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Rulemaking's Missing Tier

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RULEMAKING'S MISSING TIER

*William Ortman**

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ABSTRACT

Litigation about the validity of agency rules is anomalous. In ordinary federal cases, appellate judges scrutinize lower court decisions. In challenges to agency rules, one court usually pronounces the judiciary's first, last, and only judgment.

One might plausibly expect a compelling justification for such a significant departure from the regular order. But in fact, there is no viable reason to structure rulemaking challenges differently from other high-stakes cases that do not require judicial fact-finding. It follows that either we deploy too many judicial tiers in many cases, or too few in disputes about agency rules. Because two-tier court structures are epistemically superior to one-tier court structures—that is, they are less prone to legal error—the latter is more likely. The troubling implication is that our courts are probably getting too many rulemaking cases wrong. Indeed, although judicial error rates can't be directly observed, the occurrence of error in rulemaking litigation is suggested by the fact that, despite legal doctrines meant to make the political preferences of judges irrelevant, judicial ideology persistently influences case outcomes.

Rulemaking challenges are among the most consequential cases heard by federal courts, yet we consign them to an anomalous judicial architecture that likely generates preventable errors. Reform is possible. This Article identifies and evaluates four potential reforms: enlarging the en banc dockets of circuit courts, repudiating the presumption in favor of circuit court (over district court) jurisdiction, routing all rulemaking cases through the district courts, or enabling circuit court decisions in rulemaking cases to be appealed to different circuits, what this Article calls "intercircuit peer review." Although the latter two reforms would require congressional action, the former could be achieved by the courts alone.

INTRODUCTION

Sometime during the first semester of law school, aspiring lawyers learn about the tiers of federal courts. Cases begin, civil procedure professors everywhere explain, in district courts, the workhorses of the federal judiciary.¹ From there, they proceed to circuit courts, which correct

1. See Lawrence M. Friedman, *Looking Backward: The Central District of California*, 36 SW. U. L. REV. 245, 255 (2007) ("And the district courts are the workhorses of the federal system, the keystone of the great judicial arch.").

errors and develop the law.² It is a familiar story. Yet for a category of federal litigation vital to the administrative state, it does not apply.

To challenge the validity of an agency rule prior to its enforcement, a party typically files a “petition for review” in a circuit court. A panel of that circuit will, almost always, be the petition’s first and last stop. There is simply nowhere for a losing litigant to go, as rulemaking cases tend to be poor candidates for either a grant of certiorari or en banc review.³ This makes rulemaking litigation different from the standard account taught to first-year law students in an important respect: Whereas ordinary federal lawsuits get the attention of two tiers of judges, most rulemaking cases—despite their enormous significance—get by with just one.⁴

As a practical matter, rulemaking litigation is thus conducted in a one-tier judicial structure. Because a circuit court’s ruling on a petition for review has nationwide effect,⁵ this means that a single, three-judge panel usually has the first *and only* say on the validity of agency rules. In *Business Roundtable v. SEC*, for example, three D.C. Circuit judges invalidated the SEC’s “proxy access” rule, which would have given the shareholders of public companies greater control over their boards of directors.⁶ No other federal judge had weighed in on the SEC’s rule. Nor would any in the future; the judiciary had spoken.⁷

Contrast this with run-of-the-mill litigation. In *Sereboff v. Mid Atlantic Medical Services, Inc.*, the Supreme Court ruled that under ERISA, a health plan may pursue a subrogation claim through a “constructive trust or equitable lien on a specifically identified fund,”⁸ resolving a question that had split five circuits.⁹ Not counting the justices themselves (to keep the *Business Roundtable* comparison fair), before the judiciary finally spoke to

2. See PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2 (1976) (“In the received tradition, the functions of appellate adjudication are two-fold.”).

3. See *infra* notes 73–76 and accompanying text.

4. Most but not all. Some rulemaking litigation does originate in a district court. For instance, the litigation over the IRS’s rule authorizing tax credits for health insurance purchased on federal exchanges began in district court. See *King v. Sebelius*, 997 F. Supp. 2d 415 (E.D. Va. 2014), *rev’d sub nom.* *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *aff’d*, 135 S. Ct. 2480 (2015). As explained below, however, direct circuit review is more common. See *infra* note 52. On the significance of rulemaking litigation, see Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1069 (2000) (“While judicial review of administrative rulemaking is often regarded as a largely procedural matter, its substantive consequences are enormous.”).

5. See *infra* note 186.

6. 647 F.3d 1144, 1146 (D.C. Cir. 2011).

7. The same logic applies when the agency’s rule is validated on a petition for review. For example, in *Natural Resources Defense Council v. EPA*, 529 F.3d 1077, 1079 (D.C. Cir. 2008), another D.C. Circuit panel rejected a challenge to the EPA’s decision not to impose tougher emission standards in response to amendments to the Clean Air Act. No other federal judge would rule on whether the Clean Air Act required the enhanced standards.

8. 547 U.S. 356, 363 (2006).

9. *Id.* at 361 n.1 (collecting cases).

the ERISA question in *Sereboff*, at least twenty federal judges had issued opinions or votes.¹⁰ *Sereboff*'s subrogation issue was doubtlessly important,¹¹ but it is hard to imagine that it bore the weighty consequences of the SEC's proxy access rule.¹² Yet our courts gave the proxy access rule a fraction of the attention they paid the ERISA question, a discrepancy that starkly illuminates the peculiar judicial architecture used in agency rulemaking cases.

Although courts and commentators have recognized that many rulemaking cases begin in circuit court,¹³ few have considered the consequences of the fact that they typically end there too.¹⁴ Nor have they adequately justified the departure from the standard litigation model.¹⁵ These are significant omissions. To the extent that scholars and courts have considered the structure of rulemaking cases, they have focused on the costs of a "redundant" second judicial look at agency rules.¹⁶ Redundancy, however, has both costs *and benefits* as a tool of institutional design. Outside the petition for review context, we recognize that two-tier court systems have epistemic advantages over their one-tier cousins. They are, in other words, more likely to render legally correct judgments. At a minimum, the failure of courts and scholars to consider the advantages of two-tier systems means that the current structure of rulemaking litigation has not been adequately justified.

There is, moreover, no compelling reason to structure rulemaking cases differently from similar kinds of litigation. A leading justification for direct circuit review is that federal judges need not develop a factual record in rulemaking cases, so the trial courts, which specialize in deciding facts, can

10. Fifteen circuit judges and five district or magistrate judges. *See id.* and cases cited therein.

11. *See* C. Mark Humbert, *The Supreme Court Revisits Third-Party Reimbursement Claims Under ERISA: Sereboff v. Mid-Atlantic Medical Services, Inc.*, HEALTH LAW, Aug. 2006, at 1, 1, 3 ("Sereboff constitutes a significant victory for medical benefit plans and the medical and disability insurance industry by providing a blueprint for plans, insurers and plan fiduciaries to recoup overpayments by use of subrogation clauses in benefit plans.").

12. *See* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 308–12 (2013) (describing the proxy access rule, which "has been debated since the establishment of federal regulation of the proxy process in 1934").

13. *See infra* Part I.

14. Among the exceptions is former D.C. Circuit Judge Patricia Wald. *See* Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, in THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 171, 172 (Cynthia Harrison & Russell R. Wheeler eds., 1989) ("We are the first, and usually the only, Article III court that will pass on the citizen's protest against what he or she perceives to be an arbitrary bureaucracy.").

15. *See infra* Part II.

16. An exception is Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1 (2015), which briefly considers the potential value-add of district courts in administrative law litigation. *See id.* at 54–57. Although Mead and Fromherz thus touch on the subject of this Article, they do not focus on calibrating the number of tiers in rulemaking litigation. Their central claim—that jurisdictional statutes in administrative law are incoherent, causing confusion and leading to dead weight loss—is complementary to, but different from, mine.

be skipped.¹⁷ Many other categories of federal litigation often involve no findings of adjudicative fact, including facial challenges to the constitutionality of statutes,¹⁸ statutory preemption challenges,¹⁹ and more.²⁰ Yet outside administrative law, these cases receive the attention of two tiers of judges.

If there is no good reason to treat rulemaking litigation and other closed-record cases differently, there are only two possible implications. Either we often use too many judicial tiers, or we use too few in rulemaking cases. In light of the epistemic advantages of two- over one-tier systems, the latter is more likely. This Article identifies and explores four such advantages. First, as the Supreme Court recognizes when it denies certiorari notwithstanding a circuit split, legal questions benefit from *percolation*.²¹ Two-tier judicial structures allow legal questions to percolate within individual cases.²² Second, two-tier legal systems feature *accountability*, as the prospect of appeal makes the lower tier accountable to the higher tier.²³ If first-tier judgments matter to ultimate outcomes—which they certainly do when they are not appealed and likely do more generally—two-tier systems harness that accountability in a way that one-tier systems cannot. Third, two-tier structures enjoy the epistemic advantages of *diversity*. By involving more judges in a case, they can better access the “wisdom of crowds” and bring more viewpoints to bear on legal questions.²⁴ Finally, agreement or disagreement between tiers of courts provides *signals to outside decisionmakers*, such as the Supreme Court and

17. See *infra* note 89 and accompanying text. As explained below, in rulemaking cases the courts rely on factual records compiled by agencies. See *infra* note 79.

18. See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 455 (2008) (“Because respondents brought their suit as a facial challenge, we have no evidentiary record against which to assess their assertions that voters will be confused.”).

19. See Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 225–26 (2011) (“Preemption may conceivably, or perhaps even properly, turn on questions of fact, but that is not how courts currently understand it. Rather, courts currently understand it as purely a question of law.”).

20. See Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 318 (1998) (noting category of habeas cases which do not “require factual development beyond the trial record”).

21. See *infra* note 131 and accompanying text.

22. See *infra* notes 130–137 and accompanying text.

23. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 508–25 (2002) (applying psychological research on accountability to judicial review of agency rulemaking). See also *infra* notes 138–156 and accompanying text.

24. See Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1462–74 (2011); Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1452 (2011) (distinguishing the “statistical” and “perspectival” mechanisms of diversity); see also *infra* notes 168–172 and accompanying text.

Congress.²⁵ These are general advantages of two-tier systems, but there are good reasons to expect that they could apply in the particular context of rulemaking litigation.²⁶ If so, our process for adjudicating the validity of agency rules may leave epistemic value on the table. The likely result is unwarranted error.

Reducing unjustified judicial error is important in any context.²⁷ But is error a major problem in rulemaking cases and, if so, what does it look like? Judicial error rates can't be directly measured, but empirical scholarship sheds light on these questions. Empirical data shows that judicial ideology substantially influences outcomes in litigation challenging agency action, including agency rules.²⁸ This is evidence of systemic legal error in rulemaking litigation. To be sure, rulemaking litigation is not the only category of cases in which judicial ideology has been shown to impact outcomes.²⁹ Politics and value judgments, moreover, are inevitable in rulemaking, as they are in all lawmaking enterprises. The key question is *whose* politics matter.³⁰ As we will see, administrative law doctrine supplies a clear answer: as between an agency's politics and a court's politics, the agency's matter.³¹ The core doctrines of judicial review in administrative law—*Chevron* review of agency legal interpretations and arbitrariness review of policy choices—were meant to insulate agency decisions from the political and policy views of judges.³² Against that baseline, rulemaking outcomes influenced by judicial ideology are likely to be legally erroneous. There is thus good reason to believe that error is common in rulemaking litigation.

25. See *infra* notes 173–176 and accompanying text.

26. See *infra* Part II.B.

27. Cf. Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2194 (2014) (“Even a single admission of judicial error in a deeply controversial case can dangerously undermine the people’s critically important faith in the Court, . . .”).

28. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77 (2011) (compiling and assessing results of several empirical studies of politicization in administrative law); Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193 (2009) (summarizing results of empirical analyses of arbitrariness and *Chevron* cases conducted by authors); see also *infra* Part III.A.

29. See *infra* notes 212–214 and accompanying text.

30. Cf. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 201 (“Perhaps the central question in administrative law is how decision-making authority should be allocated among political institutions.”).

31. See *infra* Part III.A.

32. See *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”); see also *infra* notes 216–221, 239–241, and accompanying text. See generally Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 453–54 (1986) (discussing early understanding of the “‘arbitrary’ and ‘capricious’” standard) (quoting 5 U.S.C. § 706(2)(A)).

The one-tier structure of rulemaking litigation is obviously not solely to blame for judicial error or politicized outcomes. But nor is it irrelevant. This Article therefore analyzes costs and benefits of several available paths to reform. Small-scale reform is possible without getting Congress involved. For instance, the circuit courts could enlarge their en banc dockets in rulemaking cases, thus subjecting more cases to a second round of review. The Supreme Court, moreover, could revisit the interpretive presumption, announced in *Florida Power & Light Co. v. Lorion*,³³ that ambiguity in jurisdictional statutes must be read in favor of direct circuit review in administrative law litigation.

To normalize two-tier review of rulemaking, more thorough redesign would be necessary. The Article explores two variants of “true” two-tier review for rulemaking cases. The first does away with the petition for review and begins all rulemaking litigation in district courts. Because courts need not find facts in rulemaking cases, this is not the only option. An alternative reform scheme would retain the petition for review but add a second round of review at the circuit level. After a circuit court rules on a petition for review, its decision could be appealable to a different circuit, an approach I call “intercircuit peer review.”³⁴

The Article proceeds as follows. Part I provides background on the law of “direct review” of agency rulemaking. It also evaluates the justifications offered for direct review by scholars and courts. Specifically, it identifies two omissions in these justifications—they offer no good reason for structuring rulemaking cases differently from similarly situated categories of federal litigation and they do not account for the epistemic value of judicial redundancy. Part II explores the four epistemic advantages of two-tier structures noted above—percolation, accountability, diversity, and

33. 470 U.S. 729, 745 (1985) (“Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals.”).

34. A word on scope. I focus on the petition for review of agency *rulemaking*, to the exclusion of agency *adjudication*. This is somewhat underinclusive. Agencies famously have the prerogative to make policy via rulemaking or adjudication, see *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and some of my analysis applies equally to policymaking decisions regardless of their form. It does not, however, apply to adjudication that merely applies existing policy or law to discrete facts, what I call “routine” adjudication. Commentators and courts have justified direct review by conceiving of judicial authority over agencies as “appellate.” As I explain below, the appellate review model fails in the context of agency rulemaking. See *infra* notes 109–117 and accompanying text. For some of the same reasons, it may also fail with respect to adjudication that generates new policy. But for routine adjudication, the model makes sense. In routine cases, direct circuit review is the second (or higher) tier of an interbranch review process, not—as in rulemaking cases—the first tier of a new process in the judiciary. Lamentably, the tools of administrative law offer no way to cleanly distinguish routine and nonroutine adjudications. I must therefore choose between an overinclusive scope that includes routine adjudications and an underinclusive one that excludes nonroutine adjudications. I opt for underinclusiveness. Cf. Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 215 (2007) (acknowledging both the “undeniable appeal” and the “drawbacks” of “minimalism in legal scholarship”).

outside signals—each of which could apply to a two-tier structure for rulemaking litigation. Part III looks to empirical data to support the proposition that judicial error is indeed a problem in the rulemaking context. Part III also suggests that the existing one-tier structure may be linked to the finding that outcomes in rulemaking cases are problematically politicized. Part IV describes and evaluates the four reform possibilities mentioned above.

I. THE LAW AND LOGIC OF ONE-TIER REVIEW

I begin with two important pieces of background: the legal framework governing jurisdiction to review agency rules—which produced the one-tier structure for rulemaking cases—and the scholarly and judicial logic that seeks to justify it.

A. *Legal Framework*

Many statutes provide for—or are interpreted as providing for—review of agency action via a petition for review in a circuit court.³⁵ The Hobbs Act, for example, assigns the circuit courts jurisdiction to “enjoin, set aside, suspend (in whole or in part), or to determine the validity of” certain “final orders” by a number of agencies.³⁶ Sometimes “special review” statutes, as they are known, assign exclusive jurisdiction to a particular circuit.³⁷ Other statutes give petitioners a choice of circuits.³⁸ When multiple petitioners challenge the same rule in different circuits at the same time, the panel on multidistrict litigation randomly selects one of the circuits to rule on all of the petitions.³⁹

35. The petition for review can apply to both agency adjudication and agency rulemaking, but it is especially common in the rulemaking context. See 3 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 18.2, at 1683 (5th ed. 2010) (noting that “[r]ules [are] usually subject to circuit court review”).

36. 28 U.S.C. § 2342 (2012).

37. *E.g.*, 42 U.S.C. § 7607(b)(1) (2012) (“A petition for review of action of the [EPA] Administrator in promulgating any national primary or secondary ambient air quality standard . . . may be filed only in the United States Court of Appeals for the District of Columbia.”).

38. *E.g.*, 15 U.S.C. § 78y(b)(1) (2012) (“A person adversely affected by a rule of the [SEC] promulgated pursuant to [specified statutes] may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit . . .”).

39. See 28 U.S.C. § 2112(a)(3) (2012) (“The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period . . . and shall issue an order consolidating the petitions for review in that court of appeals.”).

