unsuitability of district court rules for reviewing agency decisions, the need for authoritative resolution of legal disputes, seemliness, efficiency of a direct route to the court of appeals, and accuracy. Many of these arguments—most notably, seemliness and authoritativeness—are at best only arguments for circuit court involvement at some stage in the case, such as on appeal, and say nothing by their own force about whether that role should be at the beginning or the end of a case. Only efficiency and accuracy plausibly justify a case proceeding directly to the court of appeals, and then only under assumptions that we think are unlikely to hold true in reality.

No balancing would be complete without considering the costs of jurisdictional ambiguity. And these costs, in our view, are fatal to the current design. Rather than attempt to chase uncertain marginal gains by tailoring jurisdiction based on guesses about the future, we propose a single, uniform standard to simplify matters for future litigants. At the very least, we urge efforts to seek simple, predictable rules.

143. *Elgin*, 132 S. Ct. at 2135.

144. *But see* Currie & Goodman, *supra* note 13.

A. *Legitimacy/Seemliness*

A surprisingly persistent argument in favor of circuit court involvement is seemliness: the perceived legitimacy of judicial review depends on the availability of a court of appeals.¹⁴⁵

This argument falters on several levels. On the definitional level, “seemliness” is a particularly squishy concept,¹⁴⁶ and advocates of this perspective have done little to impart substance or justify why it should matter.¹⁴⁷ Our best effort to construct the argument is that (1) a major goal of the judicial system should be to convince litigants and the public that justice is being served, and (2) litigants or the public might view a district judge reviewing an administrative agency as somehow illegitimate or less legitimate. While the former premise is debatable, the latter is wholly unjustified.

First, the supposed unseemliness of district court review would seem to be resolved by the availability of the circuit court to conduct appellate review. If litigants would not credit the say of a single district judge, they could invoke their right to appeal and have their chance to proceed in the circuit court.

But perhaps the availability of eventual review by a circuit court would not solve the problem. Perhaps “it would be unseemly and demeaning for a single district judge to set aside the decisions of an expert administrative agency”¹⁴⁸ The prospect of appeal, one could argue, does not cure the initial indignity of an agency being forced to answer to a single judge, nor does it eliminate the disrespect from a single judge setting aside a duly enacted regulation. The harm is done, so goes the argument, even if the agency later receives the respect it deserves through an encounter with the circuit court.

This line of reasoning seems almost self-refuting. After all, district judges can enjoin acts of Congress and state legislation, and review in these situations would seem to raise even more powerful concerns with

145. Schorr, *supra* note 13, at 797 (“[T]he high stature of the court of appeals generally makes it the preferred forum”); Currie & Goodman, *supra* note 13, at 14.

146. Supporters of the Administrative Orders Review Act argued that seemliness required the rejection of *three-judge* district court review in favor of single-tier, three-judge circuit court review. *Hearings*, *supra* note 83, at 112 (“[I]f we were going to take away appeals of right, there ought to be hearings by the court of appeals.”). Thus, according to the promoters of the Act, seemliness requires the right to proceed in a court called a “court of appeals.” This nomenclature preference is hardly a solid basis on which to base a jurisdictional system. We think a more persuasive—but still unconvincing—iteration would be that seemliness is satisfied by a multi-membered court but not a single judge.

147. Currie & Goodman, *supra* note 13, at 14.

148. *Id.*

seemliness.¹⁴⁹ If it is unseemly for a district judge to second-guess an administrative body, how should we feel about a single district judge striking down federal or state legislation as unconstitutional? The seemliness argument would erode judicial review by district courts to the vanishing point.¹⁵⁰

At any rate, today's system involves numerous agency decisions subject to review without widespread alarm over the system's legitimacy. As an empirical matter, we are just not convinced that many litigants, be they agencies or challenging parties, feel review by a district court is somehow beneath them.

Not only do we doubt that litigants would question the legitimacy of initial district court review, but we question how much weight litigant preferences should be given. The mere fact that things were previously done a certain way is not a sufficient reason to continue down the same path. The bar may be programmed by experience to expect a certain jurisdictional scheme, but lawyers, particularly the specialized breed that practice administrative law, can adapt. Indeed, for many years in this country, the idea that a single judge could issue final, unappealable rulings was common.¹⁵¹ In fact, there have been a number of serious—though controversial—proposals to limit circuit court appellate review of district court judgments,¹⁵² and some have suggested that litigants should have *less*

149. Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101 (2008).

150. An interesting twist on this argument was recently articulated by Aaron-Andrew Bruhl. Bruhl, *supra* note 18. Laying out the case for hierarchically variable deference to agency interpretations, Bruhl notes that, to the extent judicial review bleeds into policymaking, courts with a stronger democratic pedigree have a better claim to the robust exercise of judicial review (i.e., in a way that accords little deference to agency calls). *See id.* at 743–48. If a main argument in favor of judicial deference is that the President and his agents, as politically elected and accountable policymakers, are entitled to a significant degree of latitude within statutory bounds, then it might follow that politically vetted judges have a stronger claim to judicial review that tinkers with national policy. *Id.* From this perspective, the Supreme Court has the strongest claim, sounding in political or democratic pedigree, to revisit agency interpretations, at least when those interpretations implicate national policy. *Id.* District courts ought to be the most deferential under this rubric, with the circuit courts occupying a middle ground. *Id.*

151. Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603 (1985).

152. *E.g.*, Recommendations of the Administrative Conference of the United States, 40 Fed. Reg. 27,925, 27,927 (1975); *accord, e.g.*, David R. Cleveland, *Post-Crisis Reconsideration of Federal Court Reform*, 61 CLEV. ST. L. REV. 47, 60 (2013); Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499 (2008); *Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*.—Wang v. Attorney General, 423 F.3d 260 (3d Cir. 2005), and Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005), Recent Cases, 119 HARV. L. REV. 2596, 2600–01 (2006); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 12 (1996); Linda Greenhouse, *Rehnquist Asks Limit to Automatic Appeals*,

of an expectation of having a two-tier judiciary when it comes to review of agency decisions.¹⁵³ We see little risk of the public losing faith in the judiciary were administrative cases assigned to the same track as all other matters.

B. Workload Distribution

Dividing initial review between district and circuit courts could also be a response to a labor shortage. Lawsuits challenging agency decisions account for a decent share of the federal docket,¹⁵⁴ and some of them can be quite labor-intensive. If Congress felt that district judges were, compared to their colleagues on the circuit courts, facing heavier dockets, then Congress might see fit to balance the scales by shifting some cases to the circuit courts. The impetus here would not be the notion that circuit courts are more competent, but simply that they have a surplus of labor resources compared to the district courts.

Although we have not identified evidence that Congress had this in mind with respect to any of its allocation choices, there is evidence that this *could* have been a factor. In 1930, there were sixty-four case filings—not just administrative law cases, but cases of all stripes—per circuit judge, while there were nearly one thousand per district judge.¹⁵⁵ As Figure 1 shows, the ratio has become much less lopsided over the years. As it now stands, the ratio of district court filings to circuit court filings is in the neighborhood of two to one.

Correlation is not causation, much less evidence of Congress's motivation. That being said, it does not seem entirely far-fetched to suppose that some members of Congress were aware of the uneven workloads and sought to correct that asymmetry by tinkering with the jurisdictional scheme. For instance, although the legislative history of the

N.Y. TIMES, Sept. 16, 1984, <http://www.nytimes.com/1984/09/16/us/rehnquist-asks-limit-to-automatic-appeals.html>.

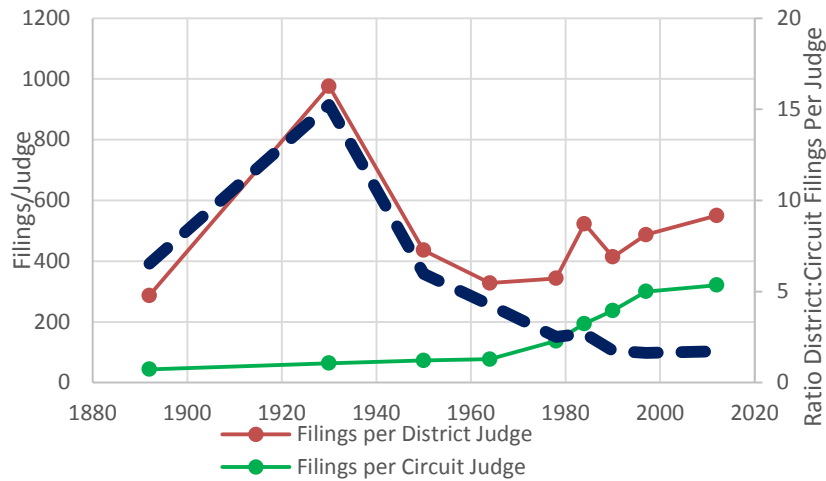
153. Denberg v. U.S. R.R. Ret. Bd., 696 F.2d 1193, 1196 (7th Cir. 1983) (“[T]o allow someone seeking judicial review of administrative action to get that review in the district court with a right of appeal to the court of appeals is to give him two judicial reviews of administrative action. That is too much”); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 176 (1973) (“The argument would be that it is enough to grant an aggrieved citizen one judicial look at the action of a disinterested governmental agency”). Indeed, the APA’s stingy scope of review generally prescribes only a limited right to challenge agency action, and this right can be and, at times, has been removed by Congress at will. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345–48 (1984).

154. Diarmuid F. O’Scannlain, *Striking a Devil’s Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 477–78 (2009).

155. COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 14 TBL. 2-3 (1998), available at <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf>.

Administrative Orders Review Act does not suggest this rationale,¹⁵⁶ it is possible that it was in the back of lawmakers' minds. Even in 1950, when the Act took effect, the ratio was still about six to one.

Figure 1: Historical Workload Per Judgeship¹⁵⁷



But whether or not Congress was trying to balance workloads, the problem is that it seems like such an odd way for Congress to respond. If Congress felt district judges were swamped, why not just create more judgeships?¹⁵⁸ Jurisdictional choices last much longer than the cyclical ebbs and flows of case filings, making them a particularly awkward method of balancing work between the courts. For example, perhaps in 1930 it made sense to shift workload to the relatively underworked circuit courts. But things have changed since 1930, and during the past three decades, commentators have widely complained that the *circuit* courts are overwhelmed with work.¹⁵⁹ Yet direct review statutes exacerbate this

156. See generally H.R. REP. NO. 81-2122 (1950).

157. The ratio is arithmetically calculated based on reported numbers. United States Courts, *Judicial Facts and Figures 2012*, USCOURTS.GOV, <http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/judicial-facts-figures-2012.aspx> (last visited Dec. 14, 2014); COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, *supra* note 155, at 14.

158. The usual reasons for not adding judgeships are concerns that the majority party will pack the new seats with ideologically biased judges or that more judgeships will water down the prestige of the judiciary. Bruce Moyer, *Will Congress Add More Federal Judgeships?*, FED. LAW., June 2009, at 10; Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 68 (1990).

159. See, e.g., David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over*

problem by committing circuit court resources to *every* direct review case that is filed.

