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. Madison2 and requires

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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).
Today’s allocation of jurisdiction to review agency decisions is untenable. 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. 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, declines to explain its choice of forum. 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, while decertified Navy
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

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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. 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. This review is conducted based on the administrative record, a record that is, at least in theory, frozen in time and unalterable before the court. Although both the standard and scope of review are nearly

15. See, e.g., United States v. Kallin, 50 F.3d 689, 693 (9th Cir. 1995).
17. Camp v. Pitts, 411 U.S. 138, 142 (1973) (stating the standard should come from the administrative record already in existence).
universal,\textsuperscript{18} the court that undertakes this review varies sharply depending on the nature of the agency action and the legal theories of the challenge.\textsuperscript{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.\textsuperscript{20}

\textbf{A. Background on Judicial Review}

Historically, the opportunities to obtain judicial review of Executive Branch action were extremely limited.\textsuperscript{21} Individuals claiming injury could bring writs of mandamus,\textsuperscript{22} habeas corpus,\textsuperscript{23} and other prerogative writs whose familiarity has been lost to time.\textsuperscript{24} These writs were extremely limited in scope—mandamus being limited to “ministerial” duties,\textsuperscript{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.\textsuperscript{26} Today, an individual might also pursue a constitutional tort claim against an officer but must still

\begin{itemize}
\item \textsuperscript{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., \textit{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, \textit{Hierarchically Variable Deference to Agency Interpretations}, 89 \textit{Notre Dame L. Rev.} 727 (2013).
\item \textsuperscript{19} See infra Part I.B.2.
\item \textsuperscript{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).
\item \textsuperscript{22} See, e.g., Richard E. Flint, \textit{The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More “Mile Marker Down the Road of No Return”}, 59 \textit{St. Mary’s L.J.} 3, 10–47 (2007) (discussing the development of the writ of mandamus).
\item \textsuperscript{24} See generally Edward Jenks, \textit{The Prerogative Writs in English Law}, 32 \textit{Yale L.J.} 523 (1923) (providing a historical background on various types of writs found in the English legal system).
\item \textsuperscript{25} Kendall v. United States \textit{ex rel.} Stokes, 37 U.S. (12 Pet.) 524, 580 (1838).
\end{itemize}
As the twentieth century arrived and the administrative state grew, so too did elaborate statutory schemes providing for judicial oversight of agency decisionmaking. 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. 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. Like an appeal, the reviewing court considers the agency’s decision on the factual record developed by the agency. Agency factual findings control the reviewing court, be it district or circuit, so long as they are supported by “substantial evidence.” Agency judgment calls are not reviewed for their correctness or wisdom, but only for whether they are arbitrary or capricious. Although the APA does not explicitly prescribe a deferential standard for reviewing an agency’s legal interpretations, the *Chevron*, *Skidmore*, and *Seminole Rock* 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

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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”).
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.”).
issue de novo.\textsuperscript{38} The APA’s standards apply to all judicial review of agency decisions unless another statute expressly prescribes a different standard.\textsuperscript{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.”\textsuperscript{40}

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

\begin{footnotesize}


\textsuperscript{40} \textit{Morgan v. Daniels}, 153 U.S. 120, 124 (1894).


\textsuperscript{42} See Emily Hammond Meazell, \textit{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.”).

\textsuperscript{43} \textit{Marbury v. Madison}, 5 U.S. [1 Cranch] 137, 177 (1803); \textit{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 \textit{Chevron}. \textit{Id.} at 1278.
\end{footnotesize}
ensuring that the rights of individuals are left untrammeled. Further, federal judges are less susceptible than administrators to “capture” by a particular segment of the population. Finally, the threat of further review may encourage agencies to be more thorough and careful in their decisionmaking.

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.” 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.

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. 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. 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. And, of course, there is the

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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).


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


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.”).

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

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. 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, 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. 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.

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).


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.* 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. Instead, the Court found, such a challenge could only be brought in a lower court.

Of course, *Marbury* says nothing about which lower court Congress may charge with review of agency action. 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. 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. 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. In 1910, Congress created a special Article III circuit court, the United States Commerce Court, to review decisions of ICC, but the court lasted only three years.

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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).
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.
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

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.”).
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. 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.” 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. The Administrative Orders Review Act, also known as the Hobbs Act, 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. 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.

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

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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).


agency challenges. 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. 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,” because it eliminates duplicative proceedings in the district court and the court of appeals. 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.

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. 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
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.”

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.”

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. Most of these provisions direct litigants to a regional circuit court, to the D.C. Circuit, or, in limited instances, to the Federal Circuit. 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. 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. 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, including challenges brought by other

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


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


104. 42 U.S.C. § 1395oo(c).


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, while determinations of entitlement to Energy Star designation are brought in district court. 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. 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.

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. 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.

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.

The seeming randomness of the division of initial review fora provides scant evidence of an intelligent design. 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.

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).
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{120}

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\textsuperscript{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.”).
\textsuperscript{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.”).
\textsuperscript{120} WRIGHT ET AL., supra note 88, at § 3941.
\end{flushright}
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

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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).
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).
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).
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.”).
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”).
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).
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.”