Absent a statute authorizing a petition for review, jurisdiction to review agency rulemaking lies in district court.⁴⁰ Congress is thus ultimately responsible for the structure of rulemaking litigation.⁴¹ To a significant degree, however, Congress has ceded this responsibility by enacting ambiguous and haphazard special review statutes.⁴² The real action has been in the courts.

From the 1970s until perhaps very recently, courts applied the “record standard” to construe ambiguity in statutes that might be read as conferring jurisdiction on the circuit courts.⁴³ Under this approach, if an agency developed a record in support of its action, courts seized on any statutory ambiguity to route litigation to a circuit court.⁴⁴ The circuits themselves led the way in creating the record standard.⁴⁵ The Supreme Court endorsed it in *Florida Power & Light Co. v. Lorion*,⁴⁶ the most significant decision to date on special review statutes. After the Nuclear Regulatory Commission (NRC) failed to act on her request to suspend the license of a nuclear

40. This follows from the proposition that only Congress can vest a court with subject-matter jurisdiction. See *Miceo Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010) (“[O]nly when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action may a party seek initial review in an appellate court.”) (quoting *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007)).

41. 3 PIERCE, *supra* note 35, § 18.2, at 1681 (“The case law . . . is complicated and confused. The fault lies more with Congress than with the courts.”).

42. *Id.* (“Statutory provisions governing review jurisdiction are often poorly drafted, ambiguous, incomplete, or based on inadequate consideration of the comparative advantages of circuit courts and district courts.”).

43. Prior to the 1970s, the leading decision on special review statutes was *United Gas Pipe Line Co. v. Federal Power Commission*, 181 F.2d 796 (D.C. Cir. 1950), *abrogated by Investment Co. Institute v. Board of Governors of Federal Reserve System*, 551 F.2d 1270, 1276 (D.C. Cir. 1977). The D.C. Circuit dismissed (for lack of jurisdiction) a challenge to a rule promulgated by the Federal Power Commission (FPC). *Id.* at 800. Because the FPC’s rulemaking process had not yielded an administrative record that would suffice for judicial review, the court held that the challenge lay in the district court, which would develop an appropriate record. *Id.* at 799–800. The emergence of “hard look” review, with its associated demand for an administrative record of the rulemaking process, quickly rendered *United Gas Pipe Line* out-of-date. See *Inv. Co. Inst.*, 551 F.2d at 1276 (concluding that *United Gas Pipe Line* was no longer good law).

44. See David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 39–53 (1975) (describing “record standard”). Conversely, if the agency had not developed a record, courts favored review in the district courts. Jonathan A. Schorr, Note, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U. L. REV. 765, 782 (1983) (“Similarly, courts have declined jurisdiction over actions that fall within the statutory terms but lack the administrative record that Congress presumably intended to be a prerequisite for court of appeals review.”).

45. See, e.g., *Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 313 (7th Cir. 1980) (rejecting a “literal” reading of a statute that subjected agency “orders,” but not “rules,” to circuit review, and holding that “orders” must be read to include rules because “the purposes of special review statutes—coherence and economy—are best served if courts of appeals exercise their exclusive jurisdiction over final agency actions”).

46. 470 U.S. 729 (1985).

reactor, Lorion filed a petition for review in the D.C. Circuit.⁴⁷ In the Hobbs Act, Congress had provided for circuit review of NRC orders “in any proceeding . . . ‘for the granting, suspending, revoking, or amending of any license.’”⁴⁸ The D.C. Circuit rejected Lorion’s claim that the NRC’s inaction was a “proceeding” and dismissed the petition for review.⁴⁹ The Supreme Court disagreed. The meaning of proceeding, the Court reasoned, was hopelessly ambiguous. Because textual analysis could not cure the ambiguity, the Court turned to “the statutory structure, relevant legislative history, congressional purposes expressed in the choice of Hobbs Act review, and general principles respecting the proper allocation of judicial authority to review agency orders.”⁵⁰ Each of these extrinsic sources of statutory meaning, according to the Court, cut in favor of direct circuit review.⁵¹

One concern dominated the Court’s evaluation of the extrinsic evidence—that district court review, followed by an appeal to a circuit court, would duplicate efforts.⁵² The Court was worried about two levels of duplication. First, the Court believed that the district court’s efforts would duplicate the agency’s. Citing a House committee report, the Court explained that the Hobbs Act was motivated by Congress’s desire to “avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice.”⁵³ The Court was also troubled—and believed that Congress was troubled in the Hobbs Act—about duplication between the two lower tiers of the federal judiciary:

Placing initial review in the district court does have the negative effect . . . of requiring duplication of the identical task[s] in the district court and in the court of appeals One crucial purpose of the Hobbs Act and other jurisdictional provisions that place

47. *Lorion v. U.S. Nuclear Regulatory Comm’n*, 712 F.2d 1472, 1479 (D.C. Cir. 1983). *rev’d sub nom.* *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985) (dismissing Lorion’s petition for review and transferring case to district court).

48. *Lorion*, 470 U.S. at 733 (quoting Hobbs Act, 42 U.S.C. § 2239) (NRC-specific language cross-referenced by Hobbs Act).

49. *U.S. Nuclear Regulatory Comm’n*, 712 F.2d at 1479. As a matter of terminology, when a court determines that it has no jurisdiction over a petition for review, it “dismisses” the petition. When it determines that the petition lacks merit, it “denies” it. *See, e.g., WildEarth Guardians v. EPA*, 759 F.3d 1064, 1067 (9th Cir. 2014) (dismissing portion of petition for review because petitioners lacked standing and denying portion of petition because agency had not acted arbitrarily).

50. *Lorion*, 470 U.S. at 737.

51. *Id.* at 737–45 (analyzing extrinsic sources of statutory meaning).

52. *Id.* at 740.

53. *Id.* (quoting H.R. REP. NO. 81-2122, at 4 (1950)).

initial review . . . is to avoid the waste attendant upon this duplication of effort.⁵⁴

Tellingly, the Court pointed to no language in the legislative history of the Hobbs Act to support this claim.

Lorion's black-letter bottom line was clear: "Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals."⁵⁵ Although the rule of default district court jurisdiction remained in place, a functional analysis of duplication required courts to overcome it whenever possible. Because agencies understood that their rules could survive judicial review only with an extensive record,⁵⁶ the effect was to concentrate judicial review of rulemaking in the circuit courts. Precise statistics on the number of rulemaking cases entertained by district and circuit courts do not exist, but it appears that a substantial majority of pre-enforcement challenges to agency rulemaking now commence in the circuit courts.⁵⁷

Lorion is still good law.⁵⁸ Over the last few years, however, a series of D.C. Circuit cases has, to an extent, circumvented it.⁵⁹ In cases interpreting special review statutes covering both rulemaking⁶⁰ and other agency action,⁶¹ the D.C. Circuit has dismissed petitions for review or transferred them to the district court.⁶²

54. *Id.* at 744.

55. *Id.* at 745.

56. This was a consequence of the hard look doctrine, which is discussed *infra* notes 216–221 and accompanying text.

57. As discussed below, more than 185 petitions for review of agency rulemaking were filed in the D.C. Circuit between July 1, 2011, and June 30, 2012. *See infra* notes 262–265. To get a rough comparison of circuit to district court filings, I searched Bloomberg Law for all federal district court cases initiated during the same period with "Nature of Suit" category 899 ("Other Statutes - Administrative Procedure Act/Review or Appeal of Agency Decision") or category 890 ("Other Statutory Actions") for which "rulemaking" or "final rule" appeared as a keyword. After eliminating false positives, I found twenty-one APA challenges to agency rules in *all* district courts nationwide. This search protocol likely missed some rulemaking cases, but it seems highly unlikely that the false negatives would bring the district court filings to anywhere near parity with the D.C. Circuit, to say nothing of the federal circuits as a whole.

58. *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336 (D.C. Cir. 2013).

59. *See* KRISTEN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 18.2, at 358 (5th ed. Supp. 2016) ("The D.C. Circuit is continuing its recent practice of resolving jurisdictional disputes in favor of district court review.")

60. *See, e.g., Am. Petroleum Inst.*, 714 F.3d at 1334; *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270–72 (D.C. Cir. 2012) (dismissing petition for review); *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 599 F.3d 662, 673 (D.C. Cir. 2010) (same).

61. *See, e.g., Midland Power Coop. v. Fed. Energy Regulatory Comm'n*, 774 F.3d 1, 7 (D.C. Cir. 2014); *In re Nat. Res. Def. Council*, 645 F.3d 400, 404–08 (D.C. Cir. 2011) (dismissing petition for review); *Reckitt Benckiser, Inc. v. EPA*, 613 F.3d 1131, 1141 (D.C. Cir. 2010) (reversing district

A recent case in this line illustrates how the D.C. Circuit has side-stepped *Lorion*. In *American Petroleum Institute v. SEC*, industry groups filed a petition for review of resource extraction rules promulgated by the SEC.⁶³ The relevant special review statute, § 25 of the Exchange Act, has two jurisdictional provisions. The first, § 25(a), provides for direct review of SEC rules promulgated under a list of statutes that does not include the provision authorizing the resource extraction rules.⁶⁴ Section 25(b), on the other hand, gives the circuit court jurisdiction over SEC “orders.”⁶⁵ Citing § 25(b), the SEC and the industry groups argued that the D.C. Circuit had jurisdiction because the agency developed a record in the rulemaking process.⁶⁶ Functionally, this argument appears at least as strong as the petitioner’s position in *Lorion*. Carefully parsing the statute, the court nonetheless rejected it. Because the Exchange Act distinguishes between “rules” and orders, the court reasoned, it reflects a congressional choice to subject only SEC rules promulgated under the statutes listed in § 25(a) to direct review.⁶⁷ The presumption of circuit-court review in *Lorion* applies when there is an ambiguity in the special review statute, but, the court held, none appears in the Exchange Act.⁶⁸

The line of cases of which *American Petroleum Institute* is part is not, however, unbroken—other recent D.C. Circuit cases have resolved disputes in favor of exclusive circuit jurisdiction.⁶⁹ It would thus be premature to herald *American Petroleum Institute* (and similar D.C. Circuit cases) as marking *Lorion*’s fall. Whether these cases are an aberration or the beginning of a new era in the judicial approach to special review statutes remains to be seen.

court’s dismissal for lack of jurisdiction); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007) (dismissing petition for review).

62. See 28 U.S.C. § 1631 (2012) (authorizing transfer of cases wrongly filed in circuit court to district court).

63. *Am. Petroleum Inst.*, 714 F.3d at 1332 (“Petitioners . . . challenge section 13(q)’s and the regulation’s disclosure requirements on First Amendment grounds. They also challenge both the regulation and the cost-benefit analysis on statutory grounds.”).

64. 15 U.S.C. § 78y(a)(1) (2012).

65. *Id.* § 78y(b)(1).

66. *Am. Petroleum Inst.*, 714 F.3d at 1332. The industry groups also argued that jurisdiction was proper under § 25(a). In the course of litigation, the SEC clarified that the basis for its authority was not a listed subsection, disposing of the issue. *Id.* at 1333 (“But as the Commission has subsequently made clear, it relied not on subsections 15(c)(5) or (6) but rather on subsection 15(d).”).

67. *Id.* at 1333–36 (“Given the statutory history, this suggests quite clearly that Congress, for whatever reason, intended challenges to section 13(q) regulations to be brought first in the district court.”).

68. *Id.* at 1336 (“Petitioners interpret *Lorion* as requiring us to resolve any ambiguity in section 25 in favor of initial appellate review. But petitioners have pointed to no ambiguity.”).

69. The most important case on this side of the ledger is *New York Republican State Committee v. SEC*, 799 F.3d 1126 (D.C. Cir. 2015). See also *Nat’l Fed. of the Blind v. Dept. of Transp.*, No. 15-1026, 2016 WL 3524569, at *1 (D.C. Cir. June 28, 2016).

B. The Putative Logic

When a rulemaking challenge can be filed directly in a circuit court, it must be; the district court is not an available forum.⁷⁰ As a practical matter, this means that the first court to hear most rulemaking cases is also the last.⁷¹ Neither the Supreme Court nor the en banc circuits take a significant number of rulemaking petitions for review. These cases tend to be “factbound and splitless,”⁷² rendering them poor candidates for certiorari.⁷³ Reliable national statistics on en banc review of agency rulemaking do not exist,⁷⁴ but between 2002 and 2012 the D.C. Circuit, the nation’s preeminent administrative law court,⁷⁵ heard only one petition for review en banc.⁷⁶

One-stop judicial shopping is an anomaly in the federal courts.⁷⁷ Even cases that involve no fact-finding begin in a district court and proceed, in

70. Special review statutes strip district courts of jurisdiction even when no express preclusion of district court jurisdiction appears in the special review statute. *See, e.g.*, *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) (“This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive.”); *see also* 3 PIERCE, *supra* note 35, § 18.2 at 1680 (“If a statute provides for judicial review of an agency action in a circuit court, that grant of jurisdiction is exclusive.”).

71. *See* Wald, *supra* note 14, at 172 (“We are the first, and usually the only, Article III court that will pass on the citizen’s protest against what he or she perceives to be an arbitrary bureaucracy.”).

72. For the “factbound and splitless” terminology, *see* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 937 (2009). On the “factboundness” of rulemaking cases, *see* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 773 (2008) (“[R]ulings by courts of appeals are usually too particularistic to be well suited to Supreme Court review.”). Rulemaking petitions for review tend to be “splitless” because, as we have seen, petitions challenging a particular rule are consolidated in one circuit. *See supra* note 39 and accompanying text.

73. Fletcher, *supra* note 72, at 980 (“The [Supreme] Court will agree to decide few ‘splitless’ or ‘factbound’ cases unless there are extraordinary circumstances, such as unusual importance to the question or an atypical lower court error.”). This is not to say that petition for review cases never make it to the Supreme Court. They do make it to the Court, for example, *EPA v. EME Homer City Generation*, 134 S. Ct. 1584 (2014), but rarely.

74. *See infra* note 272.

75. *See* John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 554 (2010) (“Although the D.C. Circuit is technically a regional circuit, it has exclusive jurisdiction over a variety of challenges to administrative action and hears a disproportionate share of the United States’ administrative law cases.”) (citation omitted); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1123 (1990) (“[T]he D.C. Circuit enjoys exclusive jurisdiction over the review of decisions of various administrative agencies. For example, it has exclusive jurisdiction over the review of standards promulgated by the Environmental Protection Agency, as well as over the review of certain orders and actions of the Federal Communications Commission and the Federal Election Commission.”) (citations omitted); *see also* Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131 (2013) (analyzing D.C. Circuit’s exclusive jurisdiction).

76. *See infra* note 274 and accompanying text. The one case was *Ruggiero v. FCC*, 317 F.3d 239 (D.C. Cir. 2003) (en banc) (rejecting challenge to FCC regulation).

77. The administrative law petition for review may be the only true one-tier form of litigation in the federal courts. In theory, the Supreme Court’s original jurisdiction appears to be one-tier litigation,

due course, to a circuit court for final judgment.⁷⁸ Rulemaking litigation's departure from the norm ought to have been carefully justified. Yet judicial and scholarly justifications for one-tier rulemaking litigation contain two serious omissions. First, they offer no good reason why rulemaking litigation should be structured differently from other high-stakes cases with closed factual records.⁷⁹ Second, they do not account for the benefits of judicial redundancy.

We saw in Part I that the courts' approach to structure in rulemaking litigation has, at least until recently, been premised on a functional account of the division of labor between district and circuit courts. But it was an entirely one-sided functionalism. The Court in *Lorion* was deeply worried about the costs of duplicative judicial analysis, but never mentioned duplication's benefits.⁸⁰ Nor did it make any effort to distinguish the "duplication of effort" that would inure from district court jurisdiction in rulemaking cases from the duplication of effort whenever a district court

but in practice the Court appoints special masters, who serve as the first tier. *See generally* Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 627–28 (2002) ("The Court delegates many of its trial functions to Special Masters, who are neither elected nor appointed by an elected body, and has appointed Special Masters with increasing frequency since the inception of the Court."). In a variety of other contexts, appellate review is available only to one side. I classify this as an asymmetric two-tier structure, rather than a one-tier structure. *See infra* note 290. The classic example is in criminal law, where the Double Jeopardy Clause of the Fifth Amendment prohibits the government from appealing an acquittal. *See* *Kepner v. United States*, 195 U.S. 100, 133 (1904) ("[T]o try a man after a verdict of acquittal is to put him twice in jeopardy . . ."). Another is district court rulings on motions to remand to state court. When district courts deny motions to remand, circuit courts may review their decision in the usual course. *E.g.*, *Valdivieso v. Atlas Air, Inc.*, 305 F.3d 1283, 1286 (11th Cir. 2002) (affirming denial of motion to remand). Subject to judicially crafted exceptions, however, a district court's remand order is unreviewable. 28 U.S.C. § 1447(d) (2012); *see also* James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 501–09 (2010) (describing exceptions). Yet another example is prisoner petitions pursuant to 28 U.S.C. §§ 2241, 2255 (2012). While the government may appeal district court rulings granting such petitions of right, prisoners may appeal only with a certificate of appealability. *Compare* 28 U.S.C. § 2253(c)(1) (2012) (prisoner appeals), *with* FED. R. APP. P. 22(b)(3) (government appeals).