C. District Court Rulemaking

One argument that could be made in favor of direct circuit court review is that district court procedures are ill-suited to the review of agency decisions.¹⁶⁰ “Although appeals of federal agency decisions are generally heard by federal district courts, they do not fit comfortably within the Federal Rules of Civil Procedure.”¹⁶¹ This is largely because the Federal Rules of Civil Procedure (Civil Rules) are built to resolve factual disputes. But there are usually no factual disputes in APA cases—only legal arguments about the *agency’s* fact-finding. Thus, for example, discovery is contemplated through rules requiring mandatory disclosures and a scheduling conference,¹⁶² but under the APA, the record is the one compiled by the agency, not a new one created before the court.¹⁶³ Without a better approach available, courts generally resort to resolving APA cases through cross-motions for summary judgment. Although effective, this approach can tempt courts into misapplying the summary judgment standard (are there genuine issues of material fact?) instead of the APA standard (is the agency view arbitrary and capricious based on the evidence that it had before it at the time of the decision?). Indeed, because there are no factual disputes, even a complaint and answer are unnecessary distractions in APA cases, which is why sophisticated courts waive the answer and allow parties to proceed directly to briefing on the merits. Trial lawyers and judges who are accustomed to discovery but unaccustomed to administrative review may struggle to reconcile the diverging standards.¹⁶⁴

In contrast, the Federal Rules of Appellate Procedure are well-tailored to the appellate-like quality of APA cases. In fact, the appellate rules contain several rules specifically tailored to administrative cases.¹⁶⁵ These rules contemplate a straightforward briefing schedule based on the administrative record, exactly as the APA contemplates.

In a typical case, then, the appellate rules may be a better match for review under the APA. But there are times when the agency’s

Unpublished Opinions, 62 WASH. & LEE L. REV. 1667, 1673 (2005); POSNER, *supra* note 1.

160. We are grateful to Matt Lawrence for this point.

161. W. Cory Haller & Karen E. Robertson, *Untangling Federal Administrative Appeals Practice in the District of Colorado*, COLO. LAW., March 2013, at 31.

162. FED. R. CIV. P. 16.

163. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

164. Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 204 (1974) (“And while the district court could act like a court of appeals by deciding motions for summary judgment, there is always a disruptive potential for lengthy trial . . .”).

165. FED. R. APP. P. 15–20.

administrative record is not controlling, and the comparatively robust civil rules make district courts the premiere triers of fact. To the extent that facts are at play in an administrative review case, we think the district courts' advantage here would be dispositive.¹⁶⁶ And often facts are at play. First, a litigant must establish the requisite standing, which in turn requires that the litigant establish an injury "in fact," an increasingly important aspect of judicial review since the time of Professors Currie and Goodman's analysis.¹⁶⁷ Factual disputes regarding a party's standing often cannot be assessed on the administrative record.¹⁶⁸ Second, although there is a presumption that the record supplied by the agency is complete, the challenging party may overcome this presumption with clear evidence that the record fails to include documents or materials considered by the agency in reaching its decision.¹⁶⁹ In district court, such disputes are handled through the familiar tool of a motion to compel.¹⁷⁰ In at least some circuit courts, however, the parties are directed to brief these issues right along with the merits. The problem with this approach, of course, is that challenging parties presumably need this information to make their case on the merits. Moreover, if a party seeks preliminary relief before the agency has had time to submit a record—a common tactic by plaintiffs—the court will have to balance whatever evidence is available at the time to determine whether agency action should be stayed. Finally, the Supreme Court itself has suggested, though never held, that there may be due process issues if a litigant lacks an opportunity to develop facts necessary to a constitutional claim by depriving him of a district court forum,¹⁷¹ although subsequent decisions have sharply limited these suggestions.¹⁷² These situations should be relatively rare, but when they arise, district courts are natural candidates to resolve the factual issues.

Of course, statutes could provide express mechanisms for referring factual disputes to an appropriate arbiter of facts, such as a district court, a special master, or the agency.¹⁷³ Indeed, at least one statute providing for

166. See Elias, *supra* note 13, at 1016.

167. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–62 (1992); see *infra* Part II.D.–F. (offering further discussion of the work of Currie and Goodman).

168. Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 959 (2010).

169. Natural Res. Def. Council, Inc. v. Train, 519 F.2d 287, 291 (D.C. Cir. 1975); Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993).

170. See, e.g., Wildearth Guardians v. U.S. Forest Serv., 713 F. Supp. 2d 1243 (D. Colo. 2010).

171. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 483–84 (1991); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993).

172. Elgin v. Dep't of Treasury, 132 S. Ct. 2126 (2012); Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).

173. WRIGHT ET AL., *supra* note 88, at § 3943.

direct circuit court review expressly contemplates referral of factual disputes to district court.¹⁷⁴ But these processes are likely more awkward, leading to considerable delay, than simply having the district court step in to resolve any factual disputes in the first place.¹⁷⁵

Although district court procedures may, at present, be clumsy when it comes to most administrative cases, this can and should be changed. Indeed, it is surprising that the Civil Rules have persisted virtually oblivious to the uniqueness of record review cases despite the large number of such cases that come before the district courts. Nevertheless, many districts have, by local rule, recognized that record review cases require different procedures than run-of-the-mill cases. Many, but not all, local rules categorically excuse record review cases from formulating a discovery plan.¹⁷⁶ The District of Colorado has a distinct set of rules for administrative cases that appropriately bypasses discovery and proceeds directly to a briefing schedule.¹⁷⁷ Even within the confines of the Civil Rules, district judges can exercise their discretion to modify the procedures to tailor them to the APA case before them. Although these efforts vary from district to district and judge to judge, they point a path toward better district court accommodation of administrative cases.

D. Authoritativeness

Another common argument for direct circuit court review relies on a cited need for authoritative resolution of the challenge.¹⁷⁸ Circuit courts, under this argument, are fewer in number, generally cover a broader

174. 28 U.S.C. § 2347(b)(3) (2012). A similar provision allows the circuit courts to remand to the agency for further factual development. 28 U.S.C. § 2347(c).

175. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593–94 (1980) (“It may be seriously questioned whether the overall time lost by court of appeals remands to EPA [Environmental Protection Agency] of those cases in which the records are inadequate would exceed the time saved by forgoing in every case initial review in a district court.”).

176. D.D.C. R. 16.3(b)(1) (exempting “an action for review on an administrative record”); *see also* Commentary to FED. R. CIV. P. 16 (“Logical candidates for [exemption from scheduling orders] include . . . reviews of certain administrative actions.”). In 2013, the Rules Committee deferred discussion on potentially amending the Civil Rules to prescribe a national set of cases that are exempt from these requirements. ADVISORY COMMITTEE ON CIVIL RULES, MEETING AGENDA 80–81 (Apr. 11–12, 2013), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf>.

177. D.C. COLO. LAPR § III; *see also* Haller & Robertson, *supra* note 161, at 31–32.

178. *E.g.*, *Natural Res. Def. Council, Inc. v. EPA*, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) (“National uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals.”); Verkuil & Lubbers, *supra* note 13, at 781 (“Article III appellate court jurisdiction of these issues is essential, both for constitutional reasons and for developing precedent on important legal questions.”); Schorr, *supra* note 13, at 796; Bruhl, *supra* note 18, at 749.

geographical region, and, under the law of the circuit doctrine, issue authoritative decisions which are binding law on all judges in the circuit absent en banc or Supreme Court intervention. According to Currie and Goodman, “the decisive advantage of the court of appeals is its capacity to develop and maintain a coherent, reliable and uniform case law for a fairly large geographical region.”¹⁷⁹ This argument has only limited traction.

To begin, the relative authoritativeness of circuit courts is helpful only when an agency decision will generate more than a single suit. Once the judiciary resolves a challenge to an agency’s fact-laden denial of benefits to a particular individual, for example, there is closure on that particular dispute through ordinary application of *res judicata*. It matters not whether such an individualized matter is settled with fanfare by the Supreme Court or through an unappealed judgment from an obscure magistrate; the precedential effect of the decision for *other* cases has no bearing on the conclusiveness of the judiciary’s resolution of the particular challenge that was brought. When no further challenges are expected, there is little value in creating binding precedent on the specific agency decision being challenged.

But certain types of agency decisions may apply broadly—rulemaking, for example, may affect millions—and multiple challenges may be expected. It serves no one’s interest if the judiciary has to resolve anew hundreds of individual challenges to the same regulation. Not only is it costly to redo the same legal analysis over and over again, but the risk of differing results depending on which judge or judges happen to be assigned undermines confidence in the rule of law and violates the norm of equal justice.¹⁸⁰ Differing rulings can also throw a regulatory regime into chaos. For agency decisions subject to multiple and possible future challenges, the judiciary can speak authoritatively on the permissibility of the agency decision only through creating precedent.¹⁸¹ Circuit courts, based on their comparatively broader geographical scope, fewer numbers, and stronger rules of precedent (published circuit court opinions bind future panels of that court), are better able to issue definitive rulings than the geographically limited and numerous district courts.¹⁸² Rules of cross-circuit

179. Currie & Goodman, *supra* note 13, at 15.

180. Mead, *supra* note 30, at 812–13. Bruhl considers this to be another justification for deference in the lower courts but not in the Supreme Court. If lower courts, and especially district courts, did not grant significant deference to agency interpretations, national regulatory policy would be severely threatened. On the other hand, because the Supreme Court’s ruling is binding on the whole nation, the concern over uniformity does nothing to justify deference by our highest court. Bruhl, *supra* note 18, at 749.

181. Consolidation before a single court would work to conclusively resolve all currently pending cases but would not bind future litigants.

182. Mead, *supra* note 30.

consolidation, such as that contained in the Administrative Orders Review Act, or limited venue, such as the Clean Air Act's channeling of all challenges to the D.C. Circuit,¹⁸³ further facilitate uniform and conclusive decisionmaking. However, it bears noting that nothing would prohibit district courts from benefiting from the same types of procedures.¹⁸⁴

The purported finality of circuit court rulings is, in many ways, illusory. True, the circuit court will, absent Supreme Court intervention, finally resolve the particular controversy between the agency and the challenging party. But there are a dozen regional circuits, which often gives rise to inter-circuit disagreements. When one circuit upholds a regulation, but another strikes it down, the status of the agency's rule is particularly uncertain.¹⁸⁵ Further, even within a circuit, the conclusiveness of circuit law is undermined by the ability of motivated jurists to distinguish prior cases, often on dubious grounds.¹⁸⁶ Moreover, agencies have legal authority to refuse to follow circuit law to which they object, although subsequent challenges to agency non-acquiescence in circuits with adverse precedent should be pre-ordained victories for the challengers.¹⁸⁷

Only by placing review in a *single* court,¹⁸⁸ as is often done with the D.C. Circuit,¹⁸⁹ can Congress actually provide any measure of uniformity in decisionmaking.¹⁹⁰ Such concentration of review has some advantages. In particular, agencies have a better idea who will be reviewing their decisions and can tailor their decisionmaking process to the law of that circuit and

183. Fraser et al., *supra* note 91; *see also* S. REP. NO. 91-1196, at 41 (1970) (citing the desire for "even and consistent national application").

184. Congress could designate a single *district* court to hear all challenges nationwide to agency action, as it previously did with mandamus jurisdiction and the District of Columbia district court; if this district court adopted a rule of precedent, and no appeal were available, then its review of an agency's rule would enjoy even greater weight than that of a regional circuit today.

185. Cross, *supra* note 41, at 1249 ("[A] circuit split over the regulations of the Environmental Protection Agency . . . on granting Clean Air Act variances kept those rules 'in limbo for well over two years and led to different treatment of polluters in different parts of the country.'").