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. 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.

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


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.


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


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).


Administrative Orders Review Act does not suggest this rationale,\(^\text{156}\) 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.

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?\(^\text{157}\) 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.\(^\text{158}\) Yet direct review statutes exacerbate this

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\(^{156}\) See generally H.R. REP. NO. 81-2122 (1950).


\(^{158}\) 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. 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. 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, but under the APA, the record is the one compiled by the agency, not a new one created before the court. 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.

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. 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


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


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 . . . .").

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.\textsuperscript{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.\textsuperscript{167} Factual disputes regarding a party’s standing often cannot be assessed on the administrative record.\textsuperscript{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.\textsuperscript{169} In district court, such disputes are handled through the familiar tool of a motion to compel.\textsuperscript{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,\textsuperscript{171} although subsequent decisions have sharply limited these suggestions.\textsuperscript{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.\textsuperscript{173} Indeed, at least one statute providing for

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\textsuperscript{166} See Elias, supra note 13, at 1016.  \\
\textsuperscript{168} Amy J. Wildermuth & Lincoln L. Davies, Standing, on Appeal, 2010 U. ILL. L. REV. 957, 959 (2010).  \\
\textsuperscript{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).  \\
\textsuperscript{170} See, e.g., Wildearth Guardians v. U.S. Forest Serv., 713 F. Supp. 2d 1243 (D. Colo. 2010).  \\
\textsuperscript{172} Elgin v. Dep’t of Treasury, 132 S. Ct. 2126 (2012); Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).  \\
\textsuperscript{173} Wright et al., supra note 88, at § 3943.
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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. Authoritiveness

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

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

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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, further facilitate uniform and conclusive decisionmaking. However, it bears noting that nothing would prohibit district courts from benefiting from the same types of procedures.

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. 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. 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.

Only by placing review in a single court, as is often done with the D.C. Circuit, can Congress actually provide any measure of uniformity in decisionmaking. 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

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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.


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.\textsuperscript{191} It also mitigates the temptation for litigants to forum shop. These advantages motivate occasional calls for a specialized administrative court.\textsuperscript{192}

But a single court also has serious drawbacks, and most scholars come out sharply against a specialized administrative court.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 review\textsuperscript{196} or acquire tunnel vision that prevents the judges from looking at decisions from a broader perspective.\textsuperscript{197}

Closely related to authoritativeness is lawmaking. The distinction lies in the subtle difference between settling particular disputes with authority, on
the one hand, and, on the other, providing guidance to the lower courts—and in this case, administrative agencies—on what the law is. The lawmaking function of courts has been most strongly associated with appellate courts, and especially the Supreme Court. 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. 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.

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.

E. Efficiency Gains

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

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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.
resolution of the matter\textsuperscript{204} to have a district judge opine on the subject first.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{207}

\textsuperscript{204}. \textit{E.g.}, \textit{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.”); \textit{Wright et al.}, \textit{ 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.”).

\textsuperscript{205}. \textit{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.”); \textit{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.”); \textit{Levy}, \textit{ 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.”).


\textsuperscript{207}. \textit{Legomsky}, \textit{ 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. \textit{Currie & Goodman}, \textit{ 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. Today, less than 5% of district court judgments in social security cases make it to the court of appeals. 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. 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. 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).
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

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.
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
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,

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.
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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,
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

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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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{229} The premise behind these unpublished decisions is that circuit
djudges cannot spend sufficient time or care on them to be confident in the
outcome.\textsuperscript{230} Judges have referred to unpublished dispositions as “junk”
law\textsuperscript{231} and “not safe for human consumption.”\textsuperscript{232} By choosing which

\begin{itemize}
  \item \textsuperscript{226} Legomsky, \textit{supra} note 13, at 1326.
  \item \textsuperscript{227} \textit{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).
  \item \textsuperscript{228} Currie \& Goodman, \textit{supra} note 13, at 18.
  \item \textsuperscript{229} Chad M. Oldfather, \textit{Universal De Novo Review}, 77 GEO. WASH. L. REV. 308, 354–55
(2009).
  \item \textsuperscript{230} Alex Kozinski, \textit{In Opposition to Proposed Federal Rule of Appellate Procedure 32.1}, FED.
LAW., June 2004, at 36, 37–38; Wade H. McCree, Jr., \textit{Bureaucratic Justice: An Early Warning,
  \item \textsuperscript{231} Penelope Pether, \textit{Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys
  \item \textsuperscript{232} Kozinski, \textit{supra} note 230, at 37.
\end{itemize}
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.\textsuperscript{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.\textsuperscript{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,”\textsuperscript{235} then a standard of appellate review that is not quite de novo may actually make sense.

\subsection*{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.\textsuperscript{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

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\textsuperscript{234} For criticism of circuit court publication practices, see Penelope Pether, \textit{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, \textit{supra} note 231, at 20 (indicating that unpublished opinions are more likely to be wrong because they are not usually written by judges).