78. Or, at least, losing litigants have the right to take them there. *See* 28 U.S.C. § 1291 (2012) (authorizing appeal in ordinary cases).

79. A litigation category is "similarly situated" to rulemaking if it meets two conditions. When a court considers the validity of an agency rule, it need not permit discovery or evidentiary hearings. Instead, it ordinarily relies exclusively on the factual record developed by the agency. *See* 2 PIERCE, *supra* note 35, § 11.6, at 1047 ("The record rule refers to the general rule of administrative law that a court can engage in judicial review of an agency action based only on consideration of the record amassed at the agency."). In a sense, then, rulemaking cases present pure questions of law. Second, rulemaking cases tend to be really important. *See* Cross, *supra* note 4, at 1069; *see also* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 356–57 (2012) (noting that by the end of the twentieth century "regulations issued by administrative agencies eclipsed statutes as sources of law"). Litigation is similarly situated to rulemaking if it involves only pure questions of law and is really important. Many facial constitutional challenges to statutes and claims that a federal statute preempts state law easily meet these conditions. Though both can involve contested questions of adjudicative fact, they often do not. *See supra* notes 19–20.

80. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 ("Locating initial review in the district court would certainly result in duplication of effort . . .").

rules on, for instance, a facial constitutional challenge to a statute. More recently, the D.C. Circuit has sent rulemaking cases to the district court.⁸¹ Even so, the D.C. Circuit's approach afforded it no occasion to consider the functional benefits of starting and ending judicial review in different courts. The courts have thus never seriously confronted the benefits of judicial redundancy in rulemaking cases or offered a compelling reason to treat rulemaking litigation differently from similarly situated cases.

The same analytical omissions afflict academic defenses of the petition for review in rulemaking cases. By far the most influential scholarly defense of direct review is David Currie and Frank Goodman's 1975 article, *Judicial Review of Federal Administrative Action: The Quest for the Optimum Forum* (hereafter "*Optimum Forum*"), a wide-ranging exploration of the judicial architecture of administrative law.⁸² Given its prominent place in the literature, I begin with *Optimum Forum*'s shortcomings.

Currie and Goodman exhaustively analyze one- versus two-tier judicial review of formal agency adjudication. They identify both direct and indirect costs of two-tier review. The direct costs to litigants include a second filing fee and additional attorney bills.⁸³ The main indirect cost is delay, which impacts the parties and the legal system as a whole.⁸⁴ Currie and Goodman also recognize several benefits of two-tier review of formal adjudication. Most importantly for present purposes, Currie and Goodman acknowledge that "an appellate court can profit greatly from a lower court opinion focusing the issues, weighing the opposing arguments and pinpointing relevant portions of the record"⁸⁵ They conclude, however, that in the context of agency adjudication this work is done by legal opinions issued by administrative law judges and agency heads.⁸⁶ The only real benefit of a two-tier system, according to Currie and Goodman, "is the possibility that a great many cases will not be appealed beyond the district court and the appellate courts will be relieved of a significant part of their workload."⁸⁷ Currie and Goodman conclude their discussion of formal adjudication by calibrating the cost-benefit analysis: "[T]he relevant search . . . is to identify readily definable categories of administrative cases whose diversion to the district courts in the first instance would spare

81. See *supra* notes 58–67 and accompanying text.

82. See Currie & Goodman, *supra* note 44.

83. *Id.* at 16 ("The litigant must pay double filing fees and brief reproduction costs, and must transport his attorney to two courts instead of to one. He must also pay for extra work by his lawyers (though presumably much less effort is required to prepare for a second appeal on essentially the same questions).")

84. *Id.* ("The indirect costs of the added delay, both to the particular parties and to the system, are more elusive.")

85. *Id.* at 17.

86. *Id.*

87. *Id.* at 18.

courts of appeals a burden of decision that threatens their ability to function as collegial bodies, or, less compellingly, that is not worth their time.”⁸⁸

When Currie and Goodman turn to judicial review of rulemaking, the careful cost-benefit calibration of the adjudication discussion is missing. They focus almost exclusively on the costs of a second tier: “Unless fact-finding requirements substantially discommode the circuit courts,” Currie and Goodman argue, “it makes sense to avoid the delay and expense of prior district court litigation.”⁸⁹ They make no attempt to explain why skipping the district court makes sense for rulemaking cases but not for other litigation where fact-finding wouldn’t “discommode the circuits.”

Currie and Goodman also give short shrift to the benefits of judicial redundancy.⁹⁰ Except in passing, they do not return to the possibility that appellate courts might “profit greatly” from rulings “focusing the issues, weighing the opposing arguments and pinpointing relevant portions of the record.”⁹¹ They discounted this benefit in the adjudication context because agency officials write formal legal opinions. The rulemaking process, however, yields no legal opinions.⁹² Currie and Goodman briefly recognize that “prior district court scrutiny facilitates correct appellate decision,” explaining by analogy that “[t]he Supreme Court surely benefits when difficult issues have first been tackled by the circuit courts.”⁹³ They view this possibility as unsettled⁹⁴ but nonetheless advocate direct circuit review for rulemaking.⁹⁵

Subsequent commentators have justified direct circuit review of rulemaking and other agency actions by expanding on Currie and Goodman’s arguments.⁹⁶ There are two primary strands of post-*Optimum Forum* commentary. The first compares district and circuit judges. Commentators suggest that circuit judges are more capable than district judges of reviewing administrative action because they are: (i) better

88. *Id.* at 19.

89. *Id.* at 52.

90. Most of Currie and Goodman’s analysis of rulemaking review addresses the then-dying *United Gas Pipe Line* rule. See *supra* note 43. By 1975, when *Optimum Forum* appeared, the emergence of hard look review had defeated the “perception that the need for judicial trial of the facts renders the appeals court an inappropriate forum.” Currie & Goodman, *supra* note 44, at 41.

91. Currie & Goodman, *supra* note 44, at 17.

92. See *infra* notes 114–116 and accompanying text.

93. See Currie & Goodman, *supra* note 44, at 54.

94. *Id.* (“The question remains whether in rulemaking cases the gain from the input of a single district judge is great enough to justify the added burden.”).

95. *Id.* at 57 (“To be sure, we suggested earlier that, in general, notice-and-comment rulemaking should be reviewed in courts of appeals despite the absence of a trial-type hearing record, and that if further factfinding became necessary the appellate court could refer the case to a district court, a master, or the agency itself.”) (footnote omitted).

96. I have already noted the principal exception. See *supra* note 16.

decisionmakers collectively, due to their collegial process;⁹⁷ (ii) better decisionmakers individually, due to their greater prestige and experience with deferential standards of review;⁹⁸ and (iii) more justified in making political decisions.⁹⁹ These comparative claims may or may not be correct,¹⁰⁰ but none is properly understood as an argument for beginning rulemaking review in circuit courts. They are instead arguments why rulemaking litigation should ordinarily *end* in a circuit court.

The second strand of post-*Optimum Forum* analysis focuses on two costs of two-tier review: delay and litigation expense.¹⁰¹ These are real costs of two-tier litigation structures. But the same costs are borne in all federal litigation outside administrative law, including, most analogously, facial constitutional challenges and statutory preemption claims. The direct litigation costs of an additional round of litigation, moreover, are probably minor in the high-stakes world of rulemaking review, where the expense of lawyers and filing fees (and from society's perspective, the cost of judges) often pale next to the amount in controversy.¹⁰²

97. 3 PIERCE, *supra* note 35, § 18.2, at 1681 (“[T]he practice of circuit judges sitting in three-judge panels reduces the risk that judicial review will produce aberrational or widely varying resolutions of major issues of law or policy.”); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 343 (1991) (“Single-judge district courts lack the collegial mechanisms by which the courts of appeals seek correct and consistent outcomes. Multi-member panels dampen the idiosyncrasy or incompetence of a single judge.”) (footnote omitted); Schorr, *supra* note 44, at 798 (“The multi-member composition of the court of appeals is generally thought to contribute to a higher quality of decision.”).

98. Bruff, *supra* note 97, at 344 (“The experience of circuit judges may make them better suited than district judges to exercise administrative review, because appellate judges always serve as restrained reviewers of decisions by others, not initial triers of fact.”); Schorr, *supra* note 44, at 799 (“[T]he individual judges of the court of appeals are well suited for the essentially appellate task of reviewing a preestablished administrative record.”).

99. Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 745–46, 762 (2013) (“Judges at different levels of the federal judiciary differ in the extent to which they have been democratically authorized to make national policy. . . . The selection process is different for the lower courts, especially if we look at the other end of the Article III hierarchy, the federal district courts.”).

100. See *infra* note 294 and accompanying text.

101. See Schorr, *supra* note 44, at 781–82 (“Court of appeals review jurisdiction has also been extended as a matter of sound judicial administration to avoid the delay and expense that results if factual matters already determined at the agency level are directed first to the district court for review.”); cf. Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1330 (1986) (focusing exclusively on review of agency adjudication). Some commentators also invoke geographic disuniformity as a cost of two-tier delay. Harold Bruff, for instance, notes that “[d]istrict court decentralization also hinders the formation of a relatively uniform body of law over a large territory.” Bruff, *supra* note 97, at 343. Circuit court rulings on petitions for review act directly on the rule itself, and thus have national effect. It is not obvious that a district court ruling on the validity of a rule would be any different. See *infra* note 305.

102. See Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC’Y REV. 735, 761 (1996) (“In contrast, the costs of judicial review litigation are relatively low. Unlike the situations of neighbors or small businesses, the EPA need not search for and hire a lawyer.”); see also Vermeule, *supra* note 24, at 1462 (“The direct costs of obtaining a second opinion from, for example, a panel of judges reviewing agency action is small; there

The costs of delay are potentially more serious. A longstanding hypothesis in administrative law posits that as a result of external constraints from courts, Congress, and the White House, agency rulemaking is ossified, meaning that “it takes a long time and an extensive commitment of agency resources to use the notice and comment process to issue a rule.”¹⁰³ Perhaps delay is costlier in rulemaking litigation than elsewhere because it contributes to rulemaking ossification.

While I cannot rule out this possibility, it is speculative. The relationship between the duration of litigation and rulemaking ossification is unclear. In light of recent empirical work, the ossification hypothesis itself is in doubt.¹⁰⁴ But even for administrative lawyers who subscribe to the view that judicial review (among other factors) ossifies rulemaking, the actual time spent in litigation does not seem to be the decisive factor.¹⁰⁵ This may be because, absent a stay, challenged rules are in place as litigation proceeds.¹⁰⁶ Courts, moreover, contribute to ossification primarily by placing rules under a high-powered microscope. This generates uncertainty that slows down internal agency rulemaking processes that are measured in years.¹⁰⁷ If, as this Article will suggest below, a two-tier

are legal fees and the litigant must pay a modest filing fee, but access to the system is at least formally open to all and parties do not directly pay judges or other officials for their time.”).

103. Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493 (2012) [hereinafter Pierce, *Ossification Is Real*] (arguing that empirical studies of ossification are, as yet, inconclusive).

104. See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414 (2012) (challenging ossification hypothesis with empirical analysis of Department of Interior rulemaking activity); Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedure and Bureaucratic Performance: Is Federal Rule-making “Ossified”?*, 20 J. PUB. ADMIN. RES. & THEORY 261 (2010) (similarly utilizing data from the Unified Agenda of Federal Regulatory and Deregulatory Actions); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000) (similarly using data set of D.C. Circuit remands).

105. E.g., Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking* [hereinafter *Seven Ways to Deossify*], 47 ADMIN. L. REV. 59, 65 (1995) (“With the exception of a few agencies, the judicial branch is responsible for most of the ossification of the rulemaking process. Through interpretation and application of sections 553 and 706 of the APA, courts have transformed the simple, efficient notice and comment process into an extraordinarily lengthy, complicated, and expensive process that produces results acceptable to a reviewing court in less than half of all cases in which agencies use the process.”).

106. JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING, AND DEFENDING FEDERAL AGENCY REGULATIONS § 13.1, at 257 (2d ed. 2007) (“The rule could be enforced while the review consumes months of time; stays are often essential to preserving rights, and well established criteria apply.”); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1255 (1999) (“The regulatory decision typically remains in effect pending judicial review, but the agency’s position surely has a cloud of uncertainty during this time.”) (footnote omitted).

107. See Pierce, *Ossification Is Real*, *supra* note 103, at 1496 (“The Wagner et al. study suggests that, had the Yackees determined the *total* time required to conduct each rulemaking, their finding that most of the rulemakings they studied were completed within two years would become a finding that most rulemakings were actually completed within six to eight years.”) (footnote omitted) (citing Wendy

review structure would yield a more accurate, and thus more predictable, system of judicial review, it could speed up agency rulemaking at the cost of a litigation delay most likely measured in months.¹⁰⁸

In the absence of a compelling basis on which to distinguish rulemaking cases from other important closed-record litigation, we are left with two possibilities. Either we frequently have too many tiers, or we do not have enough in rulemaking litigation. In Part II, I will argue that the epistemic advantages of two-tier judicial structures make the latter conjecture more likely. Before turning to those advantages, it is worth pausing to explore why so many courts and scholars have overlooked them.

The likely culprit is the prevailing understanding that a court reviewing agency action sits in an “appellate” capacity over the agency.¹⁰⁹ As Thomas Merrill notes, “the appellate review model is so thoroughly embedded in contemporary administrative law that modern lawyers take it for granted.”¹¹⁰ The model works tolerably well in the context in which it originated, judicial review of formal agency adjudication, where courts review the legal opinions of administrative law judges and agency heads.¹¹¹ The model makes little sense, however, for rulemaking.

Merrill notes one difficulty of extending the model to rulemaking: “rulemaking as originally conceived did not produce the closed record presupposed by the traditional appellate review model.”¹¹² Courts overcame this difficulty by “developing a new conception of the record for purposes of review of rulemaking.”¹¹³ A second problem with extending the model

Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 143, 145 (2011)).

108. In 2013, administrative cases in the D.C. Circuit (including challenges to both rulemaking and adjudication) took on average 16.2 months from case initiation to disposition. *Federal Judicial Workload Statistics* Table B-4C, USCOURTS.GOV, <http://www.uscourts.gov/statistics/table/b-4c/judicial-business/2013/09/30> (last visited Sept. 7, 2016). Some circuits worked faster, for instance the Fourth Circuit resolved cases in only 7.1 months, but some took longer. The Ninth Circuit was the slowest, at nearly two years. *Id.*

109. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 941 (2011).

110. *Id.* at 943. Indeed, the appellate review model appears in legal doctrine. In *Telecommunications Research and Action Center (TRAC) v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984), the D.C. Circuit ruled that it had jurisdiction under the All Writs Act, 28 U.S.C. § 1651 (2012), to review agency inaction. The line of All Writs Act precedent that the court invoked concerned appellate jurisdiction. The court noted that while the All Writs Act does not “expand the jurisdiction of a court,” an appellate court’s jurisdiction “extends to those cases which are within its *appellate jurisdiction* although no appeal has been perfected.” 750 F.2d at 76 (emphasis added) (quotations and citations omitted). *TRAC*’s holding thus depends on characterizing a circuit court’s jurisdiction to review agency action as “appellate.”

111. Currie & Goodman, *supra* note 44, at 17 (“[T]he court of appeals has the benefit of at least one, and often two, formal opinions below—by an administrative law judge and by the agency head (or heads).”). At least the metaphor works when the adjudication is merely applying existing law or policy. See *supra* note 34.

112. Merrill, *supra* note 109, at 998.

113. *Id.*

to rulemaking has not been—and cannot be—overcome: the lack of a formal opinion addressing legal claims. Although rulemaking can be contentious, it is not adversarial in the sense of adjudication or litigation and does not result in a legal judgment by an institutionally neutral official.¹¹⁴ The closest analogue, the agency’s “statement of . . . basis and purpose,”¹¹⁵ is a policy announcement, not an impartial legal analysis about whether the agency engaged in reasoned decision-making (arbitrariness review) or proffered reasonable interpretations of ambiguous statutes (*Chevron* review).¹¹⁶ When a rulemaking is challenged in a petition for review, a circuit panel is the first—and usually the last—to pass on *those* questions. The petition for review of agency rulemaking thus commences a new process with one tier. By falsely insisting that the reviewing court is the highest tier in an integrated process beginning in the agency, the appellate review model obscures that one-tier design.¹¹⁷

II. THE EPISTEMIC VALUE OF SECOND TIERS

The last Subpart left off at a fork in the road. Either we frequently use too many judicial tiers or we use too few in rulemaking cases. To choose a way forward, we must account for the value of second judicial tiers. Put differently, we must know why, outside administrative law, we have appellate courts. The costs of appeals are clear. The direct costs include the

114. It is, of course, rare that the parties are surprised by the content of final rulemakings. Various doctrines in administrative law ensure that they are not. *E.g.*, *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988) (holding that final rule must be the “logical outgrowth” of the proposed rule); *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (*per curiam*) (holding that agencies have a duty to respond to significant comments).