186. Mead, *supra* note 30, at 798.

187. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

188. Note that it is irrelevant whether this court is designated as a circuit, district, or something else.

189. Fraser et al., *supra* note 91.

190. Landis, *supra* note 4, at 1087 ("The purpose of thus centralizing review over actions always national in their scope and involving a consideration of the interrelation of other claimants in one integrated system of radio network seems obvious."); S. REP. NO. 91-1196, at 41 (1970) ("Because many of these administrative actions are national in scope and require even and consistent national application, the provision specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia.").

the peculiarities of those judges.¹⁹¹ It also mitigates the temptation for litigants to forum shop. These advantages motivate occasional calls for a specialized administrative court.¹⁹²

But a single court also has serious drawbacks, and most scholars come out sharply against a specialized administrative court.¹⁹³ Were too many decisions entrusted to a single court, the size of the court would have to be dramatically expanded, likely rendering the maintenance of a uniform jurisprudence impossible.¹⁹⁴ Moreover, relying on a single court limits the opportunities for circuit splits to develop. Although circuit splits cause headaches for litigants (“splitting” headaches, as it were), they are sometimes a necessary evil. Inter-circuit dialogue can serve to tease out nuance that might otherwise go undetected.¹⁹⁵ Further, excessive concentration can lead to a de facto specialty court, which may be overly confident in its knowledge and therefore exceed the proper scope of review¹⁹⁶ or acquire tunnel vision that prevents the judges from looking at decisions from a broader perspective.¹⁹⁷

Closely related to authoritativeness is lawmaking. The distinction lies in the subtle difference between settling particular disputes with authority, on

191. *Kendrick v. Shalala*, 998 F.2d 455, 457 (7th Cir. 1993) (“Because these reviewers are selected at random from a large pool, to be *really* safe the ALJ must please the most demanding federal judge in the jurisdiction.”); Cross, *supra* note 41, at 1251–52; James Craig Peacock, *An Anomalous and Topsy-Turvy Appellate System*, 19 A.B.A.J. 11, 14–16 (1933).

192. *E.g.*, Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377 (1990) (collecting authorities); O.R. McGuire, *The Proposed United States Administrative Court*, 22 A.B.A.J. 197 (1936).

193. POSNER, *supra* note 1, at 148; FRIENDLY, *supra* note 153, at 188; Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990); Currie & Goodman, *supra* note 13. The experience of the Federal Circuit—a specialized appellate court that hears narrow classes of cases relating to patents, federal employees, and government contracts—is decidedly mixed, with no small amount of scholarly and practitioner skepticism of the court’s performance. *E.g.*, Daniel Kazhdan, *Beyond Patents: The Supreme Court’s Evolving Relationship with the Federal Circuit*, 94 J. PAT. & TRADEMARK OFF. SOC’Y 275, 281 (2012); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105 (2004). *But see* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 329 (1991) (advocating for the “creation of a new administrative court with jurisdiction over cases meeting certain criteria”). Bruff’s article deserves particular mention for the comprehensive framework it employs to analyze the historical origins and the costs and benefits of specialized courts.

194. Fed. Courts Study Comm., *supra* note 118, at 810–11.

195. James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 550 (2006).

196. The conventional wisdom is that overly eager review doomed the specialized but very short-lived Interstate Commerce Court. FRIENDLY, *supra* note 153, at 188.

197. POSNER, *supra* note 1, at 155–60; Harold Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 UCLA L. REV. 432, 444 (1976).

the one hand, and, on the other, providing guidance to the lower courts—and in this case, administrative agencies—on what the law is.¹⁹⁸ The lawmaking function of courts has been most strongly associated with appellate courts, and especially the Supreme Court.¹⁹⁹ It occurs when a court uses the occasion of the dispute as an opportunity to refine the law or declare its contours with more precision.²⁰⁰ The relatively strong rules of precedent and broader geographical scope allow circuit courts to more readily pronounce rules of law to govern future agency decisionmaking.

Yet the supposed need for circuit court lawmaking is, at most, a weak argument for *direct* circuit court review, as opposed to eventual review on appeal. It is unlikely that a particular controversial issue will be insulated from circuit court review indefinitely, as a litigant will, sooner or later, file an appeal and allow the circuit court to announce its legal rule. Moreover, lawmaking is less important in the administrative review context than in most cases. Cases such as *Brand X* emphasize that the judiciary's usual role in developing the law is shared with administrative agencies, which can trump the judiciary on many questions of law through delegated power from the legislature.²⁰¹

To recap, although it is important not to overstate the conclusiveness of circuit precedent, circuit courts do issue more definitive statements of law than district courts, and this finality can be useful when an agency decision applies broadly and is susceptible to multiple challenges. However, the precedent-setting feature of circuit courts becomes far less useful when the agency decision under review is a fact-specific adjudication that applies only to a particular controversy—yet Congress often places this latter type of agency action directly in the circuit court.²⁰²

E. Efficiency Gains

The primary argument in favor of direct circuit court review is efficiency.²⁰³ For those cases that are likely to be appealed anyway, the argument goes, it would be wasteful, redundant, and would delay final

198. See Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1402 (2000) (“The Court is expected not only to determine the victor in the specific lawsuit before it, but also to provide standards to guide lower courts in disposing of similar controversies that may arise in the future.”).

199. See *id.*

200. See *id.*

201. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

202. See, e.g., 49 U.S.C. § 46110 (2012).

203. Currie & Goodman, *supra* note 13, at 4.

resolution of the matter²⁰⁴ to have a district judge opine on the subject first.²⁰⁵ Because both the district court and the circuit court review agency decisions with the same level of deference and on the same record, the thinking goes, there is no point in subjecting a decision to the district court when the circuit court will simply repeat the exercise on appeal. In fact, the Supreme Court once disdainfully described a two-tier system as “wasteful and irrational.”²⁰⁶ That comment would seem to apply not only to the courts’ resources but also to those of litigants.

Efficiency, however, fails to live up to its promise. Even under its own terms, efficiency favors direct circuit court review only when there is a strong chance of eventual appeal. Logic and experience teach us, however, that most cases are not destined for appeal.

1. *The Uncertain Prospects of Appeal*

Initial circuit court review is only a cost-saver when there is an appeal.²⁰⁷

204. *E.g.*, *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) (“The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal.”); *WRIGHT ET AL.*, *supra* note 88, at § 3943 (“Direct action in the court of appeals, moreover, is likely to prove more expeditious than action by a district judge followed by review in the court of appeals.”).

205. *Gen. Elec. Uranium Mgmt. Corp. v. Dep’t of Energy*, 764 F.2d 896, 903–04 (D.C. Cir. 1985) (“[E]xclusive jurisdiction in the court of appeals avoids duplicative review and the attendant delay and expense involved. . . . [O]riginal and exclusive jurisdiction in the courts of appeals promotes the congressional goals of efficiency and predictability.”); 40 Fed. Reg. 27,925, 27,927 (1975) (“[D]irect review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system.”); H.R. REP. NO. 81-2122, at 4 (1950) (“[T]he submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice.”); *Levy*, *supra* note 13, at 513 (“The most obvious and compelling reason to limit review [to direct circuit court review] is the savings of judicial resources.”).

206. *United States v. Fausto*, 484 U.S. 439, 445 (1988).

207. *Legomsky*, *supra* note 13, at 1325–26. It is possible that litigants would be deterred from bringing a petition directly to the circuit court that they would have brought to the district court. This might happen in two situations. First, if circuit courts were significantly more expensive to the litigant than district courts, a litigant might be more willing to file suit in district court (assuming jurisdiction). This may have been a larger concern in the past when proximity to the court house was important, but the invention of electronic filing has probably equalized the financial costs of each court. If anything, if district courts allow discovery when circuit courts would not, district courts could actually cost litigants more. *Currie & Goodman*, *supra* note 13. Second, litigants may be wary of proceeding to the circuit court if they are afraid of setting a bad precedent that will bind future litigants. This concern should only apply to repeat, institutional litigants; attorneys with individual clients are ethically bound to consider that case in isolation. Moreover, repeat litigants, such as nonprofit advocacy groups, regulated businesses, and governments, face a similar dilemma even in the district court, as the controversy could eventually be elevated to the circuit court.

If no appeal is had, district court review is a clear bargain compared to initial circuit court review. After all, initial circuit court review commits three judges' efforts to a challenge; district court review demands only a single judge's attention. The calculus changes when an appeal is likely to be filed from a district judge's ruling. Here, the time spent in the district court is cumulative. This adds not only the cost of an additional judge, but also requires the challenging party and the government to pay counsel to litigate the issues twice. The key point is that direct review by a circuit court is a cost-saver only for cases that would otherwise go up on appeal; in all other cases, direct review by the circuit court is more expensive.

It would be foolish to assume that all, or even most, cases will be appealed eventually. Many litigants who begin in district court are content to end there. This is true even for challenges to final agency action. For instance, before all deportation orders were channeled to the court of appeals, aliens appealed around 17% of district court judgments.²⁰⁸ Today, less than 5% of district court judgments in social security cases make it to the court of appeals.²⁰⁹ Were these cases to be placed at the circuit court, three judges would have spent time when, under the litigants' apparent preferences, one would suffice.

Of course, we cannot know *ex ante* whether a particular case is going to be appealed, but we can make some guesses based on classes of cases.²¹⁰ Direct circuit review could be justified on costs only when there is a sufficiently high appeal rate. How high is high enough? To answer that question, we must compare costs between the district court and circuit court.

Quantifying the costs with precision is not easy. Even just considering costs to the judiciary alone, it is not as simple as treating each circuit judge as being as expensive as a district judge. Circuit panels leverage micro-economies of scale by assigning one judge to write the panel's opinion and pooling law clerk analyses.²¹¹ Yet it is equally clear that circuit courts are pricier than district courts, as three judges still must coordinate their

208. See Legomsky, *supra* note 13, at 1353–54, 1402 (showing appeals for only eleven out of sixty-six deportation cases filed in the district court in 1984).

209. Compare United States Courts, *Table C-4 U.S. District Courts-Civil Cases Terminated, by Nature of Suit and Action Taken*, USCOURTS.GOV, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C04Mar12.pdf> (last visited Dec. 14, 2014) (listing a total of 14,998 Social Security suits), with United States Courts, *Table B-7, U.S. Courts of Appeals-Nature of Suit or Offense in Cases Arising From the U.S. District Courts, by Circuit*, USCOURTS.GOV, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/B07Mar12.pdf> (last visited Dec. 14, 2014) (listing a total of 570 Social Security appeals).

210. Legomsky, *supra* note 13, at 1326.

211. *Id.*

schedules, read briefs, attend oral argument, and otherwise spend the time to become sufficiently familiar with the case to render a judgment.²¹² In other words, circuit courts spend between one and three “judge units” on each case.²¹³

Making a precise comparison between the costs to courts is neither possible nor wise, but it is possible to make a rough estimate. Using data available from the United States Courts website,²¹⁴ we approximate relative time costs by comparing the ratio of cases per authorized judgeship at each level.²¹⁵ In 2012, there were 550 cases filed in district court per district judge, and 321 circuit cases per circuit judge. We assume that, on average, district and circuit judges spend an equal amount of time on resolving cases (that is, judges in one tier are not lazier than another).²¹⁶ Yet each district

212. See Currie & Goodman, *supra* note 13 (arguing that district courts can be more readily expanded than circuit courts based on their view that circuit courts cannot be expanded beyond nine judges and effectively maintain a uniform jurisprudence). Whatever merit this contention may have as a matter of theory, it bears little relation to the realities of modern life, where circuit courts regularly exceed nine judges. The Ninth Circuit, in fact, has twenty-nine active judges. United States Court of Appeals for the Ninth Circuit, *The Judges of this Court in Order of Seniority*, USCOURTS.GOV (Dec. 1, 2014), <http://cdn.ca9.uscourts.gov/datastore/uploads/general/judgeWeb.pdf>.