\textsuperscript{235} Groves v. Apfel, 148 F.3d 809, 811 (7th Cir. 1998).

\end{flushright}
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

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.\(^2\)

**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. We are quite doubtful of this proposition as an empirical matter, given the impressively high quality of the federal judiciary as a whole.\(^3\) 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.\(^4\)

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.\(^5\) In contrast, district judges

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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.”).


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.”).


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. 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.

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. Critics have long opposed a specialized administrative court, in part for this reason. 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.

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 1253–56 (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. 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.

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. The assumption that “three heads are better than one” enjoys support by analogy to other contexts, though empirical application to judicial decisionmaking is incomplete. Yet this advantage is also likely overstated, as it depends on the three judges engaging in meaningful deliberation over the case. 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. 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.

261. Currie & Goodman, supra note 13, at 12.
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, 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. 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. 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 unsupportable rulings, which is hypothetical. If a single judge is the decider, there is a 10% chance of an unsupportable 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. 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. 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

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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.”).


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

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274. It is possible that it would be more disruptive, or awkward, for district judges accustomed to solitary rule over a limited fiefdom 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. For example, scholars have found an ideological correlation in voting behavior at the D.C. Circuit in EPA cases, review of agency health and safety decisions, application of *Chevron* deference, and arbitrary and capricious review.

Yet it is important not to overstate the strength of the ideological correlation. Even the strongest evidence of ideology’s role finds a relationship only in a minority of decisions. 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. 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. Professors Epstein and King identified a number of methodological flaws that they believe undermine legal empirical work in general. 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." Other scholars reminded the legal academy that, even if a correlation is

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283. Cross, supra note 243, at 1515.


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.


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. One study found a difference of 10% to 13% between Democratic and Republican district judges for all types of cases, civil, criminal, and administrative. On the other hand, this same study found a stronger correlation in the circuit courts. 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. Again, though, the correlation was stronger with respect to circuit judges.

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. 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. 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.


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.”).


295. Id. at 1217.


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 Y—represents a flaw in the judicial system. 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. Although not without dissent, “forum shopping” is a dirty term among scholars and judges. 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

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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.”).


than one forum in which they can plausibly file suit. 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. 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.

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. 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. 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).

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.\textsuperscript{307} EPA avoids the Clean Air Act’s channeling of challenges to promulgated air quality standards to the D.C. Circuit\textsuperscript{308} by imposing its standards through decisions on individual plans.\textsuperscript{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.”\textsuperscript{310} Applying this rubric, the question of jurisdiction requires weighing the costs of an erroneous decision versus the cost of getting the right outcome.\textsuperscript{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.\textsuperscript{312} But the added set of judicial eyes looking at an agency’s lengthy decision—with an administrative record

\textsuperscript{308} 42 U.S.C. § 7607(b) (2012).
\textsuperscript{309} See Summit Petroleum Corp. v. EPA, 690 F.3d 733 (6th Cir. 2012).
\textsuperscript{310} Leventhal, supra note 197, at 435.
\textsuperscript{311} See Shavell, supra note 238, at 387.
\textsuperscript{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

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

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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

<table>
<thead>
<tr>
<th>Condition</th>
<th>Direct Court Review</th>
<th>Circuit Court Review</th>
<th>District Court Review</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Workload</strong></td>
<td>If circuit courts are underworked, district courts are overworked, and reallocating or adding judges is not a viable strategy</td>
<td>If circuit courts are relatively overworked and litigants are deterred from appeal</td>
<td></td>
</tr>
<tr>
<td><strong>Rules</strong></td>
<td>If district court rules are not amended or implemented consistent with APA</td>
<td>If factual disputes will be involved</td>
<td></td>
</tr>
<tr>
<td><strong>Authoritiveness</strong></td>
<td>If multiple challenges to single action and if circuit court ruling resolves most/all challenges</td>
<td>If venue is concentrated in single district court or multiple challenges are consolidated</td>
<td></td>
</tr>
<tr>
<td><strong>Efficiency</strong></td>
<td>If appeal rates are high and triage is not preferred strategy</td>
<td>If appeal rates are low OR if appellate court undertakes less fulsome review based on work of district court</td>
<td></td>
</tr>
<tr>
<td><strong>Accuracy</strong></td>
<td>If district court error is high, circuit court error is low, and appeal rates are low</td>
<td>If circuit court error is high and district court error is low OR if district courts improve circuit court decisionmaking by crystalizing and narrowing issues and tempering ideology and if litigants tend to appeal erroneous decisions</td>
<td></td>
</tr>
</tbody>
</table>
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. First, there is the upfront cost of determining where the division of jurisdiction should lie. 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


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.” 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. 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. These costs can quickly drown out any efficiency gains that might otherwise accrue.

The best approach would be to have a single, uniform system. 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

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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. Thus, for instance, constitutional challenges to state laws no longer require a three-judge tribunal, 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. 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. Regulations, having a broader impact, are more
likely to be challenged by multiple parties, and, therefore, benefit from the comparative authoritateness 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. 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.