115. See 5 U.S.C. § 553(c) (2012) (describing requirements for the statement of basis and purpose); 1 C.F.R. § 18.12 (2016) (same).

116. See *infra* notes 216–221 and accompanying text (arbitrariness review), and notes 239–241 and accompanying text (*Chevron* review).

117. Some readers may resist my claim that judicial review is not a continuation of the process begun in the agency. To be sure, an agency’s reasoning during rulemaking does partially overlap with a court’s inquiry on judicial review. For instance, if a commentator contends that a proposed rule exceeds an agency’s statutory authority, the agency must engage in analysis similar to a court confronting a *Chevron* question. Likewise, for executive branch agencies, review of rulemaking by the White House Office of Information and Regulatory Affairs (OIRA) may partially duplicate the judicial inquiry. See generally Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013) (analogizing OIRA review to judicial review). Given these overlaps, some may be tempted to count the initial court as the second (after the agency), third (after OIRA), or even higher tier to review a rule. This is ultimately a semantic issue, not a substantive one. Because I think that judicial review is sufficiently different from internal agency processes or OIRA scrutiny to justify labeling it the beginning of a new process, I use that terminology throughout the Article. The important substantive point is that the first court is the last tier. If one thinks that court is better characterized as the third tier of a three-tier structure, the analysis simply shifts to whether the three-tier structure is justified. This adds terminological complexity, but not much else.

expense of lawyers and judges to argue and decide cases.¹¹⁸ The indirect costs are more diverse, but foremost among them is delay in the resolution of a case.¹¹⁹

Traditionally, appellate mechanisms are understood as serving two primary functions.¹²⁰ First, they permit the efficient development of uniform law.¹²¹ First-tier courts handle the quotidian work of developing factual records and disposing of routine cases, leaving second-tier courts time to consider and cultivate legal rules.¹²² This function seems largely irrelevant to high-stakes, closed-record litigation (e.g., many facial constitutional challenges and statutory preemption claims), where trial courts often decide no adjudicative facts.¹²³ We must look elsewhere to understand the value of two-tiered courts in such cases.

The second function of appeals is error correction.¹²⁴ Appellate courts “correct error in the trial proceedings . . . to insure justice under law to the litigants.”¹²⁵ It is not immediately obvious why this is the case. In the standard appellate model, the second court’s judgment substitutes for the first’s, at least with respect to questions of law.¹²⁶ But both courts are

118. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 77 (1985) (“When an appeal is taken, the rightful winner is forced to subsidize the printing and lawyering industries just to wind up in the same place.”). As I suggest below, in the high-stakes context of rulemaking cases, the costs of lawyers will rarely be a significant consideration. See *infra* note 303 and accompanying text.

119. See *supra* notes 103–107 and accompanying text.

120. The costs of appellate process have led some to question appeal of right. See Dalton, *supra* note 118, at 62–63 n.5 (“Occasionally, a commentator on the caseload crisis in appellate courts recognizes that abolition of appeal of right is, in theory, a solution, but then withdraws it from serious consideration.”). The tradition of appeal of right nonetheless appears safe. Proposals to constitutionalize appeal of right are more common than calls for abolition. E.g., Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219 (2013) (proposing to constitutionalize the right to appeal).

121. CARRINGTON ET AL., *supra* note 2, at 3 (“[A]ppellate courts are needed to announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve.”); DANIEL J. MEADOR ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL* 4 (2d ed. 2006) (noting a principle reason for appellate courts is “[t]o enunciate and harmonize the decisional law of the jurisdiction”). Related to this, vertical court systems are political tools that help centralize control within disperse polities. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 49–56 (1981).

122. See CARRINGTON ET AL., *supra* note 2, at 14–15 (“At most times past and in most places, American appellate courts have been permitted to operate with spacious time for argument, consideration, and exposition of results. . . . [T]he deliberative process allows time and opportunity for the judges fully to inform themselves on the issues and to make a decision which properly reflects the controlling law.”).

123. See *supra* notes 18–19.

124. See Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 63–64 (2010) (noting that although error correction is one of the two principal justifications for appeal, it has received less scholarly attention than law development).

125. MEADOR, *supra* note 121, at 4.

126. When an appellate court reviews the fact-finding of a lower court, it often applies a deferential standard, such as abuse of discretion, pursuant to which it does not, in theory, “substitute” its judgment. See, e.g., *United States v. Lynch*, 58 F.3d 389, 391 (8th Cir. 1995) (“The abuse of discretion standard is highly deferential in that this court will not substitute its judgment for that of the

staffed by fallible judges. Why should we believe that the second court's judgment will be less error-prone than the first?¹²⁷ Maybe second-tier judges are just "smarter" than first-tier judges.¹²⁸ If so, it would make sense to skip first-tier courts whenever possible. That we don't—outside administrative law—suggests that more is involved.

In this Part, I argue that appellate mechanisms have four structural epistemic advantages, which I label percolation, accountability, diversity, and outside signals. If (and to the extent that) courts realize these advantages, they reduce the likelihood of legal error. Some of the advantages feature prominently in scholarship about appeals, but some draw on other literatures. The advantages provide the best explanation for using a two-tier system in high-stakes, closed-record litigation where the "efficient development of law" logic falters. They also make it more likely that we have too few tiers in rulemaking cases than that we have too many elsewhere.

Part A introduces the advantages in general terms, i.e., in terms not connected to judicial review of agency rules. Not every possible advantage of two-tier structures attaches to every actual two-tier system, so the subparts of Part A explore the empirical conditions required for each. Part B connects these general epistemic advantages to rulemaking litigation. While the available empirical evidence does not permit firm conclusions, Part B shows that the underlying conditions likely would hold in two-tier rulemaking review.

district court . . ."). Pure questions of law, however, are generally decided de novo on appeal. Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 MICH. ST. L. REV. 541, 545 ("Federal and state law in the United States is universal in two respects: on appeal decisions of questions of pure law are reviewed de novo . . .").

127. Solicitor General Rex Lee once remarked that: "[T]here is nothing in the Constitution and nothing in common sense that says that decisions of an appellate court are more likely to be right than a district court." Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 606 (1985) (citing William Overend, *Right to Choose Cases Called Way to Ease Caseloads*, L.A. Times, Dec. 23, 1984, Part I, at 3, col. 2 (quoting Lee)).

128. See, e.g., Currie & Goodman, *supra* note 44, at 12 ("A second element of superiority is the supposed overall higher caliber of the appellate bench. Because of its greater rarity, superior authority, wider territorial jurisdiction, and consequent prestige, a seat on the appellate bench attracts men who would not accept a district judgeship."). Quality comparisons are, however, difficult. Cf. Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 566 (1969) ("It is likely that the qualities required for an adequate performance on a court of appeals are more common than those required for an adequate performance on a district court."); Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 330–31 (2009) ("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.").

A. In General

Two-tier court structures have (at least) four general epistemic advantages over one-tier systems—percolation, accountability, diversity, and outside signals.¹²⁹

1. Percolation

Two-tier judicial structures let legal questions “percolate” within a case. The idea that percolation aids legal analysis is most commonly invoked to justify the Supreme Court’s practice of waiting to resolve a circuit split until several circuits have weighed in.¹³⁰ Percolation is thought to give the Supreme Court the “benefit of the experience of [the] lower courts.”¹³¹ Because they allow legal questions to percolate in a lower court

129. See *infra* notes 174–208 and accompanying text. There is a fifth epistemic advantage of two-tier systems, but it would likely have only a marginal impact in rulemaking litigation. Those closest to a case—the parties and their lawyers—have private information about whether the court erred. Steven Shavell has constructed a formal model identifying the conditions under which appellate systems efficiently “harness information that litigants have about erroneous decisions.” Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 382 (1995). The essential criteria is that the system achieve “separation” of first-tier losers, such that they will (tend to) appeal when the court erred but (tend to) not appeal when it did not. *Id.* at 384–86. Three variables determine the social value of appellate systems. The first is the private costs of appeal, including the expense of lawyers and filing fees. *Id.* at 385. The second variable is the probability of a correct decision at the second tier. *Id.* at 389. Shavell’s model assumes that the second-tier court is more likely than not to render a correct judgment, but beyond that threshold, the higher the quality of tier-two judgments, the more readily separation is achieved. *Id.* But see Charles M. Cameron & Lewis A. Kornhauser, *Appeals Mechanisms, Litigant Selection, and the Structure of Judicial Hierarchies*, in INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 173, 176 (James R. Rogers et al. eds., 2006) (constructing a model in which Shavell’s assumption of positive appellate error correction is unnecessary). The final variable is the social harm of error. In principle, a two-tier structure for rulemaking litigation might achieve “separation,” and, if it did, Shavell’s model would provide another epistemic advantage. Rulemaking challenges, however, tend to have very large stakes. See *supra* note 102. This means that parties that correctly lost at the first tier will be tempted to appeal anyway, hoping that the appellate court might introduce error where there was none below. For rulemaking litigation to achieve “separation” of correct and erroneous first-tier losers, extremely large (and normatively unacceptable) filing fees would probably be necessary. Notably, however, the same is true for other high-stakes closed-record important litigation, such as facial constitutional challenges and statutory preemption claims.

130. The Supreme Court also invoked percolation when it ruled that the government, unlike private litigants, is not subject to nonmutual offensive collateral estoppel. See *United States v. Mendoza*, 464 U.S. 154, 163 (1984) (explaining that decision not to apply doctrine to government would “better allow thorough development of legal doctrine by allowing litigation in multiple forums”).

131. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984). Percolation at the Supreme Court has its critics, who focus on the costs of disuniformity in federal law. See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 57 (1994) (“Overall, the claim that inferior court percolation is essential to provide a comprehensive array of analyses and approaches available to the Supreme Court seems to inflate its contribution significantly.”); see also Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1487 (1989); Thomas E. Baker & Douglas D. McFarland, *Commentary, The Need*

before being presented to the final decisionmaker, two-tier judicial structures offer the benefits of Supreme Court percolation in miniature. The “experience of [the] lower courts”¹³² can be valuable to appellate decisionmakers in two distinct ways.

First, assuming that appellate judges can distinguish good lower court opinions from bad ones, the lower court’s decision is itself useful. An appellate court’s examination of a lower court’s opinion, much like the Supreme Court’s examination of the opinions of several appellate courts, will “often yield[] concrete information about how a particular rule will ‘write,’ its capacity for dealing with varying fact patterns, and the merits of alternative approaches.”¹³³ That is, a good opinion signals to the appellate court that the lower court reached the correct decision; a bad one signals that it erred.¹³⁴ Either signal is epistemically valuable. While one lower court opinion contains less information than the many available to the Supreme Court, the logic is similar.¹³⁵

Second, if the lawyers are competent, the process of litigating a claim in the lower court, and receiving judgment on it, improves their ability to frame the issues for the second court.¹³⁶ While parties may raise a host of arguments at the onset of litigation, not knowing which will pan out, the first round of litigation provides information about their viability. As Nicholas Fromherz and Joseph Mead observe, on appeal “[r]ational litigants will abandon the arguments on which they are clearly outmatched, while fine-tuning potential winners in subsequent rounds of briefing.”¹³⁷ Such fine-tuning inures to the benefit of the appellate court, which will not be distracted by a raft of comparatively weak arguments.

for *A New National Court*, 100 HARV. L. REV. 1400, 1408 (1987) (similar); Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689 (1990) (similar).

132. Estreicher & Sexton, *supra* note 131, at 716.

133. SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT’S ROLE* 48 (1986). See also Sanford Caust-Ellenbogen, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078, 1080 (1984) (“[W]hen a court faces a particular issue, it may benefit from the reasoning of courts that have previously confronted the same issue.”).

134. Cf. Stephen J. Choi et. al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1321 (2009) (using opinion quality as a proxy for judicial ability). These signals are imperfect, of course, as in some cases lower courts do the right thing for bad reasons, or the wrong thing for good reasons. My premise is that good opinions are correlated with correct outcomes and that bad opinions are correlated with incorrect ones, not that the correlations are perfect.

135. See Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1606 (2012) (noting that when appellate courts decide legal questions not first decided by trial courts, “the appellate court [does] not enjoy the benefits of knowing the trial judge’s thoughts on such issues”).

136. Edward Re, in *Panel Discussion on Professionalism and Ethics*, 11 FED. CIR. B.J. 601, 602 (2002) (“Brandeis once told us that when better briefs are written, better opinions will be written.”).

137. Mead & Fromherz, *supra* note 16, at 55.

2. *Accountability*

In a two-tier system, lower courts are *accountable*, in the psychologists' sense, to higher courts. According to a well-developed psychological literature, accountability can improve decision-making.¹³⁸ The leading account of the psychology of accountability is Jennifer Lerner and Philip Tetlock's 1999 literature review.¹³⁹ They define accountability broadly as "the implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others."¹⁴⁰ When a watchful eye encourages careful thinking, accountability has a salutary effect on decision-making.¹⁴¹ Yet it is no panacea.¹⁴² When accountability encourages an agent to predict her principal's views, she may not scrutinize the issues.¹⁴³ That reaction not only squanders the beneficial effects of accountability but also detracts from the percolation and diversity advantages of two-tier systems.

Lerner and Tetlock distinguish good and bad accountability mechanisms using four variables: (i) whether the agent knows who will review her;¹⁴⁴ (ii) whether the agent learns that she will be reviewed before or after making her decision;¹⁴⁵ (iii) whether the agent is accountable for her decision-making process or just the outcome;¹⁴⁶ and (iv) whether the

138. See Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999) (reviewing psychological research on the effects of accountability on decision-making).

139. *Id.* Lerner and Tetlock have been cited many times in the legal literature. A search of Westlaw's Law Reviews and Journal database on February 22, 2015, yielded 93 references.

140. *Id.*

141. *Id.* at 265–66 (summarizing results of research).

142. *Id.* at 270 ("This review underscores the falsity of the conventional wisdom—often born out of frustration at irrational, insensitive, or lazy decisionmakers—that accountability is a cognitive or social panacea . . .").

143. Vermeule discusses the potential adverse consequences of accountability:

[A]nticipation of review might have any of several bad effects instead (or in addition). One is playing it by the book: the first doctor might adopt an excessively conventional or cautious stance, anticipating that another doctor will, on average, be likely to reject any unusual diagnosis. Another is moral hazard: the second opinion might induce the first doctor to make a sloppy or hasty diagnosis, anticipating that the second doctor will catch any errors.

Vermeule, *supra* note 24, at 1464–65; see also Stephenson, *supra* note 24, at 1478 ("If the [first-tier] invests very little in research, the [second-tier's] optimal response will be to discount the [first-tier's] decision Because the [first-tier] can anticipate this response, it may be rational for the [first-tier] to do little or no research, because the [first-tier] knows the [second-tier] will pick up the slack.").

144. With a known audience, agents "avoid the unnecessary cognitive work of analyzing the pros and cons of alternative courses of action, interpreting complex patterns of information, and making difficult trade-offs," with predictably negative consequences. Lerner & Tetlock, *supra* note 138, at 256.

145. Post-decision accountability results in self-justification rather than self-criticism. *Id.* at 257–58.

146. Lerner and Tetlock report some empirical evidence suggesting that when agents are accountable only for outcomes, accountability may "increase the escalation of commitment to prior courses of action" by making self-justification more potent. *Id.* at 258.

agent perceives the reviewer as legitimate.¹⁴⁷ Accountability mechanisms are well-structured to the extent that these variables point in the right direction—i.e., predecisional awareness that an unknown but legitimate reviewer will examine process.¹⁴⁸ The effects of even well-structured accountability mechanisms are mixed.¹⁴⁹ Agents make mistakes for lots of reasons, not all of which can be tempered by accountability. Synthesizing the empirical studies, Lerner and Tetlock explain that well-structured accountability alleviates one specific class of biases, those that “arise from lack of self-critical attention to one’s decision processes and failure to use all relevant cues.”¹⁵⁰

To my knowledge, no empirical research directly applies the psychological work on accountability to judges. Nonetheless, as David Klein observes, the conditions that make accountability well-structured “would seem to describe the primary audiences for judges’ opinions—bench and bar—quite well.”¹⁵¹ Below I will assess the conditions’ applicability to rulemaking litigation.¹⁵²

Even if accountability improves the decision-making of first-tier courts, final authority rests with second-tier courts, so does first-tier accountability matter? It does for two reasons. First, in any two-tier system, some judgments at the first tier are not actually appealed.¹⁵³ In those cases, an accountable decisionmaker renders the legal system’s final judgment.¹⁵⁴

For cases that are appealed, the value of accountability depends on the stickiness of first-tier judgments. Good lower court opinions are probably stickier than bad ones because, as Stephen Choi, Mitu Gulati, and Eric

147. Accountability works when agents do perceive reviewers as legitimate. “By contrast,” Lerner and Tetlock explain, “if accountability is perceived as illegitimate, say, as intrusive and insulting, any beneficial effects of accountability should fail and may even backfire.” *Id.*

148. “Well-structured” is my term, not Lerner and Tetlock’s.