213. Circuit judges are slightly more costly than district judges in financial terms as well: circuit judges get paid slightly more and enjoy an extra law clerk compared to district judges. See United States Courts, *Judicial Salaries Since 1968*, USCOURTS.GOV, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/judicial-salaries-since-1968.aspx> (last visited Jan. 25, 2015) (listing 2015 salaries as \$201,100 for district judges and \$213,230 for circuit judges); Casey R. Fronk, *The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in the Federal Appellate Courts*, 2010 U. ILL. J.L. TECH. & POL’Y 51, 71–72 (describing the increase in clerk resources for circuit judges). From the taxpayer’s perspective, this would also need to be included in the calculus.

214. United States Courts, *Judicial Business of the United States Courts*, USCOURTS.GOV, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx> (last visited Dec. 14, 2014).

215. This is, admittedly, an imperfect measure. We consider cases filed rather than resolved on the merits because district courts often spend considerable effort on cases before settlement. See, e.g., *In re Sunbeam Secs. Litig.*, 176 F. Supp. 2d 1323, 1332 (S.D. Fla. 2001) (chronicling more than three years of complex litigation before a settlement was reached). Moreover, some authorized judgeships are left vacant. See *Heckler & Koch, Inc. v. Li*, No. 1:09-cv-0748-WTL-JMS, 2009 WL 4842843, at *2 (S.D. Ind. Dec. 11, 2009) (discussing vacancies in two districts). And some work at each level is performed by senior judges who do not count toward the number of authorized judgeships. Ruggero J. Aldisert, *A Nonagenarian Discusses Life as a Senior Circuit Judge*, 14 J. APP. PRAC. & PROCESS 183, 188 (2013). Nevertheless, we assume that these variables are not skewed in favor of one court or another. One factor that probably understates the cost of circuit courts is the practice of district judges sitting by designation and helping with the appellate workload. However, we think our approach provides a rough approximation of relative cost.

216. In reality, of course, one case may be easy, and one may be hard, and circuit courts may spend their time on different matters than district judges. But the goal here is to compare how much time is spent on each case on average, not how that time is allocated

judge is assigned more cases than each circuit judge. This means that circuit courts are devoting more “judge-units” to each case than district courts, as we would expect. To quantify this, in 2012, circuit courts were spending 1.7 judges per case for every 1 judge per case spent by district courts. This makes district courts about 58% as expensive as circuit courts. This figure is not too far away from a prior effort, which estimated that district court resolution of a case is 1/3 cheaper than circuit courts based on a rough assumption of how circuit courts spend their time.²¹⁷ These estimates require an appeal rate of at least 33–42% to warrant direct circuit court review.

So far, we have treated the cost of circuit court review as a constant variable, regardless of whether it is acting in an original or appellate capacity. But this assumption might not hold true in reality. A circuit court could spend less time on matters when acting in an appellate capacity, since it could be guided by the opinion of the district judge. Or, as we explore in greater detail below, a circuit court also might give appeals from district judges less rigorous review if it is satisfied that the challenger has already been treated to substantial Article III review. This could be the case despite the appellate court’s recitation of a *de novo* standard of review *vis-à-vis* the district court decision.²¹⁸ On the other hand, cases that have completed their run through the district court but remain in contention on appeal might be more difficult cases that require extra effort.²¹⁹

The analysis up to this point has primarily focused on the costs to the judiciary. But, of course, the litigants’ costs are worth something too. In a prior age, physical proximity to the courthouse was an important factor, making district courts a cheaper forum.²²⁰ Today, however, electronic filing and the ease of travel make the costs of litigating an administrative case approximately the same regardless of forum. Yet it is considerably more expensive to litigate a matter in two courts rather than one. Granted,

among cases or activities. However, to the extent that administrative review cases are more or less expensive than an average case at one level or another, then that could affect the comparison. Administrative review cases might be more costly than the average district court case because there are more difficult legal issues, and they are less likely to settle, or they might be cheaper because there is a more streamlined process that does not require discovery, extensive motion practice, and a trial.

217. Currie & Goodman, *supra* note 13, at 9.

218. As scholars have noted in a variety of contexts, the actual content of a given standard is not always reflected in its name. *See, e.g.*, Nicholas A. Fromherz, *A Call for Stricter Appellate Review of Decisions on Forum Non Conveniens*, 11 WASH. U. GLOB. STUD. L. REV. 527, 530 (2012) (“[W]hile the stakes are similar to class certification rulings and the standard of review is ostensibly the same (abuse of discretion), appellate courts actually give much more deference to district court decisions concerning [forum non conveniens].”).

219. Legomsky, *supra* note 13, at 1326.

220. Currie & Goodman, *supra* note 13.

it probably is not twice as expensive, since a litigant can re-use much of the prior district court filings on appeal. When calculating the relative costs of the courts, the cost to the litigant should also be considered along with the cost to the judiciary. Thus, we need to take into account litigant costs from the original and subsequent fora and the possibility that circuit costs differ depending on the capacity in which the circuit court acts.

Beyond the question of cost is the question of time. All else being equal, a speedier process is preferable to a lengthier one. The Supreme Court has suggested that this is, or ought to be, a key motivator in the design of the jurisdictional scheme: “The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal.”²²¹ Similarly, Congress identified speed as the main reason for the first direct review statute of the FTC.²²² But, again, this rationale kicks in only if an appeal is likely. If Congress has guessed wrong as to which sorts of cases are likely to be appealed—and, truth be told, it does not appear that Congress has made much of a guess at all—then time-savings are not realized.

In fact, it is possible that routing the wrong cases to the circuit court for direct review could translate to a *longer* process.²²³ The circuit court could take longer to decide the case, or, as the Supreme Court has observed, there can be enormous delay if the circuit court has to remand an issue to the agency to develop facts.²²⁴ This question is ultimately an empirical one, and it is a question that has thus far gone without much study. Statistics compiled by the federal government shed light on the average duration of *all* civil cases in both the district and circuit courts, suggesting that slightly more time passes from filing to disposition in the district court than in the circuit court.²²⁵ But these differences might not hold true for suits challenging agency actions, so the question remains: From the time of

221. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980); *see also* WRIGHT ET AL., *supra* note 88, at § 3943 (stating that direct circuit court review would likely be faster than two-tiered review).

222. H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.).

223. Legomsky, *supra* note 13, at 1336 (“Direct court of appeals review can even prolong the litigation process. Absent a high appeal rate from district court decisions, direct review lengthens the total review time unless the courts of appeals can decide petitions for review more expeditiously than district courts can decide habeas applications, which is doubtful.”).

224. *Harrison*, 446 U.S. at 593–94.

225. Compare United States Courts, *Table C-5 Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition*, USCOURTS.GOV, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C05Mar12.pdf> (last visited Jan. 2, 2015), with United States Courts, *Table B-4 Median Time Intervals in Cases Terminated after Hearing or Submission, by Circuit*, USCOURTS.GOV, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B04Sep13.pdf> (last visited Jan. 2, 2015).

filing, would direct review cases last longer in the circuit court or in the district court? We hesitate to offer a guess. Without an answer based on data, however, the time-savings rationale is a shaky foundation on which to build the case for direct review by circuit courts.

One final note is that even if efficiency favors direct circuit court review in some subsets of cases, the current system does a poor job in identifying cases with a strong appeal potential and those that lack it. In fact, Congress seems to get it backwards with some frequency. Petitions to review immigration cases, for example, inundate circuit courts, despite the relative lack of care, and, often, merit, put into the challenges and the estimated low chance of appeal if they were they placed in the district court in the first instance.²²⁶ Meanwhile, challenges to Department of Education and DHHS regulations—strong candidates for appeals given the amount of money and important issues of policy at stake—begin their judicial journey at the district court.²²⁷

2. Triage

Not only does district court review screen out a large number of cases from the circuit courts, but it also allows circuit courts to spend less time on cases that are ultimately appealed.²²⁸ Although circuit courts are supposed to engage in de novo review on appeals, they may be satisfied by the review that has already happened and be somewhat more relaxed in their ultimate review. A good example of this is the unpublished opinion: under the current system, although appeals are technically available as of right, circuit courts often resolve appeals through non-precedential, unpublished opinions.²²⁹ The premise behind these unpublished decisions is that circuit judges cannot spend sufficient time or care on them to be confident in the outcome.²³⁰ Judges have referred to unpublished dispositions as “junk” law²³¹ and “not safe for human consumption.”²³² By choosing which

226. Legomsky, *supra* note 13, at 1326.

227. *E.g.*, *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 137–38 (D.D.C. 2012) (involving a Department of Education regulation); *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 28–29 (D.D.C. 2012) (involving a Department of Health and Human Services regulation).

228. Currie & Goodman, *supra* note 13, at 18.

229. Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 354–55 (2009).

230. Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36, 37–38; Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 791–94 (1981).

231. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 56 (2007).

232. Kozinski, *supra* note 230, at 37.

appeals deserve the full, precedential treatment and which get a more cursory review, circuit courts triage their resources to the issues where precedential rulings are needed.²³³

Thus, combining the certiorari-like aspect of appellate procedure with initial district court review would provide for full circuit court treatment of an issue only when (1) the parties view it as sufficiently important to appeal, and (2) the circuit court decides to spend enough time on the case to write a precedential opinion. Although circuit courts can write non-precedential opinions even on direct review, they may be more willing to do so if one Article III judge has already given the case a close look. Whether allowing circuit courts to shirk their review is a good thing or a bad thing is a complicated question.²³⁴ From a pure cost perspective, though, the benefits are palpable. If a chief concern in all this is unnecessary duplication, or doubt that there “should be two tiers of review of identical scope of the administrative decision,”²³⁵ then a standard of appellate review that is not quite de novo may actually make sense.

F. Accuracy

Although there is a long-running debate over what the ultimate goals of a judicial system should be, accuracy, however defined, is regularly among the top values.²³⁶ Accuracy, however, would likely be improved by the inclusion of district courts in the judicial process in administrative review cases, as arguments are the better for having been screened by a district judge and matured during an added tier of litigation. Only under very narrow circumstances—high district court error, low circuit court error, and low rates of appeal of those particular matters—would accuracy favor direct circuit court review. As we explain, this alignment of variables is likely very rare. Thus, rather than supporting direct circuit court review, the accuracy argument favors administrative cases being placed on the

233. Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 433 (2013).

234. For criticism of circuit court publication practices, see Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; Or Why The Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 961–62 (2009) (denouncing the nonprecedential status rules in regards to unpublished opinions); Pether, *supra* note 231, at 20 (indicating that unpublished opinions are more likely to be wrong because they are not usually written by judges).

235. *Groves v. Apfel*, 148 F.3d 809, 811 (7th Cir. 1998).

236. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475–91 (1986) (discussing the core values in our judicial system); AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 155 (1997) (“Truth and accuracy are vital values.”).

same judicial path as every other case.

1. *Unappealed Erroneous District Court Rulings*

So far, we have largely credited the litigant's appeal preferences as a key determinant of the preferred court. However, to the extent that the ultimate goal of a judicial system is to improve accuracy, relying on litigant appeal preferences will often fall short.²³⁷

A litigant's wish for a circuit court ruling does not necessarily imply that it is socially beneficial to grant it.²³⁸ Nor is it necessarily fair or just to assign a litigant to a lengthier and more costly appeal process *because* that process will dissuade an appeal.²³⁹ A litigant's incentives are not necessarily aligned with those of society, and, therefore, her appeal preferences should not be treated as conclusive.²⁴⁰ This difficulty is compounded by the fact that litigants might not correctly identify which decisions are likely to be reversed on appeal.²⁴¹

Giving undue weight to the likelihood of appeal can lead to a less accurate system under the right conditions.²⁴² For example, consider a case that is likely to be botched by the district court but likely to be fixed by the court of appeals. If the litigants were to accept the error rather than to appeal (whether they are deterred by high transaction costs or information costs), then placing that dispute directly in the circuit court would lead to a more accurate outcome, so long as the circuit court will reach the correct outcome on direct review.