149. As Lerner and Tetlock explain, “even among studies that incorporate” the cognition-enhancing versions of accountability “effects are highly variable across judgment tasks and dependent variables, sometimes improving, sometimes having no effect on, and sometimes degrading judgment and choice.” *Id.* at 259.

150. *Id.* at 265.

151. David E. Klein, *Unspoken Questions in the Rule 32.1 Debate: Precedent and Psychology in Judging*, 62 WASH. & LEE L. REV. 1709, 1719 (2005).

152. See *infra* notes 188–199 and accompanying text.

153. Given the high stakes, however, this may be relatively uncommon in rulemaking litigation. See *supra* note 102.

154. When cases are not appealed, accountability can be conceived as an “error prevention” mechanism. See Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1606 n.1 (1995) (“In my model, appellate courts have an additional function as appellate decisions also improve the accuracy of prospective trial court decisions. My model thus justifies hierarchy in terms of error prevention as well.”); Shavell, *supra* note 129, at 425–26 (“Another purpose of the appeals process apart from error correction is error prevention: inducing trial court judges to make fewer errors because of their fear of reversal.”).

Posner explain, it takes more effort for an appellate court to reverse a high-quality judgment:

Appellate judges' willingness to overturn an opinion is likely to be at least partly a function of its quality. Given that the appellate panel will have to exert greater effort to reverse a high-quality trial court opinion, resource-constrained appellate panels will be less likely to reverse high quality trial court opinions.¹⁵⁵

If accountability leads to high-quality first-tier judgments, it makes the first tier more likely to be correct *and* more likely to be affirmed.¹⁵⁶ That means that even in cases that are appealed, the benefits of first-tier accountability do not wash out at tier two.¹⁵⁷

3. Diversity

The next reason to expect two-tier court systems to outperform one-tier systems is the epistemic value of diversity. Holding the size of courts constant (more on this shortly),¹⁵⁸ two-tier structures necessarily involve more judges in a case than one-tier structures. Under the right conditions, that can make two-tier systems more reliable than one-tier systems. The epistemic value of diversity depends on two independent mechanisms—statistical aggregation and perspectival aggregation.¹⁵⁹

a. Statistical Aggregation

Statistical aggregation is the principle sometimes referred to as the “wisdom of crowds” and more formally represented by the Condorcet Jury Theorem.¹⁶⁰ The intricacies of the formal model need not concern us.¹⁶¹

155. See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518, 524 (2012).

156. Accountability is a complement, in the economic sense, of percolation. Cf. Stephenson, *supra* note 24, at 1467 (“Pieces of information are complements when the possession of one piece of information *increases* the marginal value of acquiring the second piece.”). Accountability makes first-tier judgments better, and (if appellate judges recognize quality) percolation makes them more likely to stick.

157. On this assumption, we have reason—holding the competency of the judges across the two courts even—to be *more* confident in the first tier’s judgment than the second tier’s. Of course, we can’t make the first tier final without losing the accountability.

158. See *infra* notes 165–167 and accompanying text.

159. Vermeule, *supra* note 24, at 1452 (distinguishing statistical and perspectival aggregation); see also Stephenson, *supra* note 24, at 1471–72 (noting distinctiveness of diversity-based information aggregation theories).

160. Stephenson, *supra* note 24, at 1462 (“The basic insight underlying what has been popularly dubbed the ‘wisdom of crowds’ dates back at least to the Marquis de Condorcet’s famous Jury Theorem . . .”).

The basic idea is that when a question has a right answer a group's ability to find it increases with the size of the group, provided that (i) each member is better than a random guesser and (ii) the members vote independently.¹⁶² The logic is mathematical. Individual group members may err in their estimation of the right answer, but as Adrian Vermeule observes, "The average error of two estimates will tend to be lower than the error of a single estimate because random error washes out."¹⁶³ The average of three estimates will be lower yet and so on and so forth. All else equal (and setting costs aside for the moment), more judges are better than fewer so long as the additional judges don't guess randomly or delegate their votes to colleagues.¹⁶⁴

The benefits of statistical aggregation could be achieved, of course, by having the "more judges" sit on one large court. Rather than route litigation first through a trial court and then through an appellate one, perhaps we could do better yet with a one-tier system with lots of judges.¹⁶⁵ As Vermeule explains, however, "the greater the correlation" between decisionmakers, "the less likely it is that random errors or systematic biases will wash out."¹⁶⁶ Separating review between two courts counteracts correlation. Judges on multi-member courts do partially (and rationally) delegate the closest examination of cases to opinion writers, a practice that can lead to information cascades and the correlation of votes.¹⁶⁷ Locating review in two courts with two opinion writers forces at least two judges to examine a question. Depending on the degree to which judges defer to the opinion writer, a large enough number of judges in a single court might eventually overcome this advantage of two-tier systems. Holding the total

161. Some of the intricacies are discussed in William Ortman, *Chevron for Juries*, 36 CARDOZO L. REV. 1287, 1323–26 (2015).

162. The independence condition does not mean that voters must be hermetically sealed or that they can have no influence on one another. See David M. Estlund, *Opinion Leaders, Independence, and Condorcet's Jury Theorem*, 36 THEORY & DECISION 131, 158 (1994) ("Independence cannot be easily ruled in or out merely by knowing voters are influenced by common opinion leaders."); David M. Estlund, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AM. POL. SCI. REV. 1317, 1328 (1989) ("If average voter competence is calculated *after* a discussion in the assembly has taken place, one cannot object to a Condorcetian prediction *based on that calculation* on the grounds that the competence of some voters was affected by that of others.").

163. Vermeule, *supra* note 24, at 1452.

164. Estlund, *supra* note 162, at 158 ("If [decisionmakers'] deference is complete then independence is violated, . . .").

165. See Sydney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 355–61 (2012) (proposing that high-stakes rulemakings be reviewed by a five-judge panel).

166. Vermeule, *supra* note 24, at 1454.

167. See RUGGERO J. ALDISERT, *OPINION WRITING* 35 (3d. ed. 2012) ("When the assignment is made prior to decision, the system encourages one-judge decisions and one-judge opinions. It has the unfortunate tendency to encourage judges in a multi-judge court to concentrate only on the cases assigned to them, and conversely, to give too much deference, consciously or unconsciously, to the judge who has been assigned the opinion.").

number of judges constant, though, we should expect two-tier systems to surmount the correlation obstacle to statistical aggregation more readily than one-tier systems.¹⁶⁸

b. Perspectival Aggregation

The second mechanism of epistemic diversity is perspectival aggregation. The most elaborate model of perspectival aggregation is Lu Hong and Scott Page's theory of cognitive diversity, which posits that diversity can be more valuable to group decision-making than ability.¹⁶⁹ Diversity's utility depends on the degree to which group members vary in two dimensions: perspectives (how they "represent problems") and heuristics (how they "go about solving them").¹⁷⁰ For Hong and Page's model, the value of perspectival aggregation in court systems thus rests on whether judges think about legal issues in different ways and whether they use different decision processes for resolving them. Compared to the universe of people who are not judges, judges are not very diverse.¹⁷¹ Nonetheless, there is every reason to think that meaningful differences exist among courts, resulting from variance in selection procedures, culture, and caseloads.¹⁷² If so, two-tier judicial systems leverage cognitive diversity more than systems with only one tier.

168. A complication is that the judgment of the second court in a two-tier system trumps the judgment of the first court, which means that the final outcome need not be that favored by the total majority of judges between the courts. This complication does not displace the benefit of statistical aggregation for courts if, as I argued above, lower court judgments are epistemically valuable to appellate courts. See *supra* note 155 and accompanying text. It may, however, cut in favor of "asymmetric" two-tier review, as discussed *infra* note 290.

169. SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007) (modeling epistemic value of diversity); Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCI. 16385 (2004) [hereinafter *Diverse Problem Solvers*] (same, but more formally); Lu Hong & Scott E. Page, *Problem Solving by Heterogeneous Agents*, 97 J. ECON. THEORY 123 (2001) (same). Hong and Page's model is described in more detail in Ortman, *supra* note 161, at 1323–24.

170. Hong & Page, *Diverse Problem Solvers*, *supra* note 169, at 16385.

171. See Ortman, *supra* note 161, at 1325.

172. See Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal Than Others?*, 45 L. & SOC'Y REV. 171 (2011) (empirically evaluating ideological differences among circuits); see also JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 169–209 (2002) (analyzing cultural aspects of circuit courts); *id.* at 70–84 (analyzing various procedural mechanisms used by circuit courts); cf. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) ("Judges on the D.C. Circuit have a far higher political profile than do federal judges generally. Before their appointment to the bench, a disproportionate number of them serve in Congress or in political positions in the Executive Branch.").

4. *Signals to Outside Decisionmakers*

A final epistemic advantage of two-tier structures is that agreement or disagreement between the tiers can, in the right circumstances, provide valuable information to outside decisionmakers.¹⁷³ Agreement between the tiers can legitimate their judgment, while disagreement indicates that additional work outside the two-tier structure may be in order.

As Vermeule explains, legitimacy can be understood “in epistemic terms as public certainty or confidence that a governmental decision is correct.”¹⁷⁴ The necessary condition is perception. When the tiers are perceived as competent and independent of one another, the second’s concurrence gives other government officials and the public special reason to be confident in the judgment.¹⁷⁵ The reverse of agreement is disagreement, and as Vermeule notes, “disagreement between the two opinion givers may make the final decision less legitimate than it would have been if only one or the other opinion giver had been consulted.”¹⁷⁶ Disagreement can also be useful. Provided again that the tiers are perceived as independent and capable, disagreement signals uncertainty about the outcome.

B. *In Rulemaking Litigation*

We have seen that under certain conditions two-tier court structures offer epistemic advantages over one-tier structures. The question remains whether the conditions would apply to a two-tier system to review agency rules. While firm conclusions here are impossible,¹⁷⁷ there are good reasons to believe that they would. As a result, it is more likely that we have too

173. This advantage, of course, involves a different epistemic actor than the foregoing, which have been reasons why the internal court structure is more likely to render correct judgments with two tiers.

174. Vermeule, *supra* note 24, at 1456; *see also* Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 218 (2014) (“So long as the overseer’s evaluation is better than random, and her bias is not too extreme, then if the overseer agrees with the primary agent, this endorsement has a ‘legitimation effect,’ improving the primary agent’s reputation.”).

175. Matthew Stephenson makes a similar point about supermajority voting rules: “A supermajority rule has the attractive feature of allowing a change from the default policy only if a sufficiently large number of agents have independently concluded the change is a good idea, which would imply a particularly high degree of confidence that the change is justified.” Stephenson, *supra* note 24, at 1468–69; *see also* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984) (“Only when litigants can command the attention of more than a single state official can individual decisionmakers’ rulings be legitimated.”).

176. Vermeule, *supra* note 24, at 1457; *see also* Gersen & Stephenson, *supra* note 174, at 218 (“Likewise, overseer opposition to the primary agent’s policy has a delegitimizing effect, hurting the latter’s reputation.”).

177. At least they are impossible without empirical data that does not presently exist. It may be that too few rulemaking cases currently originate in the district courts for a “large-N” empirical study to be possible. *See supra* note 57 and accompanying text.

few judicial tiers in rulemaking cases than that we have too many in high-stakes, closed-record litigation outside administrative law.

Percolation. In-case percolation works when (i) judges on the reviewing court can distinguish good from bad lower court opinions¹⁷⁸ and/or (ii) lawyers are competent enough to learn from the first round of litigation.¹⁷⁹ It seems obvious that circuit judges and Supreme Court Justices (the likely reviewing jurists in a two-tier system for rulemaking cases) can tell the difference between high- and low-quality opinions. Given the large stakes of typical rulemaking litigation, moreover,¹⁸⁰ it would be very surprising if the lawyers involved were incompetent.¹⁸¹ The conditions for in-case percolation thus seem well suited to rulemaking cases.

Indeed, in-case percolation may be *more* important in rulemaking litigation than in litigation outside administrative law, where issues percolate both between tiers and among dispersed courts. As noted in the Introduction, before the Supreme Court decided *Sereboff v. Mid-Atlantic Medical Services, Inc.*,¹⁸² five circuit courts offered their views on whether an ERISA health plan may pursue a subrogation claim.¹⁸³ Pre-enforcement challenges to agency rules, by contrast, are generally consolidated in one circuit.¹⁸⁴ While the consolidation rule prevents courts from subjecting agencies to inconsistent orders,¹⁸⁵ a side effect is that it often precludes percolation by dispersed courts.¹⁸⁶ Without risking conflicting judicial

178. See *supra* notes 133–35 and accompanying text.

179. See *supra* notes 136–37 and accompanying text.

180. See *supra* note 102 and accompanying text.

181. Indeed, some of the nation's top law firms tout their prowess in rulemaking litigation. See, e.g., *Administrative Law and Regulatory Practice*, GIBSON, DUNN & CRUTCHER LLP, <http://www.gibsondunn.com/practices/pages/adl.aspx> (last visited Aug. 20, 2016) (“We work with companies and trade associations throughout the agency rulemaking process . . . laying the groundwork for ultimate judicial review of final agency rules.”); *Environmental*, COVINGTON & BURLING LLP, <https://www.cov.com/en/practices-and-industries/practices/regulatory-and-public-policy/environmental> (last visited Aug. 20, 2016) (“We have long represented companies and trade associations in . . . rulemaking proceedings and challenges to regulations. . .”).

182. 547 U.S. 356 (2006).

183. See *supra* notes 8–9 and accompanying text.

184. 28 U.S.C. § 2112(a) (2012) (providing for consolidation of petitions for review).

185. See Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 312–18 (1980) (describing costs of forum shopping in administrative law).

186. Often but not always. Courts are empowered to “set aside” agency rules. See, e.g., 28 U.S.C. § 2342 (2012). When they do, the rule is invalid everywhere. But when the court validates the rule, parties not involved in the litigation may be able to collaterally attack it in a subsequent enforcement action. See Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1468 (2010). The courts have not decided whether the initial circuit's ruling has precedential effect in such a collateral attack. See *id.* at 1470–75 (articulating arguments for and against nationwide precedential effect for rulings on petitions for review).

orders,¹⁸⁷ percolation of legal questions implicated by rules covered by special review statutes is possible only with a two-tier judicial structure.

Accountability. In likely the most extensive analysis of the psychology of accountability in legal scholarship, Mark Seidenfeld examined whether agencies are accountable to courts when they make rules.¹⁸⁸ Much of Seidenfeld's analysis applies equally to our question: whether first-tier courts reviewing agency rulemaking could be accountable, in the relevant sense, to second-tier courts. Tracking Seidenfeld's analysis, the four requirements for well-structured accountability would likely be satisfied. First, lower-tier judges, like agencies, generally do not know the identity of the particular judges who will review their decisions.¹⁸⁹ Second, just as agencies understand that their rules "generally are subject to judicial review,"¹⁹⁰ so too first-tier judges would know that their judgments are

187. The consolidation rule serves an important interest. Conflicting decisions can pose a serious problem when agency rules are not subject to a special review statute. Consider, for instance, the Supreme Court grant of certiorari in *King v. Burwell* to decide whether the Internal Revenue Service (IRS) may "promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the [Affordable Care Act]." Petition for a Writ of Certiorari at i, *King v. Burwell*, 135 S. Ct. 2480 (2014) (No. 14-114), *cert. granted*, 135 S.Ct. 475 (2014). When the certiorari petition was filed, the D.C. Circuit and the Fourth Circuit had reached opposite conclusions, and it would have been impossible for the IRS to comply with them both. See *id.* at 17. (After the petition was filed but before it was granted, the D.C. Circuit voted to rehear the case en banc, which vacated the panel decision. *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014), *vacated en banc*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).) As the petitioners explained in their certiorari petition:

Notably, this Circuit split is especially troubling given uncertainty over how the competing rulings would apply even in the Fourth Circuit's territorial jurisdiction. On one hand, the decision below would ordinarily be thought to resolve the validity of subsidies within the states comprising the Fourth Circuit: Virginia, Maryland, North Carolina, South Carolina, and West Virginia. Yet, on the other hand, one of the [D.C. Circuit] plaintiffs resides in West Virginia. Further, the D.C. Circuit has long held that when it vacates a rule under the APA, such a decision has "nationwide" effect. This division therefore not only has the usual effect of regional disuniformity, but also creates a special sort of nationwide confusion and conflict.

Petition for Writ of Certiorari at 17, *King*, 135 S. Ct. 2480 (2014) (No. 14-114) (internal citation omitted). The rulemaking in *King* attracted the Supreme Court's interest. But if it hadn't been so important—legally, economically, or politically—the IRS would have been in an untenable position.

188. Seidenfeld, *supra* note 23, at 513.

189. *Id.* at 517 ("[T]he very uncertainty about the likely views of the reviewing judge . . . is a necessary antidote to decisionmakers' tendencies to tailor their decisions to the views of their prospective audiences."). This is not true, however, when federal circuit courts are ideologically homogenous. In the two-tier structure of federal courts, district judges know which circuit court will review their work. If a district judge is confident that the panel of circuit judges will have a particular ideological bent, she may tailor her ruling to fit that perspective rather than engage in careful decision-making. When circuit judges are heterogeneous, on the other hand, district court judges may still be able to identify the median circuit judge, but large variance among randomly assembled panels diminishes the risk that accountability will detract from careful decision-making. This is consistent with the findings of a recent empirical study of federal district judges. See Choi et al., *supra* note 155, at 543–45 (finding that if the political orientation of a circuit is apparent, district courts tend to rule in ways that conform to that ideology to avoid reversal).