There are two problems with using this possibility as a basis for system design. First, we think this scenario will be fairly rare. As we unpack below, there is little empirical or theoretical reason to think that district courts are erring at rates significantly higher than circuit courts. Moreover, *a priori*, we would expect litigants to more readily appeal from erroneous district court decisions where they believe they can obtain a reversal from the circuit court, although efforts to model or study litigant appeal behavior are so far inconclusive.²⁴³

237. Charles M. Cameron & Lewis A. Kornhauser, *Appeals Mechanisms, Litigant Selection, and the Structure of Judicial Hierarchies*, in *INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT* 173, 194 (James R. Rogers et al. eds., 2006).

238. Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 *J. LEGAL STUD.* 379, 387 (1995).

239. Currie & Goodman, *supra* note 13, at 18.

240. Cameron & Kornhauser, *supra* note 237.

241. *Id.*

242. Shavell, *supra* note 238; Cameron & Kornhauser, *supra* note 237.

243. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 *CALIF. L. REV.* 1457, 1512, 1514 (2003); Shavell, *supra* note 238, at 390; Andrew F. Daughety & Jennifer F. Reinganum, *Appealing Judgments*, 31 *RAND J. ECON.* 502, 503 (2000); Matt Spitzer & Eric

Second, when designing a system *ex ante*, it will be difficult or impossible to identify situations where district courts are getting it “wrong” and circuit courts are getting it “right.” Even assuming that these concepts have any coherence as a theoretical matter, there is unlikely to be a consensus on measurement for quite some time. Simply looking at circuit court reversal rates, for instance, would tell you that circuit and district courts are reaching different outcomes, but it would not tell you whether it was the district court that was erring or the circuit court. In fact, this is one of the key criticisms of empirical legal scholarship: Because it is difficult to code content, empiricists have placed inordinate weight on outcomes.²⁴⁴

a. Comparative Personnel

Much of the pretext behind the case for direct circuit review is that the judges who staff appellate courts are, on balance, smarter or otherwise “better” at judging than their district court counterparts.²⁴⁵ We are quite doubtful of this proposition as an empirical matter, given the impressively high quality of the federal judiciary as a whole.²⁴⁶ If anything, the less political nature of the district judge selection process could indicate that merit plays a greater role in who is appointed to the bench, which in turn would suggest higher quality district judges.²⁴⁷

But apart from pure “smarts,” it may be that circuit judges, through experience, form an expertise that makes them better suited to review administrative actions. As the intermediate appellate courts, circuit judges spend their days reviewing the work of others.²⁴⁸ In contrast, district judges

Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 650–51 (2000).

244. Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 885 (2008).

245. See Currie & Goodman, *supra* note 13, at 12 (emphasizing the capacity for superior decisionmaking); Elliot E. Slotnick, *Federal Trial and Appellate Judges: How Do They Differ?*, 36 W. POL. Q. 570, 570 (1983) (“Conventional wisdom suggests that the more prestigious U.S. Courts of Appeals will be staffed by judges who are ‘better’ trained and more ‘qualified’ in several respects than their counterparts on the U.S. District Courts.”).

246. Oldfather, *supra* note 229, at 330–31 (“At least in the federal courts, nothing about the process by which judges are selected or the terms under which they serve suggests that judges on appellate courts are inherently more competent than trial judges at resolving legal issues.”).

247. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 11 (2013) (concluding that ideology does not play as large a role at the district court level as in the higher levels of the federal judiciary).

248. See Wildermuth & Davies, *supra* note 168, at 965 (“As such, review of these cases in the courts of appeals is quite logical, because it is similar to what those courts usually do.”). However, it is important to note that judicial review of administrative decision is *more* deferential than appellate review of lower court decisions. Even similar standards, like

are “more accustomed to exercising discretion, [and] less accustomed to reviewing its exercise”²⁴⁹ However, the flip side of this is that district judges are used to having *their* discretionary decisions reviewed by circuit courts and, thus, may be more sensitive to deferential standards. Knowing what it feels like to have a discretionary decision reversed, district judges may be less likely to overstep their power of review. Further, through assessing motions for summary judgment and for directed verdict, district judges are accustomed to weighing evidence to determine whether it is sufficient to support a jury verdict—the same standard called for by the substantial evidence standard of APA review.²⁵⁰ Non-dispositive orders of magistrate judges are reviewed only for clear error.²⁵¹ Habeas petitions also call for deferential review in the case of state court decisions.²⁵² On the whole, then, a district judge reviewing an agency decision under a deferential standard is hardly entering unfamiliar territory.

Another possibility is that circuit judges may have an opportunity to develop specific expertise in the law or science applicable to the review of particular agency decisions.²⁵³ Because there are fewer circuit judges, placing review of especially complicated agency decisions in a particular circuit court allows those judges to learn, through repeated exposure to the issues, more about highly technical nuances applicable to certain agencies. “One of thirty district judges in a circuit can expect to hear no more than 3 percent of the total caseload in any field; one of nine appellate judges will hear 33 percent of that caseload.”²⁵⁴ For example, the judges on the D.C. Circuit have, through repeated adjudication of numerous petitions for review of FERC orders, learned a great deal about the complicated set of regulations and background industry economics that are implicated in such

“abuse of discretion,” are subtly different when there is court/agency review instead of court/court. See *Dickinson v. Zurko*, 527 U.S. 150, 159 (1999) (quoting *Morgan v. Daniels*, 153 U.S. 120, 124 (1894)) (reasoning that the greater deference to agencies is grounded in notions of separation of powers, stating “[b]ut this is something more than a mere appeal. It is an application to the court to set aside the action of one of the executive departments of the government.”).

249. Currie & Goodman, *supra* note 13, at 13.

250. See *Ill. Cent. R.R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 66 (1966) (requiring substantial evidence); Dragich, *supra* note 152, at 60 (“Review for error under highly deferential standards of review calls for careful study of the record and established law, a task with which district judges are highly familiar.”).

251. 28 U.S.C. § 636(b)(1)(A) (2012).

252. 28 U.S.C. § 2254(e)(1).

253. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 98 (2011) (highlighting the need for understanding the role of agencies).

254. Currie & Goodman, *supra* note 13, at 13–14 (noting that the disparity persists but is lessened if we control for the confounding factor of three-judge panels).

cases.²⁵⁵ Given the greater number of district judges in any particular circuit, to say nothing of their tendency to work solitarily rather than collegially, each district judge would be unlikely to hear numerous challenges to FERC orders, even if Congress did give district courts jurisdiction in the first instance.²⁵⁶

Increased judicial experience with a particular statutory scheme or regulatory framework could allow for a more informed review, but it also comes with a serious downside: judges who know an area may be more willing to second-guess the agency's decision.²⁵⁷ Critics have long opposed a specialized administrative court, in part for this reason.²⁵⁸ Regardless of whether one thinks this increased experience is a good thing or a bad thing, however, it is only effective if there are a limited number of decisions that go to the circuit court. If circuit courts were to be inundated with challenges to every type of agency decision, the court would either have to be dramatically expanded, thereby reducing the likelihood that any particular judge would have repeat interactions with an agency, or the judges would be so overwhelmed with workload from a diverse set of cases that they could develop expertise in nothing.²⁵⁹

So far, there is little basis for thinking that circuit judges are better at reviewing agency decisions than district judges.

255. *E.g.*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (involving “challenges to the most recent reforms of electronic transmission planning and cost allocation”).

256. *WRIGHT ET AL.*, *supra* note 88, at § 3940 (“Concentration of review in the courts of appeals may facilitate the development of greater expertise in the substantive areas administered by the agencies, since a far smaller number of appellate judges perform the chores that otherwise would be performed by many district judges.”).

257. *See Pierce*, *supra* note 253, at 90–93 (summarizing research showing the D.C. Circuit is less deferential than its counterparts and offering explanations). A further advantage of judicial review being limited to a smaller set of judges is that it allows for greater predictability. *See Cross*, *supra* note 41, at 1255–56 (discussing the lack of predictability that flows from “the random assignment of cases to individual district judges or three-judge appellate panels that may be unrepresentative of the judiciary as a whole”). An agency that knows any challenge that will go before a randomly drawn sample of ten D.C. Circuit judges has a much better idea of the judicial personalities likely to hear the case. However, this advantage does not consistently distinguish direct review in a regional circuit from district court review, given the large number of circuit courts in which a challenge may be brought. If an agency can predict the forum because it is an agency decision of limited impact, like an adjudication, it can respond to the likely set of jurists drawn for the review, whether at the district or circuit level.

258. *E.g.*, *FRIENDLY*, *supra* note 153, at 188 (discussing the fear of the court becoming the expert).

259. *FRIENDLY*, *supra* note 153, at 184–88.

b. Institutional Competence

Circuit courts are generally credited with having four advantages over district courts: (1) as appellate bodies, we expect that there will be a narrowing of issues on appeal, at least if the advocates are skilled; (2) litigants in the circuit court can focus on briefing without the distractions of discovery; (3) the circuit court and the parties already have had the benefit of one arbiter previously working through the legal issue; and (4) they decide cases in sets of three.²⁶⁰ Notably, the first three of these no longer distinguish district courts from the circuit courts on direct review of agency decisions. However, the benefits of collegial decisionmaking still apply. Professors Currie and Goodman found this to be “by far the most important” argument in favor of circuit court decisionmaking.²⁶¹

Collaborative decisionmaking is thought to improve the quality of decisionmaking by invoking the collective judgment of three judges instead of one and by providing a process for jurists to debate a complicated issue.²⁶² The assumption that “three heads are better than one” enjoys support by analogy to other contexts, though empirical application to judicial decisionmaking is incomplete.²⁶³ Yet this advantage is also likely overstated, as it depends on the three judges engaging in meaningful deliberation over the case.²⁶⁴ In reality, panels often delegate primary responsibility for a case to a single authoring judge, with the other two members reading the opinion but giving the matter less than their full attention.²⁶⁵ Deliberation is not something that is easy to monitor, much less to police. Nevertheless, in some particularly complicated cases, circuit courts depart from the typical single-judge authorship approach and distribute the workload among the members of the panel.²⁶⁶

260. Mead, *supra* note 30, at 823; *see also* *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991).

261. Currie & Goodman, *supra* note 13, at 12.

262. *See* Lewis A. Kornhauser, *Appeal and Supreme Courts*, in *PROCEDURAL LAW AND ECONOMICS* 26–34 (Chris Sanchirico ed., 2012) (cataloging the theorized benefits of collegiality); Christina L. Boyd & James F. Spriggs II, *An Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges*, 29 WASH. U. J.L. & POL’Y 37, 43 (2009).

263. *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 77 (David Klein & Gregory Mitchell eds., 2010) (“Though numerous scholars have extended our collective knowledge about the role of law in judicial choice, virtually none have paid attention to how the small group context of collegial court decision making might matter for understanding the influence of legal factors in appellate adjudication.”). One exception is empirical evidence that collegial decisionmaking was more likely to find state statutes unconstitutional. Solimine, *supra* note 149, at 129–30.

264. Oldfather, *supra* note 229, at 330.

265. *Id.*

266. *United States v. Haldeman*, 559 F.2d 31, 51 n.1 (D.C. Cir. 1976) (en banc) (“The

The implicit premise to this discussion is that deliberation is more likely to lead to a correct decision. This is likely true when the various members of a group bring expertise, experience, or perspective on which they can draw to further the quest for truth. But looking for “correctness” may be a fool’s errand if there is no meaningful standard to apply. If asked to pick the “best” flavor of ice cream,²⁶⁷ a panel of experts will fare no better than a hungry child. It is possible, though, that the amorphous standards that govern agency decisions—most notably arbitrary and capricious review—are sufficiently without content that deliberation has no refining value.²⁶⁸ We are sympathetic to this possibility, but are not yet ready to go quite that far.

Beyond improving the quality of decisionmaking, collegial decisionmaking also ensures that at least two judges must vote to set aside agency action, thereby preventing a single rogue judge from throwing out the considered decision of an agency.²⁶⁹ In part, this is a numbers game. Assume that judges are randomly assigned to a case, which is typical, and that 10% of judges up for selection would issue unworkable rulings, which is hypothetical. If a single judge is the decider, there is a 10% chance of an unworkable ruling. But if a majority of a three-judge panel must issue a ruling, two erring judges would have to be picked. Yet there is little reason to think that such a rate of district court error is common, particularly in light of the low rates of reversal that district courts enjoy.²⁷⁰ Moreover, the would-be errant or sloppy judge is checked by the omnipresent threat of appeal and reversal.

In sum, the practice of circuit courts using multiple judges to decide matters might improve decisionmaking, although how much is difficult to quantify, and whether it is worth this added cost is another question altogether.²⁷¹ Thus, it is possible that circuit courts would be more likely than district courts to get certain types of decisions “right.” We would expect that circuit court advantage to be at its peak in particularly complex

opinion in this case is issued *per curiam* . . . because the complexity of the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the court.”).

267. The answer, of course, is ~~pistachio~~ chocolate.

268. As one article put it: “The rules governing judicial review have no more substance at the core than a seedless grape . . .” Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780–81 (1975).

269. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 998 (2002) (“[T]he development of an appellate hierarchy with collegial courts at the higher levels . . . operates structurally to ensure that no individual judge can, by his or her actions alone, inflict too much damage on the judiciary by making aberrant or overly ambitious decisions.”).

270. U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship, 513 U.S. 18, 28–29 (1994).

271. Currie & Goodman, *supra* note 13, at 9.

cases where the judges engage in meaningful back and forth, and each judge brings some measure of relevant experience or knowledge to the discussion. The advantage ebbs for straightforward cases and fact-intensive cases, such as reviewing a fact-based adjudication about an individual's entitlement to benefits or other relief. Interestingly, however, the *United States Code* today often channels review of simple adjudications, such as deportation orders or airline mechanic licensure, to the court of appeals, even though collaboration is unlikely to be of use in these types of decisions.²⁷²

Finally, note that an argument for collaborative decisionmaking is simply an argument for three-judge panels at whichever court happens to hear a case; it is agnostic as to the *level* of those three judges. As noted above, district courts were previously directed to resolve challenges to certain agency decisions in three-judge panels.²⁷³ The benefits that may come with collaborative decisionmaking do not, by their own force, compel review in any particular court.²⁷⁴ Today, however, we are accustomed to triplets at the circuit court and singles at the district court.

c. Ideology

The advantage that collegiality gives to circuit courts must be balanced not only against its cost, but also against the potential ideological influences on circuit court decisionmaking. If empirical evidence implies that circuit courts are more ideological than district courts when reviewing agency action, and if we believe that ideological influences are improper and, therefore, lead to “wrong” decisions, then the benefits of collegiality could be quickly overwhelmed by improper influences. If a circuit court employs ideology when reviewing a non-ideological district court decision, then it will have introduced an error where none previously existed.

The empirical literature in this area is increasingly deep and sophisticated but still incomplete. Empiricists have repeatedly, though not universally, found evidence of ideological correlations in the voting behavior of federal judges at the Supreme Court and circuit court levels,²⁷⁵

272. 8 U.S.C. § 1252(a)(1) (2012); 49 U.S.C. § 46110.

273. *Supra* Part I.B.1.

274. It is possible that it would be more disruptive, or awkward, for district judges accustomed to solitary rule over a limited freedom to decide cases in groups of three than it would be for circuit judges to undertake the same process. After all, each circuit court meets collegially several times a year, while district judges might go years in between sittings. The legislative history to the Administrative Orders Review Act reveals currents of the belief that three-judge district court panels were just too clumsy. *Hearings, supra* note 83, at 112. Yet some of the complaints that applied in the 1940s, such as the inconvenience of sharing drafts by postal mail, have lesser relevance in the modern era.

275. Pierce, *supra* note 253, at 77 & n.1; Daniel R. Pinello, *Linking Party to Judicial Ideology*

frequently in the context of review of administrative decisions.²⁷⁶ For example, scholars have found an ideological correlation in voting behavior at the D.C. Circuit in EPA cases,²⁷⁷ review of agency health and safety decisions,²⁷⁸ application of *Chevron* deference,²⁷⁹ and arbitrary and capricious review.²⁸⁰

Yet it is important not to overstate the strength of the ideological correlation.²⁸¹ Even the strongest evidence of ideology's role finds a relationship only in a minority of decisions.²⁸² Authors are quick to observe that legal factors, such as precedent and the arguments of the parties, play a large—likely the largest—role in predicting case outcomes.²⁸³ Further, the methodologies in the empirical literature have been the subject of fierce criticism. Judge Edwards of the D.C. Circuit noted that the studies omitted variables, including applicable precedent and the record before the court, which might also explain the voting patterns.²⁸⁴ Professors Epstein and King identified a number of methodological flaws that they believe undermine legal empirical work in general.²⁸⁵ Their conclusion was harsh: legal empirical scholars have been “proceeding with little awareness of, much less compliance with, many of the rules of inference, and without paying heed to the key lessons of the revolution in empirical analysis that has been taking place over the last century in other disciplines.”²⁸⁶ Other scholars reminded the legal academy that, even if a correlation is

in American Courts: A Meta-Analysis, 20 JUST. SYS. J. 219 (1999).

276. See generally Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111 (2002) (discussing the use of empirical evidence in administrative rulemaking).

277. E.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

278. E.g., Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100 (2001).

279. E.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

280. E.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008).

281. David E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813 (2010).

282. Pinello, *supra* note 275; Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. L. REV. 743, 758 (2005).

283. Cross, *supra* note 243, at 1515.

284. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1914–15 (2009); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1336 (1998); Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths about the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985).

285. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

286. *Id.* at 1.

established, correlation does not necessarily imply causation.²⁸⁷

The evidence of ideology in district court decisions is considerably weaker and more mixed. This may suggest that ideology plays a lesser role in the decisions of district judges, or it may simply be a reflection of the relative dearth of empirical scholarship focusing on these courts.

There are some important theoretical reasons to believe that ideology is a lesser problem in the district courts. These include (1) the more contentious or “difficult” nature of cases handled by the circuit courts;²⁸⁸ (2) the less visible, and thus less politically charged, confirmation process; (3) the use of merit-based instruments in the selection of district judges;²⁸⁹ and (4) the stronger check on ideological decisionmaking secured through appeal as of right in the circuit courts (compared with certiorari in the Supreme Court).²⁹⁰

On the other hand, the autonomy enjoyed by district judges removes a major check on ideological decisionmaking. Whereas a circuit judge has to convince at least one other colleague that her position is sound, a district judge has to convince nobody but herself. All else being equal, this structural factor would presumably serve as an obstacle to ideological decisionmaking: a position that is based in part on one’s politics or worldview is less likely to withstand collegial scrutiny than one based on legally cognizable variables, like facts, law, precedent, etc. At the very least,

287. Ho & Quinn, *supra* note 281, at 817. Another point to consider is the distinction between ideological inclinations, or the desire that a judge may have to render a decision that comports with her policy preferences, and ideological decisionmaking, or the extent to which that desire is in fact actualized in a decision. Some disputes may trigger a judge’s ideological inclinations, for example, claims under the Bill of Rights, but nevertheless present little opportunity for the judge to express those inclinations due to the force of clear precedent. Other disputes may be less likely to trigger strong ideological reactions but nevertheless yield more ideological decisionmaking because the body of law is relatively malleable. An example of this later phenomenon may be disputes under the National Environmental Policy Act (NEPA). Although the standard of review is generally thought to be rather deferential, so that we would expect few reversals of agency decisions, empirical study has shown that judicial review under NEPA corresponds significantly with the political affiliation of the deciding judge. See JAY E. AUSTIN ET AL., JUDGING NEPA: A “HARD LOOK” AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 7–9 (2004); Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109, 123 (2013).

288. In fact, as cases move up the judicial food chain, they are *supposed* to get more difficult. EPSTEIN, LANDES & POSNER, *supra* note 247, at 234–35.

289. See Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 140 (1995) (discussing the merit-based selection panels for district judges).

290. See EPSTEIN, LANDES & POSNER, *supra* note 247, at 226 (“A district judge’s own ideology can be expected to influence some of his decisions, though probably only a small percentage because of the prospect of reversal if he deviates from the precedents established by and the known ideological propensities of the judges of the court of appeals for his circuit.”).

a district judge who wished to inject ideology into his decisions would seem to have an easier go of it, even if the effect was only temporary, given the possibility of reversal on appeal. Of course, this hardly means that a significant number of district judges leverage this structural opportunity.

Unfortunately, despite the theorizing, there has been far less empirical work on the role of ideology in the district courts. Although the literature suggests that ideology may have a slightly diminished role in the district courts, far more study is needed to confirm this observation.²⁹¹ One study found a difference of 10% to 13% between Democratic and Republican district judges for all types of cases, civil, criminal, and administrative.²⁹² On the other hand, this same study found a stronger correlation in the circuit courts.²⁹³ Similarly, in the context of religious freedom decisions, Professors Heise and Sisk found that politically conservative judges, whether hailing from the district courts or the circuit courts, were less likely than their liberal counterparts to credit free-exercise or accommodation claims.²⁹⁴ Again, though, the correlation was stronger with respect to circuit judges.²⁹⁵

Though we must again stress scholars' relative neglect of district courts, the balance of studies does suggest that ideology is more consistently imbedded in the Supreme Court and the circuit courts.²⁹⁶ This was echoed in the recent studies conducted by Richard Posner, William Landes, and Lee Epstein, who found that Republican circuit judges were more likely to issue conservative decisions than Republican district judges.²⁹⁷ This resonates with the conventional wisdom that circuit courts, and certainly the Supreme Court, are more like political institutions than the district courts.

291. It could be argued that the average issue presented to district courts is less controversial than those that make it up to the circuit court because litigants first persevere through two tiers of litigation to get a circuit opinion in their case. Thus, the fact that circuit courts display a higher correlation with ideological variables simply reflects the less settled, and, therefore, more controversial, nature of the controversies at that level.

292. C. K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 34 (1996).

293. ROBERT A. CARP & C. K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 7 (1983) (“[T]he evidence for a relationship between judicial background variables and subsequent policy decisions is somewhat inconclusive. Although it is fairly strong for appellate court judges, it is weak and inconsistent for trial jurists.”).

294. Gregory C. Sisk & Michael Heise, *Ideology “All the Way Down”?: An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1216–17 (2012).

295. *Id.* at 1217.

296. Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 486–87 (1998) (collecting studies); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 273–74 (1995). *But see* Sisk & Heise, *supra* note 294.

297. EPSTEIN, LANDES & POSNER, *supra* note 247, at 234.

Once more, the balance between the benefits of collegiality and the influence of ideology is an empirical question. Yet assuming that ideology is present among circuit courts in certain classes of cases, we might want to limit circuit court involvement in those cases. Thus, politically charged agency decisions under the Clean Air Act or the National Labor Relations Act could tend to implicate judicial political preferences. Contrary to the existing scheme, that would, if true, militate in favor of placement in a relatively non-ideological forum. District courts just might fit the bill. Of course, to the extent these matters represent issues of national policy with likely appeals, such additional factors would cut the other way.

d. Forum Shopping

Related to the issue of ideology is the question of forum shopping. The orthodox thinking on forum shopping goes like this: The practice of a litigant choosing a particular court or jurist for a strategic reason—such that Court X will tend to favor the litigant’s position over Court Y²⁹⁸—represents a flaw in the judicial system.²⁹⁹ Not only is such a practice unseemly, but forum shopping has practical problems as well. If an agency expects a challenge to a decision but does not know in which forum the challenge will be brought, the agency will not know which judges it will have to satisfy, nor even which circuit’s law will govern the challenge.³⁰⁰ Although not without dissent, “forum shopping” is a dirty term among scholars and judges.³⁰¹ At some level, opportunities for forum shopping may be a necessary evil, but we assume for purposes of this Article that a system that limits opportunities to forum shop is generally preferable to a system that promotes such opportunities.

Opportunities for forum shopping only arise when plaintiffs have more

298. As Chris Whytock points out, forum shopping assumes not just multiple forums, but at least some degree of heterogeneity. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 486 (2011). Without heterogeneity, a plaintiff would have no reason to choose one forum over another.

299. The stakes of forum shopping take on even greater dimensions in the context of transnational litigation, where the choice of forums implicates not just a choice between two or more courts, but a choice between two or more countries, and often, two or more entirely different legal systems. See *id.* at 485 (“Domestic forum shopping occurs when a plaintiff chooses between two or more courts within a single country’s legal system, whereas transnational forum shopping occurs when the choice is between the courts of two or more countries’ legal systems.”).

300. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 514 (2002).

301. For a brief summary of the benefits of forum shopping, see Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 318–19 (1980).

than one forum in which they can plausibly file suit.³⁰² And concerns over forum shopping tend to become more pronounced as the number of available forums increases. In other words, a scenario that presents only two potential forums is less problematic than a scenario giving rise to a dozen.

With this in mind, a uniform system of initial review in district courts might, at first glance, seem to invite more forum shopping. Especially in states with multiple districts (the majority), litigants could be afforded a choice of forum more frequently than if the statute called for direct review in the circuit court. The loose character of venue statutes at the district court level undoubtedly provides plaintiffs with latitude in filing and, thus, opportunities to shop around.³⁰³ On the other hand, even when it is clear that initial review lies with the circuit court, forum shopping is not necessarily precluded. Again, the APA does not identify a particular forum, and the venue provisions of individual agency statutes commonly allow for review in several possible circuits.³⁰⁴

This is the problem of what we might call “horizontal forum shopping.” But the split scheme also allows for vertical forum shopping: the ability of the litigant to pick the level of the court, circuit or district. For example, a challenge based on an agency action might go directly to the circuit court, so a clever litigant could recast the challenge as an agency’s failure to act to force the issue to the district court. Or a litigant might choose to name particular agencies as defendants to force a case to a particular forum.³⁰⁵ For many cases, there will be only one correct forum. In these cases, we do not have a situation of concurrent jurisdiction—where two courts have legal authority to hear the suit—but nevertheless we have ambiguity as to *which* court has jurisdiction, allowing the challenging party to exploit the ambiguity to obtain a favored court.³⁰⁶ If a plaintiff can make a plausible argument of original jurisdiction in both the district court and circuit court, she has an opportunity to choose a forum based on strategic considerations where both courts’ interpretation of the law of jurisdiction would seem to indicate otherwise. For other cases, however, a challenging party can pick a preferred forum through thoughtful casting of the challenge—an option that is made possible only through the divided scheme of review.

302. See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554 (1989) (“[F]orum shopping connotes the exercise of the plaintiff’s option to bring a lawsuit in one of several different courts.”).

303. McGarity, *supra* note 301, at 304 n.3.

304. McGarity, *supra* note 301, at 304.

305. See *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983 (9th Cir. 2012).

306. *Suburban Mortg. Assocs., Inc. v. U.S. Dep’t of Hous. & Urban Dev.*, 480 F.3d 1116, 1124 (Fed. Cir. 2007) (lamenting the forum shopping generated by an ambiguous ruling dividing jurisdiction between the Court of Federal Claims and the district courts).

Although usually thought of from the perspective of a plaintiff, the current scheme also permits the *agency* some leeway in choosing a forum by modifying the type of decisionmaking process it will undertake. For example, the *Wall Street Journal* recently reported that SEC has increasingly opted for administrative adjudications, which can be appealed directly to the court of appeals, instead of bringing suit in federal district court.³⁰⁷ EPA avoids the Clean Air Act's channeling of challenges to *promulgated* air quality standards to the D.C. Circuit³⁰⁸ by imposing its standards through decisions on individual plans.³⁰⁹ Jurisdictional divisions can be gamed by the agency as well as the challenger.

2. *The Added Value of District Court Review*

The argument for accuracy has so far considered the cases that are not appealed. But what about the cases that end up in the circuit court anyway? In the prior section, we noted that a pure cost approach might favor direct review of these decisions. Yet the question is not simply the expense of a particular jurisdictional scheme but its value: what you get for what you spend. As put by Justice Berger: "Efficiency must never be the primary objective of a free people."³¹⁰ Applying this rubric, the question of jurisdiction requires weighing the costs of an erroneous decision versus the cost of getting the right outcome.³¹¹ Far from being worthless, as the Supreme Court has implied, district courts improve the overall accuracy of the judicial system by offering useful opinions, providing a chance for litigants to narrow and improve their arguments, and potentially tempering ideology. Moreover, for the fraction of cases that require resolution of factual disputes—notably facts relevant to standing, but also potentially issues about the scope of the record, or facts relevant to a constitutional case—district courts provide a decisive advantage.

First, having one Article III judge work through the agency's decision and record provides helpful guidance to the reviewing circuit court. True, having a lower court opinion will not be *as* helpful in administrative review cases as it is in other cases, since the courts already have the benefit of a formal decision from the agency.³¹² But the added set of judicial eyes looking at an agency's lengthy decision—with an administrative record

307. Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, WALL ST. J., Oct. 21, 2014, <http://online.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590>.

308. 42 U.S.C. § 7607(b) (2012).

309. *See Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012).

310. Leventhal, *supra* note 197, at 435.

311. *See* Shavell, *supra* note 238, at 387.

312. Currie & Goodman, *supra* note 13, at 17.

perhaps spanning thousands of pages—and applying the APA standard almost certainly provides some assistance to the appellate court. Although this could backfire in some situations—such as if the panel used a faulty district court opinion as a roadmap for the analysis on appeal or as a summary of the administrative record—that seems unlikely to occur with any frequency.

Moreover, the added layer provides a further opportunity to crystallize issues on appeal by reducing the volume and improving the quality of arguments. By briefing the matter in the district court, the litigant will be forced to show her cards and, perhaps more importantly, see the opponent's hand. Rational litigants will abandon the arguments on which they are clearly outmatched, while fine-tuning potential winners in subsequent rounds of briefing before the circuit court. The well-established rule of issue-forfeiture, if consistently applied, prevents litigants from raising new arguments on appeal.³¹³

The benefits of an added layer of review are highlighted by the common practice of district courts referring all challenges to Social Security Administration benefit determinations to magistrate judges for report and recommendation.³¹⁴ By providing another judge's analysis and giving litigants an opportunity to focus their challenge, this added layer of review is widely thought to be a helpful process rather than a wasteful one.

In addition to issue clarification, it is plausible that channeling agency review cases through the district court would temper the ideological nature of judicial review. As we discuss above, a common finding by empiricists is that judicial ideology plays a role in a significant number of cases, at least at the circuit court level. But, as noted above, there are empirical and theoretical reasons to believe that district court decisionmaking tends to be less ideological.³¹⁵ There are also reasons to believe that the influence of district judges' opinions persists to the appellate level, such that the district judges serve as "hidden fourth members of the appellate panel[s]."³¹⁶ We would expect, therefore, that routing a case through the less ideological district court decisionmaking process would lead to a less ideological decision on appeal. Of course, empirical study is needed to confirm this.³¹⁷

313. *Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008).

314. *E.g.*, Admin. Order 07-AO-015 (E.D. Mich. 2007), available at <https://www.mied.uscourts.gov/PDFFiles/07-AO-015.pdf>.

315. *See supra* notes 289–297 and accompanying text.

316. Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1165 (2010).

317. An attempt to test this hypothesis was made by Frank Cross. Cross found that in situations where a circuit court affirms a district court, a circuit panel whose ideology is unaligned with that of the district court will tend to issue a longer opinion than a panel whose ideology is a match. Cross inferred that "longer opinions in this circumstance are

In the previous section, we observed that initial district court review could work as a timesaver by allowing circuit courts to engage in less thorough review on the eventual appeal. The marginal gains of multi-layer review would be quickly washed away if circuit courts engage in commensurately less thorough review. Even with unpublished opinions, however, the initial district court review is likely to improve circuit court accuracy because circuit courts are quite unlikely to give the quick treatment to every appeal from district courts. Instead, circuit courts likely distinguish between “hard” and “easy” cases, giving the former a more thorough work-up than the latter. District court review can help the circuit courts distinguish between the two types of cases,³¹⁸ and for either type, district court review serves as an advantage. For the hard cases that are given a close look by the circuit court, the arguments presented to the circuit court should be the better for having aged in the district court. And for the easy cases, the circuit court can rest largely on the district court decision, freeing up resources for the hard cases.

Further, as noted above, district courts have expertise when it comes to factual development and resolution of factual disputes.³¹⁹ For the minority of APA cases that involve factual disputes—whether regarding litigant standing, constitutional issues, requests for preliminary relief, or debate about the scope of the record—district courts serve as a logical choice to hammer out these disputes.

Given the benefits of added judicial brainpower, increased issue crystallization, potential tempering of ideological decisionmaking, and the resolution of factual disputes when appropriate, there is reason to think that district courts add value in administrative review cases, even when an eventual appeal is likely. Quantifying the added value is no easy task, but we might theorize that it is at its peak in cases that are complicated or bear lengthy administrative records, cases with a strong threat of ideological judging, and cases where standing or constitutional issues are likely to be at play.

G. Summary

The arguments in favor of direct circuit court review depend on highly

meant to limit the scope of the holding and its precedential effect because the outcome apparently does not align with judicial ideological preferences.” FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 66 (2007).

318. Again, it is possible that this could backfire in certain situations—a panel might falsely assume a case is simple based on an erroneously stripped-down analysis by the district court—but the sophistication of courts and litigants suggests that this would not happen very often.