190. Seidenfeld, *supra* note 23, at 513.

appealable. Third, Seidenfeld found “no evidence . . . that agency staff considers judicial review to be illegitimate oversight.”¹⁹¹ Likewise, I am aware of no evidence that first-tier judges perceive appellate oversight as illegitimate.¹⁹² Such evidence would be quite surprising.¹⁹³

The most difficult issue (for both Seidenfeld and me) is outcome versus process accountability. Noting empirical scholarship showing that judicial ideology has a significant impact on outcomes in rulemaking litigation, Seidenfeld concludes that both process and outcome factor into judicial review of agency rules.¹⁹⁴ The same would likely be true for lower courts. While the outcome of a lower court's ruling would obviously matter, opinions that score well on process—i.e., those that are “comprehensive, careful, and persuasive”—are more likely to convince an appellate court to affirm.¹⁹⁵ Although psychologists have not explicitly tested mechanisms that combine process and outcome accountability, Seidenfeld explains that the experiments “suggest that decisionmakers subject to a process-based evaluation nonetheless perceive that outcome will also affect the evaluation.”¹⁹⁶ Thus, the “actual criteria by which judges review agency decisions” (Seidenfeld's context) and lower court decisions (my context) “seem to mirror the perceptions of the decisionmakers in [the] experiments.”¹⁹⁷ To the extent that judicial errors in rulemaking cases flow from a “lack of self-critical attention” or a “failure to use all relevant cues”¹⁹⁸—more on this below¹⁹⁹—it is likely that accountability could reduce errors.

Diversity—Statistical. Increasing the number of judges that hear rulemaking cases could reduce errors. As explained above, the logic of statistical aggregation applies to courts if we assume that legal questions

191. *Id.* at 515.

192. To the contrary, “When individuals are appointed to judgeships, it is known by all involved in the selection process that individuals placed on the appellate bench will review the decisions of those selected for the district court.” Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 106 n.94 (1975).

193. Paul Horwitz, *Judicial Character (and Does It Matter) Constitutional Conscience: The Moral Dimension of Judicial Decision*, 26 CONST. COMMENT. 97, 104 (2009) (“The standard pronouncement of a judge, whether it is for public consumption only or accurately reflects the judge's self-perception, is still usually the kind of legalism that is reflected in ‘the loftiest Law Day rhetoric.’”).

194. Seidenfeld, *supra* note 23, at 520 (“Despite these difficulties, those who have looked at the impact of ideology on judicial review of agency action generally conclude that both legal doctrine and a judge's ideology affect how that judge is likely to vote in a particular case.”). The empirical scholarship is discussed in Part III.A.

195. *Id.* at 521.

196. *Id.* at 521–22.

197. *Id.* at 522.

198. Lerner & Tetlock, *supra* note 138, at 265.

199. See *infra* notes 250–55 and accompanying text.

have right answers.²⁰⁰ In some settings, that assumption seems wildly off the mark. It is hard to say, for example, that there are “right answers” available to a common law court designing a contributory negligence regime. The core doctrines of judicial review of rulemaking—arbitrariness review of agency fact-finding and reasoning, and *Chevron* review of legal interpretation—pose questions that are different in kind. Courts are not asked to pick a grand theory of justice, but to decide whether an agency’s reasoning satisfies a standard of rationality (arbitrariness) or reasonableness (*Chevron*).²⁰¹ It does not seem far-fetched to presuppose that there are right and wrong answers to those questions.²⁰²

Diversity—Perspectival. Cognitive diversity would also be epistemically useful in rulemaking cases. Posit that some approach is particularly useful for analyzing the rationality of agency rulemaking. For instance, perhaps a judge with a background in financial regulation is well positioned to evaluate SEC rulemaking.²⁰³ On the other hand, we might think technical expertise hinders judicial review, and that some other approach is better.²⁰⁴ Whatever method is useful, the probability that at least one judge has “it” increases with the number of judges. High-quality opinions, moreover, tend to be sticky on appeal.²⁰⁵ Thus, on the reasonable assumption that the judge with “it” will receive the writing assignment,²⁰⁶ her perspective is epistemically useful even if she sits on the lower court.

Outside Signals. In the rulemaking context, a two-tier court structure would provide valuable signals to outsiders. Unlike in constitutional law, courts do not have the final word on most matters addressed in rulemaking

200. There need not, however, be a “right” answer in any absolute (e.g., natural law) sense. See Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 8 (2009) (“[I]t is not the case that the Jury Theorem presupposes the existence of an exogenous ‘right answer,’ where by exogenous I will mean independent of the preferences held by the group’s members (or the members of some larger underlying group).”). The epistemic version of the Jury Theorem merely requires that if the voters had perfect information, they would agree about whether an outcome is right.

201. The arbitrariness and *Chevron* doctrines are discussed *infra* notes 216–21 and 239–41 and accompanying text.

202. Cf. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1453 (1992) (“When the courts engage in substantive judicial review, they should, like the pass-fail prof, see their role as that of screening out bad decisions, rather than ensuring that agencies reach the ‘best’ decisions.”).

203. See Jeffrey Golden, *Judges and Systemic Risk in the Financial Markets*, 18 FORDHAM J. CORP. & FIN. L. 327, 337 (2013) (“Judges who understand finance can be allies of the regulators and play an important role in fighting systemic risk in the financial markets.”).

204. See Bruff, *supra* note 97, at 332 (“Growing expertise may lead courts to substitute their judgment for an agency, creating an overly dominant oversight body.”).

205. See *supra* note 155 and accompanying text.

206. See Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599, 1657 (2014) (“[J]udges with expertise generally receive a disproportionate share of opinion assignments.”).

litigation.²⁰⁷ Congress can, after a court rules, revise the rule itself or the agency's authority to promulgate it. Under these circumstances, signals about judicial error are especially useful. If both courts in a two-tier structure for rulemaking cases were perceived as capable and independent, agreement between them would legitimate the judiciary's decision, suggesting to Congress that the proper result (at least with respect to current law) had been reached. Disagreement, on the other hand, would suggest that further legislative involvement might be worthwhile.²⁰⁸

III. JUDICIAL ARCHITECTURE AND POLITICIZATION

We saw in Part II that it is more likely that we have too few judicial tiers in rulemaking cases than that we have too many elsewhere. The implication is that our courts are probably getting too many rulemaking cases wrong. Judicial error should be optimized, not minimized, but it seems unlikely, and contrary to the weight of practice outside administrative law, that the marginal cost of additional procedure meets the marginal benefit of improved accuracy at a single tier.²⁰⁹

But is error in rulemaking cases really a problem worth worrying about? Judicial error rates are difficult or impossible to measure.²¹⁰ No one reveals, at the end of a rulemaking case, whether the agency was *actually* arbitrary and capricious. Nonetheless, empirical scholars have generated results from which we can infer that at least one sort of error *is* common in rulemaking litigation. As this section details, they have shown that outcomes in rulemaking cases are significantly impacted by the ideological composition of circuit panels. The core doctrines of judicial review of agency rulemaking—arbitrariness review of the agency's reasoning and fact-finding, and *Chevron* review of its legal interpretations—are supposed

207. See, e.g., Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 485 (2011) ("From an agency's perspective, Congress exerts significant authority over agency rulemaking.").

208. Cf. Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 66–67 (2001) ("Clearly Congress has assumed some role for itself as resolver of conflicts among the federal circuits.").

209. See generally Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399–400 (1973) ("The purpose of legal procedure is conceived to be the minimization of the sum of two types of costs: 'error costs' (the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it), and the 'direct costs' (such as lawyers', judges', and litigants' time) of operating the legal dispute-resolution machinery.").

210. Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 473 (2007) ("Factors such as rates of judicial error are nearly impossible to measure.").

to depoliticize outcomes.²¹¹ Against the backdrop of these depoliticizing doctrines, politicized outcomes insinuate error.

The empirical scholarship provides support for my claim that error is too common in one-tier rulemaking litigation. It also—and this is tentative—means that if we wish to depoliticize rulemaking litigation, moving to a two-tier structure might help. A second round of litigation might correct some ideologically produced errors of the first tier without adding an offsetting number of second-tier errors.

Politicized judging, of course, is not limited to administrative law. In several high-profile domains, ideology influences circuit court decisions.²¹² But there is a sense in which politicization in administrative law litigation is different. Politics are inevitable in regulation, just as they are inevitable in domains like affirmative action and campaign finance where scholars find similar evidence of ideological voting.²¹³ But in administrative law, the core doctrines of judicial review privilege agency political and policy decisions, as the subsections below detail.²¹⁴ The politicization problem in administrative law isn't that courts are political, but that the doctrines didn't fully succeed in depoliticizing them.²¹⁵

This section explores the possible link between judicial structure and politicized outcomes in rulemaking cases. Part A briefly reviews the empirical scholarship on ideology in arbitrariness and *Chevron* review. Part B explains why two-tier review might alleviate judicial politicization.

A. Politicization in Rulemaking Litigation

Two doctrines constitute the backbone of judicial review of agency rulemaking—arbitrariness review of the agency's reasoning and fact-finding and *Chevron* review of its legal interpretations. Both were meant to shelter agency decision-making from the political and policy views of

211. See *infra* Part III.A.1 (arbitrariness review) and Part III.A.2 (*Chevron*).

212. E.g., Cass R. Sunstein et. al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 303 (2004) (assessing impact of judicial ideology in several categories of cases). This research, Thomas Miles and Cass Sunstein explain, “examined the role of panel composition in cases involving controversial issues that were ‘especially likely to reveal divisions between Republican and Democratic appointees,’ such as affirmative action and campaign finance.” Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 852 (2006).

213. Sunstein et al., *supra* note 212, at 337 (“We observe substantial panel effects in the areas of campaign finance, affirmative action, disability discrimination, piercing the corporate veil, race discrimination, sexual harassment, sex discrimination, and judicial review of environmental regulations at the behest of industry plaintiffs.”).

214. Miles & Sunstein, *supra* note 212, at 852 n.36 (“In contrast, *Chevron* is intended to reduce, even minimize, divisions between Republican and Democratic appointees.”). This reflects that in administrative law, the relevant political preferences belong to agencies, not courts.

215. See *supra* notes 28–32 and accompanying text.

judges. As this section details, however, empirical scholars have discovered that litigation outcomes under both doctrines are, to a troubling degree, ideologically determined. The disconnect between depoliticizing doctrines and politicized outcomes evidences that ideology sometimes leads judges to err in rulemaking litigation.

1. *Arbitrariness Review*

The Administrative Procedures Act (APA) directs courts to set aside agency rules (along with other “informal” agency actions) that are “arbitrary [and] capricious.”²¹⁶ Courts initially understood this language as prescribing a “lunacy test,” under which they could strike down agency decisions only, as Martin Shapiro explains, “if no reasonable person could have written” them.²¹⁷ In the 1960s and 1970s, courts and scholars converted the lunacy test into the “hard look” doctrine.²¹⁸ The Supreme Court explained hard look review in *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, noting that to determine whether an agency acted arbitrarily and capriciously, courts inquire whether the agency:

[R]elied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²¹⁹

216. See 5 U.S.C. § 706(2)(A) (2012) (instructing courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”). For “formal” agency action, the APA directs courts to apply the “substantial evidence” standard in lieu of the “arbitrary and capricious” standard. *Id.* § 706(2)(E). As agencies almost never engage in “formal rulemaking” (in the technical APA sense), the distinction is of theoretical but not practical importance. See Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106 (2003) (“[F]ormal rulemaking has turned out to be a null set.”). It’s doubtful, moreover, that there is any substantive difference between the “arbitrary and capricious” and “substantial evidence” standards. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 186–87 (2010) (arguing, based on empirical analysis comparing hard look and *Chevron* to other standards of agency review, that the doctrinal tests do little work).

217. MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 56 (1988).

218. Daniel B. Rodriguez, *Jaffee’s Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1160 (1997) (noting that hard look gave courts a “vigorous, searching role in superintending the modern regulatory process”). See generally LOUIS L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

219. 463 U.S. 29, 43 (1983); see also McGarity, *supra* note 202, at 1410 (explaining hard look’s scope).

Although *State Farm* reflected a more aggressive review posture than the lunacy test, the Court stressed that the arbitrariness standard remained deferential and non-ideological.²²⁰ Justice White insisted in his majority opinion that judges must not “substitute [their] judgment for [those] of [] agenc[ies].”²²¹

Both before *State Farm* and since, hard look review has been controversial.²²² Some early critics focused on the institutional capability of judges to review technically complex and lengthy administrative records.²²³ Others feared that hard look would open the door for judges to decide cases based on their policy preferences.²²⁴ A prominent line of commentary argued that hard look review (among other things) ossified the rulemaking process.²²⁵ Over the last two decades, scholarship on the hard look doctrine has taken an empirical turn and borne out some of the concerns of the early critics.

The empirical work has yielded evidence that—notwithstanding Justice White’s admonition in *State Farm*—the political preferences of judges play a significant role in determining case outcomes. The first major study in this area was conducted by Richard Revesz, who examined challenges to EPA rulemaking in the D.C. Circuit.²²⁶ Revesz found that in the 1980s and into the 1990s, judges on the D.C. Circuit voted in predictable ideological patterns. Judges appointed by Republican presidents, he found, were more likely than judges appointed by Democratic presidents to invalidate EPA

220. 463 U.S. at 42–43.

221. *Id.* at 43.

222. Miles & Sunstein, *supra* note 72, at 762 (“As it developed, however, the hard look doctrine became highly controversial.”).

223. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 388 (1986) (“To what extent can a group of men and women, typically trained as lawyers rather than as administrators or regulators, operating with limited access to information and under the constraints of adversary legal process, be counted upon to supervise the vast realm of substantive agency policymaking?”); cf. Irving R. Kaufman, *Judicial Review of Agency Action: A Judge’s Unburdening*, 45 N.Y.U. L. REV. 201, 201 (1970) (“I shall begin—candidly—by divulging a trade secret: appellate judges cannot possibly be as familiar as the administrative agency with the factual controversies or the specialized knowledge involved in many agency decisions.”).

224. See Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 317 n.106 (“The unfortunate effect of *State Farm* in encouraging appellate courts to assume an activist posture in reviewing agency policy decisions is attributable to a few passages of dicta in which the Court referred to ‘hard look’ review with apparent approval.”); Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1192 (1981) (“The review process gives judges the freedom to make decisions based at least in part on their view of the role of the judiciary in the administrative process and the propriety of a particular administrative decision.”).

225. See McGarity, *supra* note 202, at 1411 (“During the 1970s the overall judicial trend was toward a more activist substantive judicial review in which the courts defined the issues less in terms of agency expertise and more in terms of political value judgments. Consequently, several important agency rulemaking initiatives during the 1970s were stymied by judicial remands.”).

226. Revesz, *supra* note 172, at 1725–27.

rules challenged by industry groups.²²⁷ The inverse was true of rules challenged by environmental groups.²²⁸ Revesz also found support for what he termed the “hierarchical constraint hypothesis,” that “judges act more ideologically when their decisions are unlikely to be reviewed by a higher authority.”²²⁹

Subsequent studies have confirmed and expanded several of Revesz's findings. A 2002 study, for instance, evaluated whether judges choose strategically between ruling on arbitrariness grounds and ruling on statutory grounds.²³⁰ Because arbitrariness cases are less likely to attract the Supreme Court's attention, judges can insulate decisions that accord with their policy preferences from higher review by disposing of them on arbitrariness grounds.²³¹ Consistent with the strategic hypothesis, the study found that when liberal judges made liberal decisions, they relied more heavily on arbitrariness, as did conservative judges making conservative decisions.²³²

The most significant empirical study of arbitrariness review was conducted by Thomas Miles and Cass Sunstein.²³³ Miles and Sunstein created a dataset of all circuit rulings on hard look challenges to the NLRB and EPA from 1996 to 2006.²³⁴ They found substantial differences in agency validation rates based on the party of the presidents who appointed the reviewing judges. Liberal agency decisions, they found, were validated by judges appointed by Democrats 72% of the time, while they were validated by Republican-appointed judges only 58% of the time, and the numbers flipped (almost exactly) for conservative agency decisions.²³⁵ Sunstein and Miles also found that the effects of ideology are most pronounced when judges sit in panels that lack partisan diversity, i.e., when

227. *Id.* at 1737–38.

228. Revesz found that voting was more political when litigants challenged procedural irregularities, as opposed to an agency's statutory authority. *Id.* at 1730 n.36.

229. *Id.* at 1729. Statutory challenges are more likely than procedural challenges (including challenges to agency reasoning) to be reviewed by the Supreme Court. Revesz found that ideological voting was more pronounced in cases with no meaningful chance of Supreme Court review. *Id.* at 1766–67.

230. Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002).