319. *See supra* notes 166–168 and accompanying text.

questionable premises. Even if the seemliness argument had some merit, which it does not, it requires only that a circuit court be available at some stage in the process, not on direct review. At best, the other arguments provide tentative support for direct circuit court review only in very limited circumstances, while favoring initial district court review most of the time. The conditions under which one arrangement is favorable to the other can be charted out as follows:

Figure 2: Conditions Favorable to Competing Jurisdictional Schemes

	Direct Court Review	Circuit Review	District Review	Court Review
Workload		If circuit courts are underworked, district courts are overworked, and reallocating or adding judges is not a viable strategy		If circuit courts are relatively overworked and litigants are deterred from appeal
Rules		If district court rules are not amended or implemented consistent with APA		If factual disputes will be involved
Authoritativeness		If multiple challenges to single action and if circuit court ruling resolves most/all challenges		If venue is concentrated in single district court or multiple challenges are consolidated
Efficiency		If appeal rates are high and triage is not preferred strategy		If appeal rates are low <u>OR</u> if appellate court undertakes less fulsome review based on work of district court
Accuracy		If district court error is high, circuit court error is low, and appeal rates are low		If circuit court error is high and district court error is low <u>OR</u> if district courts improve circuit court decisionmaking by crystalizing and narrowing issues and tempering ideology and if litigants tend to appeal erroneous decisions

The best arguments for direct circuit review—cost and time savings and increased accuracy—are limited in their traction and must be balanced against the benefits of an added layer of review and the ability of circuit courts to spend resources where most needed. For the cases that would not be appealed—most cases fall into this category—district courts are a clear bargain, providing high quality decisionmaking at a low price. Unless we have reason to think they are making systematic errors that circuit courts would avoid, district courts are the logical choice.

Even if a matter is likely to be appealed, the case for direct circuit court review is still highly tentative. Because initial district court review adds some value to the decisionmaking process by resolving any factual disputes, improving argument quality, and tempering ideology, it is useful in difficult cases. And because initial district court review facilitates the circuit court engaging in a more selective review, it is useful in easy cases where full circuit court involvement is unneeded. This means that district courts add value in both easy and hard cases, further weakening the argument for direct circuit court review.

III. THE NEED FOR UNIFORM RULES

A. Uniform Rules

As noted above, the calculus as to the “best” forum and hierarchy might differ from case to case depending on a number of specific circumstances. But attempting to tailor jurisdictional rules to classes of cases comes with two types of costs: the costs associated with making the initial choices and the costs of implementing those choices.³²⁰ First, there is the upfront cost of determining where the division of jurisdiction should lie.³²¹ The marginal benefits of tailored jurisdiction depend on this division being made correctly. If you guess wrong, and assign cases to the wrong jurisdictional treatment, you could be worse off than if you had stuck with a single rule. Calculating the best division depends on weighing competing factors and making important predictions about the future. This cost is significant; in fact, as we have argued, Congress has not done a good job of allocating jurisdiction based on any policy preference that we can identify.

Even the best predictions can turn stale over time. Agencies evolve

320. Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 523–24 (2012); Harold Leventhal, *Book Review of Henry J. Friendly's Federal Jurisdiction: A General View*, 75 COLUM. L. REV. 1009, 1012 (1975) (describing how federal courts should be limited to appellate review and factfinding); Scott Dodson & Elizabeth McCuskey, *Structuring Jurisdictional Rules and Standards*, 65 VAND. L. REV. EN BANC 31, 35 (2012).

321. Nash, *supra* note 320, at 522.

through time, changing their regulatory focus and their means of implementing policy. For example, over time, many agencies have become more reliant on rulemaking than individualized orders, perhaps departing from the expectations of the Congresses that provided for direct review only of “orders” and not “rules.”³²² Moreover, the scope of an agency’s regulatory agenda can shift markedly due to changes in facts or the political/legal landscape. The attacks of September 11, 2001 led to a major shift in the missions and methodologies of several agencies. Once attracting only the interest of specialists, DHHS has become increasingly salient as debates over health care issues have rose to national prominence. But statutes do not automatically adapt to temporal changes, and the utility gains of today’s jurisdictional divide are rendered obsolete by the march of time. Thus, the costs of designing the jurisdictional scheme do not end with implementation; it will also require very costly monitoring if maximum utility is to be achieved.

The more damning problem with the effort to tailor jurisdiction is not the cost of design but of implementation. Today, there is frequent indeterminacy in the appropriate forum for reviewing an agency’s action. Repeated Supreme Court involvement and diverging conclusions from sister circuits drive up the cost of litigating agency decisions. The occasional and inconsistent interpretive methods employed by the courts exacerbate the existing statutory ambiguities and introduce new ones. The ambiguity as to proper forum leads to substantial dead weight in terms of litigating disputes over jurisdiction and, perhaps even worse, missed opportunities based on jurisdictional uncertainty.³²³ It also can lead to potentially duplicative proceedings required when one aspect of a challenge is channeled to one forum and another aspect to another.³²⁴ These costs can quickly drown out any efficiency gains that might otherwise accrue.

The best approach would be to have a single, uniform system.³²⁵ One easy fix would be to place all review in a single type of forum for all categories of agency action. This would certainly reduce the amount of jurisdictional litigation. Indeed, the strong trend over the last one hundred years in other areas is to move toward the approach of placing all cases on

322. Note, *supra* note 7, at 989–92.

323. See *supra* note 122 and accompanying text (noting potential for forfeited claims); cf. Wildermuth & Davies, *supra* note 168, at 1011 (noting the “inefficiency, uncertainty, and inaccuracy generated by standing doctrine also impose large costs on both parties and courts in cases where standing is ultimately found”).

324. Courts strive to interpret statutes to avoid bifurcated review, which reduces but does not eliminate the potential for simultaneous proceedings. *E.g.*, *Wagner v. FEC*, 717 F.3d 1007, 1012 (D.C. Cir. 2013); JAFFE, *supra* note 137, at 158.

325. McAllister, *supra* note 80, at 167 (“If we are to continue to have some form of judicial review of administrative action the road to review should be as simple as possible.”).

the same judicial path.³²⁶ Thus, for instance, constitutional challenges to state laws no longer require a three-judge tribunal,³²⁷ and Supreme Court certiorari jurisdiction has become nearly universal. Yet jurisdiction to review administrative review cases has stubbornly bucked this trend by getting more complicated.

We recognize that it may be a bit much, particularly in today's deeply cynical political environment, to expect Congress to go back and clean up the mess it has created over the past century through a large-scale recodification.³²⁸ However, as Congress enacts new legislation, creating new agencies, new programs, or new review schemes, it should strive to do a better job going forward than it has to date.

B. Other Dividing Lines

Although we favor a single scheme, a next best alternative would be to have a small number of clear rules dividing cases between the usual route of district court review and direct circuit court review. The goal here is to define a dividing line that is relatively free from ambiguity, that is resistant to litigant manipulation through forum shopping, and that tends to place cases on the track that maximizes the benefits we lay out in this Article.

Perhaps the most intuitive division would be between regulations and individualized orders.³²⁹ Regulations, having a broader impact, are more

326. Solimine, *supra* note 149, at 129–30 (discussing the use of three-judge district court panels in the Civil Rights Era).

327. *Id.*

328. A reallocation of jurisdiction would have short-term implications for workload. For example, a universal rule that gives district courts jurisdiction over all administrative cases would add eight thousand cases a year to the district court docket. Given that circuit courts are generally thought to be overworked, Congress might choose to hold the number of circuit court judgeships constant and simply add judgeships to the district courts. But it might have other options as well. Assuming that salary remained unchanged, Congress might be able to redesignate circuit judges as district judges. This is an unsettled and controversial topic beyond the scope of this Article. *See generally* David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007). Even if constitutional, redesignating existing personnel would raise fears by each political party of the other gaining an advantage through strategic designations. A better approach would be to add judgeships to the district court, and allow circuit court judgeships to expire as they become vacant until the workload reaches the level deemed ideal by Congress.

While there would be an upfront cost to correct the workload imbalance, likely by adding district judgeships or prioritizing currently unfilled slots, the long term savings in transaction costs, not to mention likely gains in efficiency and accuracy, are well worth this fairly minor cost.

329. Although definitely preferable to the current system in terms of clarity, the dividing line between rules and orders still suffers from ambiguity at the margins. Take a litigant who appeals from an agency's adjudication of his case but in that process seeks to draw into question the agency's regulation. Or what about an agency that acts through precedent-

likely to be challenged by multiple parties, and, therefore, benefit from the comparative authoritativeness of circuit court resolution of the legality of the agency decision. Relatedly, we might expect that challenges to regulations are more likely to be appealed to circuit courts than individualized adjudications, given the rule's broader impact, which could justify direct circuit review on an efficiency rationale. Moreover, one might hypothesize (although further testing would be needed to confirm) that challenges to regulations tend to focus on legal questions—whether the rule satisfies *Chevron*, for instance, or the Constitution—than adjudications, which tend to involve fact-bound inquiries into whether the decision was arbitrary or capricious or supported by substantial evidence.

Even for rules, however, the balance does not wholly favor direct circuit review. Challenges to regulations are more likely to have fact-bound ripeness or standing issues at play, which can be readily resolved by the district court's fact-finding machinery. Moreover, the abstract legal nature of many challenges to regulations potentially invites ideological decisionmaking, which should be mitigated to the extent possible. Finally, the complexity and importance of nationwide regulation favors additional deliberation, which favors allowing disputes to marinate a bit in district court before locking in a rule at the circuit court. As with every category of case that we have imagined so far, the rationales do not universally point to one court over another.

CONCLUSION

Our primary goal here was to suggest a framework for analyzing future decisions about jurisdiction, relying on data-driven goals of accuracy and efficiency. Our secondary goal was to urge fewer, clearer rules. Applying the framework, we find that the case for direct circuit court review has not been made, and a single system of judicial review that begins in the district court would be a better approach. Going forward, Congress should pay more attention to the difficulties of a divided system of review and consider more closely how it allocates review of agency decisions. Better yet, Congress should revisit its prior choices and bring some order to the chaos by adopting uniform legislation with simple rules.

Beyond major policy implications, we offer several specific lessons for courts and litigants who must struggle with the existing system. For the judiciary, we urge the adoption of predictable interpretive approaches. Jurists' occasional and inconsistent reliance on their own policy perspectives

setting, broad actions that are not regulations, such as Clean Air Act State Implementation Plans? As highlighted by the cases discussed in Part I.B.3, courts have not found the rule/order division to be clear so far, and there is little reason to think that such a system would eliminate ambiguity.

only makes matters worse for litigants by grafting ambiguity onto ambiguity.

Moreover, when a litigant chooses the wrong forum, courts should recognize the difficulty of the jurisdictional maze and exercise their discretion to transfer a case to the right court, at least absent evidence of bad faith or dilatory motive.³³⁰ And when a litigant prudently files a challenge in multiple courts, the courts can avoid wasting time by staying one of the cases and resolving jurisdiction as the first priority.

We also identify a need for greater attention to the manner in which district courts apply procedural rules to APA cases. A substantial fraction of the district court docket is spent on APA cases, yet the civil rules that apply to all proceedings in district court are quite awkward in these cases. Although many district courts or judges have come up with ways to implement the Civil Rules so as to better match the peculiarities of APA cases, the process is ad hoc and unpredictable. It is well past time that we amend the Civil Rules to reflect the idiosyncrasies of record-review matters.

Finally, we identify a number of unanswered empirical questions that reflect a great level of uncertainty about how judicial review of agency action is carried out in the real world. We plan to address some of these questions in future empirical work.

The overall message is clear: The burden is on proponents of direct circuit court review to make their case. And for supporters of the current approach—ad hoc slicing and dicing from statute to statute and agency to agency—that burden looks to be insurmountable.

330. 28 U.S.C. § 1404(a) (2012).