231. *Id.* at 65 (“[B]ecause of statutory interpretation's high policy impact and decision transparency, a lower court's use of this instrument is also more vulnerable to review and possible reversal by higher courts (and Congress, since legislators are particularly interested in the judicial interpretations of its statutes).”).

232. *Id.* at 81 (“[O]ur results support the strategic instrument perspective, which asserts that judges strategically select reversal instruments so as to protect decisions that advance their policy goals.”).

233. Miles & Sunstein, *supra* note 72.

234. *Id.* at 766.

235. *Id.* at 767 (“When the agency decision is liberal, the Democratic validation rate is 72 percent and the Republican validation rate is 58 percent. When the agency decision is conservative, the Democratic validation rate drops to 55 percent and the Republican validation rate rises to 72 percent.”).

they sit only with other judges appointed by a president of the same party.²³⁶ Because the set of rulemakings litigated to conclusion does not represent a random sample of agency rulemakings (or even rulemakings challenged in court), the findings should not be understood as yielding a precise measure of judicial politicization.²³⁷ They are striking nonetheless.²³⁸

2. Chevron

In the rulemaking context, agency interpretations of law are reviewed using the famous *Chevron* two-step.²³⁹ Under *Chevron*, when Congress has not spoken clearly to a question about a statute that an agency administers, courts are to defer to any reasonable interpretation by the agency.²⁴⁰ Deference is warranted, Justice Stevens wrote for the Court in *Chevron*, because the “responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”²⁴¹

In light of the vast academic commentary on *Chevron*,²⁴² I limit my discussion to the leading study of *Chevron* in the circuits.²⁴³ Using a dataset of circuit court *Chevron* cases decided between 1990 and 2004, Miles and

236. *Id.* at 789 (“These figures reveal an important point: the seesawing validation rates of Democratic and Republican appointees in response to the nature of agency decisions . . . is largely attributable to the behavior of judges on politically unified panels. . . . For judges sitting on politically mixed panels, the movement of validation rates in response to the ideological content of the agency decision is muted but not entirely absent.”).

237. This is the problem of selection effects, which is considered at length in George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Rulemaking challenges may be litigated (rather than settled or not filed) in an unrepresentative subset of cases where the arbitrary and capricious standard is at its most indeterminate, and thus most political. If so, small differences between judges could yield an outsized effect on litigated outcomes. See Shapiro & Murphy, *supra* note 165, at 331 (“But how significant is the influence of ideology? How many case outcomes does it affect? The short answer is that we do not know.”).

238. See Miles & Sunstein, *supra* note 72, at 785 (“As we shall soon see, our most striking finding here is a form of ideological amplification, clearly demonstrated once agency and judicial decisions are coded in political terms.”).

239. But see Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing that *Chevron* is not, in fact, a two-step). In contexts other than rulemaking, difficult questions arise over whether *Chevron* applies to an agency’s interpretation. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (describing as “step zero” a court’s determination of whether to apply the *Chevron* framework). Under the framework of *United States v. Mead Corp.*, 533 U.S. 218 (2001), however, statutory interpretations incorporated into notice-and-comment rulemaking will typically qualify for *Chevron*.

240. This is, of course, a simplification. For a fuller description of the *Chevron* doctrine, see Ortman, *supra* note 161, at 1291–95.

241. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

242. Cf. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1088 (1997) (“A tremendous amount of ink has been spilled in assessing the pros and cons of *Chevron* . . .”).

243. Miles & Sunstein, *supra* note 212.

Sunstein found that conservative judges were significantly more likely than liberal judges to validate conservative agency interpretations (determined by the identity of the party challenging the agency action), and that liberal judges were substantially more likely than their conservative brethren to validate liberal interpretations.²⁴⁴ Validation rates, Miles and Sunstein showed, “display[ed] an almost seesawing pattern according to the identity of the challenging party,”²⁴⁵ a finding that coheres with other empirical work on *Chevron* pre- and post-dating the study.²⁴⁶ As Miles and Sunstein conclude, “the political convictions of federal judges are continuing to play a large role in judicial review of agency interpretations of law.”²⁴⁷ As with the arbitrariness studies, this finding suggests that, in some subset of rulemaking cases, the ideological priors of judges generate legal error.

B. Structural Reform and Depoliticization

What does politicization have to do with the architecture of rulemaking litigation? Two-tier judicial structures are less error-prone than one-tier structures, and politicized outcomes in rulemaking cases are evidence of error. This raises the possibility that a two-tier structure would be less political than our one-tier system for rulemaking litigation. Of course, not all errors are created equal. The question is whether the epistemic advantages of two-tier structures temper errors caused by ideological priors. This section analyzes two reasons why they might. First, two-tier structures may bring into focus biases—including ideological priors—that are hidden from decisionmakers. Revealing biases for what they are might weaken them. Second, two-tier structures may expose decisionmakers to additional judicial viewpoints, and exposure of this sort has been shown to alleviate politicization. The first reason rests on the percolation and accountability mechanisms, the second on perspectival aggregation.

244. *Id.* at 870 (“In its actual application, the *Chevron* framework shows a large influence from the political convictions of federal judges.”). Of course, as with arbitrariness review, selection effects prevent us from knowing the exact magnitude of the politicization. See *supra* note 237 and the accompanying text.

245. *Id.* at 850. Miles and Sunstein found that the divergence of conservative and liberal judges occurs in cases with unmixed panels, i.e., panels consisting entirely of conservative or liberal judges. The divergence is attenuated or even eliminated in mixed panels. *Id.* at 863.

246. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155, 2160 (1998); Revesz, *supra* note 172, at 1759–60; see also Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 *COLUM. L. REV.* 1727, 1734 (2010) (finding “ideological concerns influence application of deference doctrine”).

247. Miles & Sunstein, *supra* note 212, at 871.

This section explores the possibility that two-tier court structures counteract politicization.²⁴⁸ If they do, two things follow for rulemaking litigation. First, our one-tier structure may be contributing to—or at least not ameliorating—politicized outcomes. Second, if we wish to constrain politicization, we should consider moving towards a two-tier structure.²⁴⁹

1. *Hidden Biases*

Judges often deny that ideology plays a role in litigation outcomes.²⁵⁰ The gap between what judges say and the empirical findings of ideological voting supports the theory of cultural cognition.²⁵¹ Ideologically predictable voting, according to cultural cognition theory, is often the product of “subconscious influence on cognition,” rather than bad faith or naked politics.²⁵² Judges, in other words, are sometimes unaware of the ideological priors that influence their votes.

Two-tier structures may bring ideology into the light. Both the percolation and accountability mechanisms encourage decisionmakers to

248. To be clear, until it can be tested empirically, see *supra* note 177 and accompanying text, the link between judicial structure and politicization is only a hypothesis.

249. Commentators have put forth several proposals to depoliticize administrative law. For instance, Jacob Gersen and Adrian Vermeule propose using supermajority voting rules, rather than doctrine, to operationalize *Chevron*. Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 699–701 (2007). *But see* Matthew C. Stephenson, *The Costs of Voting Rule Chevron: A Comment on Gersen and Vermeule’s Proposal*, 116 YALE L.J. POCKET PART 238, 240–42 (2007) (criticizing the voting rule proposal). Sidney Shapiro and Richard Murphy suggest expanding the size of circuit panels to five in major rulemaking cases. Shapiro & Murphy, *supra* note 165, at 355–61. And Sunstein and Miles consider, but ultimately reject, requiring politically diverse circuit panels. Sunstein & Miles, *supra* note 28, at 2227–29; *see also* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215 (1999) (proposing mandatory mixed panels). As Sunstein and Miles recognize, “a requirement of mixed panels might seem objectionable insofar as it would be an acknowledgement that political commitments matter to judging.” Sunstein & Miles, *supra* note 28, at 2228. This could worsen politicization: “Perhaps both Republican and Democratic appointees would conceive of themselves, to a somewhat greater degree, as political partisans, simply because the requirement of mixed composition would suggest as much.” *Id.* But because scholars have paid relatively little attention to the one-tier design of rulemaking litigation, structural judicial reform has been largely ignored. *But see* Mead & Fromherz, *supra* note 16, at 56 (noting the possibility that “channeling agency review cases through the district court would temper the ideological nature of judicial review”).

250. *See* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1464 (2003) (“[J]udges justify their conclusions by referring to analogous precedents or other governing texts that, at least purportedly, dictate the judge’s decision [rather than ideology].”).

251. Dan M. Kahan, “*Ideology In*” or “*Cultural Cognition of*” *Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 417–18 (2009) (“The phenomenon of cultural cognition refers to the tendency of individuals to conform their views about risks and benefits of putatively dangerous activities to their cultural evaluations of those activities.”).

252. *Id.* at 413–14 (arguing that those who claim that judges decide cases based on ideology “have failed . . . to distinguish between values as a *self-conscious motive* for decision making and values as a *subconscious influence on cognition*. Once that distinction is made, it becomes clear that the evidence cited to support the ideology thesis fits just as well with another account, which I’ll call the ‘cultural cognition thesis.’”).

examine their priors. When legal issues percolate, judges and litigants can question, refine, and clarify earlier analyses, a process that will sometimes unearth previously unseen ideological priors. And the point of well-structured accountability is to alleviate biases that result from “lack of self-critical attention to one’s decision process.”²⁵³ To the extent that judges do not pay “self-critical attention” to their ideological priors, accountability would encourage them to do so. Assuming, as we should, that judges judge in good faith,²⁵⁴ exposing ideology could weaken its influence. “Sunlight,” Justice Brandeis tells us, “is said to be the best of disinfectants.”²⁵⁵

To my knowledge, there is no empirical research testing whether percolation has a depoliticizing effect. But there is support for the proposition that accountability does. In his study of the D.C. Circuit discussed above, Revesz found that the prospect of Supreme Court review is inversely related to ideological voting.²⁵⁶ According to this analysis, ideological voting was especially pronounced in cases unlikely to be reviewed by the Supreme Court.²⁵⁷ The chance that the Supreme Court will review *any* circuit decision is small.²⁵⁸ If such low-intensity accountability attenuates politicization, it seems possible—even likely—that the routine accountability of a two-tier structure could do so even more.

2. *Missing Perspectives*

The perspectival aggregation mechanism of two-tier court structures might also prove depoliticizing in the rulemaking context. An intriguing finding of the empirical scholarship discussed above is that partisan

253. Lerner & Tetlock, *supra* note 138, at 265.

254. See Sunstein & Miles, *supra* note 28, at 2218 (“No one should doubt that judges act in good faith, and when they vote to strike down or to uphold agency action, they are behaving in accordance with the law as they understand it.”).

255. See LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914). Citing Brandeis, Sunstein and Miles are pessimistic that sunlight can depoliticize administrative law litigation. Sunstein & Miles, *supra* note 28, at 2218 (“[T]here is no reason for confidence in this prospect. It is an understatement to say that most judges do not spend a great deal of time reading academic work, and studies of judicial behavior are not likely to come to their attention.”). But they focus on whether judges will learn, or react to, studies such as theirs demonstrating politicization at the wholesale level. See *id.* The sunlight that percolation and accountability might offer, on the other hand, is retail. It may reveal, in other words, ideological priors impacting individual cases or legal questions.

256. See *supra* note 229 and accompanying text.

257. Revesz, *supra* note 172, at 1767 (“The empirical analysis in this study provides support for the proposition that judges act more ideologically when their decisions are unlikely to be reviewed by a higher authority . . . than when such review is more probable (as is the case with respect to statutory challenges).”).

258. See *The Supreme Court 2012 Term—the Statistics*, 127 HARV. L. REV. 408, 416 (2013) (reporting about a 5% certiorari grant rate for paid cases and a much lower rate for *in forma pauperis* cases).

diversity within a panel counteracts ideological voting.²⁵⁹ Perspectival aggregation may deserve the credit.

Sunstein and Miles suggest that ideological diversity is depoliticizing because outlier judges offer “counterarguments” to their colleagues, which lead to different “initial ‘argument pool[s]’” than on homogenous panels.²⁶⁰ A similar logic might apply in a two-tier structure for rulemaking cases. More judges hear a case in a two-tier structure than in a one-tier structure. The more judges who hear a case, the less likely that all will be Democrats or that all will be Republicans. It might not matter all that much whether the diversity comes from the first or second tier. Only second-tier judges get to vote on the final decision, but like judges in the minority of an appellate panel, first-tier judges may be able to contribute to the “initial argument pool” of the second-tier court. To paraphrase Sunstein and Miles, it would “not be entirely surprising” if second-tier judges reviewing the work of diverse (from them) first-tier judges “show[ed] relatively greater moderation.”²⁶¹

IV. TWO-TIER REFORMS

Rulemaking litigation is usually conducted in a one-tier structure that likely produces needless error and may even exacerbate judicial politicization. This final Part analyzes four potential reforms, arrayed from least to most sweeping. I first briefly consider two partial reforms that could be achieved without Congress—the circuit courts could enlarge their en banc dockets, or the Supreme Court could revisit *Lorion*'s presumption of direct circuit review. Achieving a true two-tier system would require Congress to engage in institutional redesign, and I consider two possibilities in depth. The first eliminates the petition for review and begins all rulemaking cases in district court. The second retains the petition for review but allows losing litigants to appeal to a different circuit, a structure that this Article calls “intercircuit peer review.” This section considers costs and benefits of each possibility.

Before analyzing the plausible reform options, I must rule out an implausible one. A simple way to implement a two-tier judicial structure in rulemaking cases would be to allow a losing litigant to appeal by right to the Supreme Court or the en banc circuit court. We can quickly reject this approach, however, because the caseload would overwhelm the Supreme Court or the en banc circuit courts.

259. See *supra* note 236 and accompanying text.

260. Sunstein & Miles, *supra* note 28, at 2203–04.

261. *Id.* It may be that judges on the higher court take the contributions of the lower court judges less seriously than those of their colleagues. If so, this would cut for “intercircuit peer review” and against originating a two-tier structure in a district court. See *infra* at Part IV.D.

Detailed data on the quantity of rulemaking litigation do not exist, so I examined one year's worth of D.C. Circuit filings.²⁶² While there is no guarantee that the year I chose is representative, the goal is merely to provide some perspective on the amount of litigation. I identified 189 petitions for review of rulemakings filed in the D.C. Circuit between July 1, 2011, and June 30, 2012.²⁶³ Consolidation is common in rulemaking litigation.²⁶⁴ Excluding petitions transferred to other circuits, the 189 petitions for review were consolidated into fifty-nine discrete cases. As of July 2016, the D.C. Circuit had ruled on the merits in thirty-three of the cases, eighteen were voluntarily dismissed, and six remained pending.²⁶⁵

Relying on statistics provided to him by the Administrative Office of the U.S. Courts, D.C. Circuit Judge Douglas Ginsburg estimates that his court receives roughly one-third of the nation's complex administrative law cases.²⁶⁶ We can use this estimate to roughly approximate the overall incidence of rulemaking litigation in the federal courts.²⁶⁷ Tripling the D.C. Circuit numbers, we can approximate that there were in the neighborhood of 600 petitions for review of agency rulemaking, resulting in around 100 separate merits decisions. These are rough estimates, to be sure, but they suffice for present purposes.

262. I began by searching Bloomberg Law dockets for cases with "Petition for Review" as a keyword. I believe this returned virtually all direct circuit challenges to agency rules, but it also included many false positives. My research assistants and I then examined dockets to separate challenges to agency rulemakings, agency adjudications, and other cases that found their way into the results. When there was a question about whether the agency action constituted rulemaking or adjudication, I generally relied on the agency's characterization of its action (this was especially true for EPA and FERC actions, which can be hard to classify). After we had identified rulemaking cases, we further investigated the dockets to determine the consolidations and outcomes.

263. This number includes petitions filed in other circuits and thereafter transferred to the D.C. Circuit and excludes petitions filed in the D.C. Circuit and transferred elsewhere. I selected the date range to try to minimize the number of cases still pending.

264. See Dobbins, *supra* note 186, at 1466–67 (describing consolidation procedure in petition for review cases).

265. In the remaining two cases, the agency voluntarily withdrew the challenged rule. The EPA is the respondent in all of the petitions still pending as of July 2016. It is plausible in those cases that action by the EPA will either moot the existing case or lead the petitioners to withdraw them, so I do not count them as merits decisions. The dispositions of the merits decisions are not, strictly speaking, relevant to the analysis here, but readers may nonetheless find them interesting. Of the thirty-three merits decisions, the court validated the agency rule in sixteen cases, invalidated it in six, validated in part and invalidated in part in four, and held in seven cases that it lacked jurisdiction. An Excel spreadsheet containing these results is available upon request.

266. See Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J.L. & PUB. POL'Y 1, 2–3 (2012). Judge Ginsburg excluded from the "complex" category cases from the Board of Immigration Appeals and the Social Security Administration, noting that such cases "are considerably less complex than most administrative cases of the types commonly filed in the D.C. Circuit." *Id.*

267. This assumes (plausibly) that filings were stable from 2010 to 2012 and (still plausibly but more tentatively) that the mix of petitions for review from adjudication and rulemaking are not systematically skewed among the circuits.

This volume of cases, or anything near it, would be unmanageable for the Supreme Court. In its October Term 2012, the Supreme Court considered ninety-three cases on the merits.²⁶⁸ If we count each petition as a separate case, mandatory jurisdiction of rulemaking cases would dwarf the existing docket. Even if we count each consolidated merits resolutions as a separate case, the addition of around 100 complex cases would nearly double the docket.

As the D.C. Circuit is currently composed, mandatory en banc jurisdiction for rulemaking cases would also engulf it. Judge Ginsburg estimates that an en banc sitting consumes the same judicial resources as five or six panel cases.²⁶⁹ In 2013, 1,020 cases were initiated at the D.C. Circuit.²⁷⁰ Multiplying 189 rulemaking petitions by five would thus nearly double the effective size of the D.C. Circuit's docket. If the relevant number is 160 cases (i.e., thirty-two consolidated merits resolutions multiplied by five), things seems somewhat more manageable. In light of the complexity of rulemaking cases, however, the consolidated figure surely understates the additional judicial work that mandatory en banc jurisdiction would require.²⁷¹

Having set obligatory en banc or Supreme Court jurisdiction aside as implausible, we turn to the viable reform options.

A. *En Banc Dockets*

Notwithstanding the impossibility of mandatory en banc review, the circuit courts could move in the direction of two-tier review in rulemaking litigation by enlarging their en banc dockets in these cases. There are no reliable statistics on the number of en banc decisions in the federal

268. *The Supreme Court 2012 Term—the Statistics*, *supra* note 258, at 416.

269. See Ginsburg, *supra* note 266, at 5 (“Because of the added complexity of coordinating an opinion that satisfies the majority of a larger number of judges and almost certainly dealing with a dissent, I have estimated one en banc rehearing consumes resources that could otherwise go to panels of three hearing five or six cases.”); Douglas H. Ginsburg and Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1020 (1991) (“In sum, it is safe to estimate that one case reheard en banc consumes as much of the court’s resources as five or six cases heard by a panel; thus, one rehearing displaces four to five panel hearings.”); see also Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1222 (1992) (“[En banc] proceedings are very difficult to convene and to administer. Extraordinary amounts of time and effort must be devoted to considering whether to grant review, assembling the judges, discussing the decision, and circulating opinions.”).

270. Admin. Office of the United States Courts, U.S. Court of Appeals Federal Court Management Statistics, USCOURTS.GOV, <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2013/12/31> (last visited Sept. 16, 2016) (then follow “Download Data TABLE (PDF, 69.4 KB)”).

271. Cf. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 237 (1999) (noting that in administrative law cases, “judges are tasked simply with plowing through volumes of complex data and reams of statistical evidence to see if the agency has substantial evidence to back its findings or has acted in an arbitrary and capricious way”).

circuits,²⁷² but by all accounts, en banc hearings represent a tiny fraction of the work of circuit courts.²⁷³ In light of the D.C. Circuit's special role in administrative law, it makes sense to focus on the en banc practices of that court.²⁷⁴

From 2002 to 2012, the D.C. Circuit heard eleven cases en banc.²⁷⁵ Only *one* of these involved a petition for review of agency action.²⁷⁶ This strikingly low en banc rate is not inevitable. During the 1980s, the court heard about six en banc cases every year.²⁷⁷ Writing in 1993, Michael Stein connected that relatively high en banc rate to the D.C. Circuit's administrative law work: "Because the D.C. Circuit may often be the only court to resolve the important type of disputes that appear before it, its occasional fervor relating to en banc cases, and its tendency to grant rehearing, are not surprising."²⁷⁸

The D.C. Circuit's current norm against rehearing en banc appears to be a corollary of its emphasis on collegiality.²⁷⁹ As Judge Ginsburg explains:

I think the declining number of en banc rehearings over the last thirty years, and their paucity in the last decade, reflect a

272. See Michael W. Giles et al., *The Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals*, 51 AM. J. POL. SCI. 449, 454–55 n.17 (2007) (discussing flaws in existing en banc statistics).

273. Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2004 (2014) ("Despite the significance of en banc review, the federal courts of appeals very rarely sit en banc."); SECOND CIRCUIT COURTS COMM., FEDERAL BAR COUNCIL, *EN BANC PRACTICES IN THE SECOND CIRCUIT: TIME FOR A CHANGE?* 5 (2011), <http://studylib.net/doc/8734563/en-banc>—federal-bar-council (reporting en banc cases by circuit).

274. See *supra* note 75 and accompanying text.

275. See Ginsburg, *supra* note 266, at 5 ("Better still, we have reheard en banc only eleven cases in the last ten years."); see also *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc); *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (en banc); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc); *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008) (en banc); *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (en banc); *United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007) (en banc); *Boehner v. McDermott*, 484 F.3d 573 (D.C. Cir. 2007) (en banc); *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc); *Ruggiero v. FCC*, 317 F.3d 239 (D.C. Cir. 2003) (en banc); *United States v. McCoy*, 313 F.3d 561 (D.C. Cir. 2002) (en banc). I should note that I was a law clerk on the D.C. Circuit while several of these cases were pending. Nothing in this section (or elsewhere in the Article) draws on any confidential source or knowledge.

276. *Ruggiero*, 317 F.3d at 239.

277. Ginsburg & Falk, *supra* note 269, at 1013 ("That the court rehears en banc only six cases per year suggests that the court as principal is overwhelmingly satisfied with the work of its panels as agents.")

278. Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 836 (1993).

279. See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (describing and applauding judicial collegiality in general, and at the D.C. Circuit in particular).

significant and increasing degree of mutual trust among colleagues. To have so few en banc rehearings, the judges must have either an extraordinarily homogenous view of the law or a great deal of respect for each other's judgments. Clearly, the latter is primarily what induces our reluctance to second-guess a panel of three colleagues²⁸⁰

If collegiality means "only that [judges] discuss each other's views seriously and respectfully,"²⁸¹ the practice is unassailable. But if it means—as Judge Ginsburg appears to suggest—that judges will not scrutinize panel opinions for errors, it is more problematic.²⁸² Absent other reform measures, en banc rehearing will remain the principal error correction mechanism in direct review cases. The D.C. Circuit could be less chary about rehearing direct review cases, especially those in which an agency rulemaking is challenged.

B. Repudiating *Lorion*

The Supreme Court could move in the direction of two-tier review in rulemaking litigation by repudiating the presumption of direct review announced in *Florida Power & Light Co. v. Lorion*.²⁸³ *Lorion's* flaws are discussed above and need not be reiterated here.²⁸⁴ In summary, although the Court purported to justify the presumption of direct review on a functional account of the costs and benefits of bypassing district courts,²⁸⁵ the Court failed to either consider the epistemic advantages of two-tier review or distinguish administrative law cases from other high-stakes, closed-record litigation.

In *Lorion's* place, the Supreme Court could adopt a presumption or a clear statement rule providing that jurisdiction to review agency rulemaking (or agency action generally) lies in the district court unless Congress expressly provides for direct circuit review.²⁸⁶ As Part I explained, recent D.C. Circuit cases may be moving toward such a position,

280. Ginsburg, *supra* note 266, at 6.

281. Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1361 (1998).

282. As Judge Edwards points out, "It follows from our practice of collegiality that our views are sometimes affected by our deliberations with the other judges." *Id.* Judge Ginsburg's explanation of the low en banc rate, however, makes no space for deliberation. See *supra* note 280 and accompanying text. By rejecting that the en banc rate results from a "homogenous view of the law," Ginsburg appears to rule out the possibility that deliberation drives judges to agreement. Ginsburg, *supra* note 266, at 6.

283. 470 U.S. 729 (1985); see also *supra* notes 46–55 and accompanying text.

284. See *supra* notes 47–57, 80 and accompanying text.

285. See *Lorion*, 470 U.S. at 740–41.

286. Rebecca Aviel, *When the State Demands Disclosure*, 33 CARDOZO L. REV. 675, 724 (2011) (describing clear statement rules generally).

Lorion notwithstanding.²⁸⁷ Although these decisions have not been based on a functional account of two-tier structures, an advocate of two-tier review should nonetheless support the trend and encourage the Supreme Court to bless it.

C. Discarding the Petition for Review

If we want a true two-tier system of review in rulemaking cases, more comprehensive institutional redesign will be required. One possibility is to do away with the “petition for review” and allow district courts to entertain all challenges to agency rules. There are two variants on this theme. We could begin rulemaking cases in ordinary single-judge district courts.²⁸⁸ Of the two-tier mechanisms I will consider, this requires the least deviation from extant institutional structures. Alternatively, we could make a three-judge district court the first tier of rulemaking review. Although no longer used in administrative law, three-judge district courts once reviewed orders of the Interstate Commerce Commission and today decide certain election law cases.²⁸⁹ This section explores the costs and benefits of a two-tier system that begins in a one- or three-judge district court and concludes in a circuit court.²⁹⁰

287. See *supra* notes 59–66 and accompanying text.

288. See Mead & Fromherz, *supra* note 16, at 54–57. But see William Funk, *Response to Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. ACCORD 88 (2016) (criticizing Mead and Fromherz’s proposal).

289. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 1–2 (1964); Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 782–87 (2007). Typically, appeal from a three-judge district court has been to the Supreme Court. Nothing in the logic of three-judge district courts, however, requires this bypass of circuit courts.

290. In addition to a one- versus three-judge district court, a second threshold design question concerns whether the second tier would be available to a losing agency, a losing challenger, or both. It may be that the social costs of erroneous invalidations and erroneous validations are the same, but this is not necessarily so. Suppose you think erroneous invalidations of agency rules are costlier and that the deference doctrines fail to account for the difference. On these assumptions (and holding all else equal), you would want to make judicial review more deferential. Two sorts of interventions are possible, corresponding to what Jacob Gersen and Adrian Vermeule call soft and hard solutions. Gersen & Vermeule, *supra* note 249, at 680–81. Soft solutions are doctrinal reforms, while hard solutions “change the rules that govern the composition, powers, or voting mechanisms of the relevant institutions.” *Id.* at 681. A soft solution to the (assumed) problem of inadequate deference to agency rulemaking would change the deference doctrines themselves. A hard solution to the same problem would make a second judicial tier available asymmetrically to the government when it loses at the first tier, but not to the challenger when it loses. For someone who thinks that the deference doctrines don’t adequately account for the costs of erroneous invalidations, this one-way ratchet may have advantages over doctrinal reform within a one-tier structure. See *id.* at 693–97. But see Stephenson, *supra* note 249, at 240–42. Likewise, a reformer who concludes on the basis of her normative judgments or empirical observations that erroneous *validations* are especially costly or frequent might be attracted to an asymmetric structure in which a losing challenger, but not a losing agency, can appeal.

The benefits side of the ledger follows from Part II. The accountability benefit applies straightforwardly. District judges would know that their decisions are appealable to circuit courts, making them accountable in the psychologists' sense. This is valuable in itself for cases that are not appealed, and valuable to the appellate court in cases that are.²⁹¹ The remaining benefits—percolation, diversity, and outside signals—require more analysis.

The epistemic value of percolation depends on the quality of the first-tier decision, so questions of institutional capacity loom large. Much existing commentary suggests that district judges are not well positioned to review agency rulemaking. For some analysts, this is a function of crowded dockets and the fact that district judges sit alone, not in panels.²⁹² These concerns might be alleviated by employing a three-judge district court. For other analysts, the institutional superiority of circuit over district judges in administrative law is a function of the quality of the judges or their experience handling agency cases.²⁹³ Judicial experience, however, is endogenous to institutional structure. If we transitioned to a two-tier system that begins in the district courts, district judges would quickly gain experience with agency rulemaking. Claims that circuit judges are inherently more capable than district judges are less tractable. I am dubious of these claims,²⁹⁴ but for readers who see district judges as less able to address complex questions of administrative law, the percolation benefit of a two-tier system beginning in a district court is probably fairly low.

Turning to diversity, the statistical aggregation benefit of two-tier systems is straightforward. The more decisionmakers, the better.²⁹⁵ This makes four decisionmakers (a district judge and three circuit judges) better than three, and six (three district judges and three circuit judges) better than four. The value of perspectival aggregation hinges on the degree to which decisionmakers differ in their perspectives and heuristics.²⁹⁶ Regardless whether one shares my skepticism that there is a meaningful quality gap between district and circuit judges, they certainly have different day-to-day

291. See *supra* notes 153–56 and accompanying text.

292. See *supra* note 97.

293. See *supra* note 98.

294. I am not alone in doubting such claims. Mead and Fromherz explain that they are skeptical of claims that circuit judges are “smarter” than district judges because of the “impressively high quality of the federal judiciary as a whole.” See Mead & Fromherz, *supra* note 16, at 43; see also Oldfather, *supra* note 128, 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.”).

295. See *supra* notes 161–63 and accompanying text.

296. See *supra* notes 169–71 and accompanying text.

jobs.²⁹⁷ They vary in their procedures, their relationships with other legal institutions, and perhaps even in their degree of responsibility for lawmaking.²⁹⁸ We can reasonably expect each of these differences to result in distinct perspectives and heuristics.

The district court option, however, may falter on the final advantage of two-tier structures: outside signals. District judges are not seen as particularly legitimate when passing on matters of national significance.²⁹⁹ Perhaps district judges *would* be perceived as equally legitimate decisionmakers if the two-tier structure considered here was adopted. But likely not.³⁰⁰ If this intuition is right, there are two significant implications. First, the perception of illegitimacy may lead more litigants to appeal error-free judgments than in a two-tier system that begins in circuit court. Second, although disagreement between tiers signals the possibility of error to external decisionmakers (i.e., Congress), if the first tier is not regarded as legitimate, the signal may be weak.

We turn next to the costs of two-tier review beginning in the district court. The direct costs of two-tier review consist of the litigation expenses for the parties and the courts. In some settings, the direct costs of litigation matter a great deal.³⁰¹ For instance, the direct costs of any additional tier(s) of judicial scrutiny of low-dollar agency adjudications would likely outweigh the benefits.³⁰² But as I have noted, the direct costs of adding a

297. E.g., Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 479 n.54 (1998) ("But, so far as day-to-day activities go, trial judges are under much greater scrutiny than appellate court judges. Trial judges appear in court more frequently, often before the same lawyers, and very quickly develop a reputation in the local legal community. Appeals judges appear in court only to hear oral argument and are less likely to be seen repeatedly by the same lawyers.").

298. See *supra* note 99 and accompanying text.

299. See, e.g., Bruhl, *supra* note 99, at 762 ("[R]eview of agency action often has an appellate character but, as explained above, it also often has a *political* character; to that extent, district judges have less business [than circuit judges] setting aside the choices of national administrators.").

300. Fromherz and Mead identify the remarkable congressional testimony of Chief Judge Orrie Phillips of the Tenth Circuit in 1950:

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

Mead & Fromherz, *supra* note 16, at 14 n.86 (quoting *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three Judge District Courts: Hearing on H.R. 1468, H.R. 1470, and H.R. 2771 (80th Cong.) and HR 2916 (81st Cong.) Before Subcomms. No. 3 and No. 4 of the H. Comm. on the Judiciary (80th Cong.) and Subcomm. No. 2 of the H. Comm. on the Judiciary, 81st Cong. 112 (1949)* (statement of Orrie L. Phillips, C.J., U.S. Court of Appeals, 10th Cir.).

301. See Vermeule, *supra* note 24, at 1462 ("Direct costs are sometimes important in public settings as well.").

302. In one such setting, social security appeals, critics have invoked the costs of litigation as a reason to reduce the number of tiers available to a losing litigant. See, e.g., HENRY J. FRIENDLY,

single round of litigation in a district court seem minor next to the high stakes of rulemaking cases.³⁰³ The more significant costs of two-tier review are indirect, and chief among these is delay, which raises the specter of ossification. I suggested above that an ossification-based objection to two-tier review of rulemaking is speculative.³⁰⁴ If a two-tier review structure made rulemaking litigation more predictable, adding a delay measured in months could even prove deossifying.³⁰⁵

Beginning judicial review of rulemaking in a one- or three-judge district court achieves the general benefits of two-tier judicial structures without obviously intractable costs, and there is reason to think that it may be better than our current one-tier structure. But there are potential drawbacks. Most importantly, district judges may be perceived as less capable than their circuit court colleagues at handling rulemaking cases. The perception of district judge inferiority makes it worthwhile to consider a two-tier structure that maintains the initial jurisdiction of circuit courts.

D. Intercircuit Peer Review

The final reform option is for the circuits to review each other.³⁰⁶ After a circuit court decides a rulemaking case, the losing party could have an

FEDERAL JURISDICTION: A GENERAL VIEW 176 (1973); *Kolman v. Shalala*, 39 F.3d 173, 176 (7th Cir. 1994) (Posner, J.) ("The wisdom of inserting the district court as a reviewing court in between an administrative agency and the court of appeals can be and has been questioned, . . . but it is a fact of life that we are not authorized to ignore by undertaking to issue our orders directly to the agency, even though that would make life simpler.") (internal citations omitted).

303. See *supra* note 102.

304. See *supra* note 104 and accompanying text.

305. Delay is the most serious indirect cost, but others are possible. For instance, there may be a moral hazard problem. That is, it may be (contrary to my suggestion above) that accountability is perverse rather than beneficial, because judges who know that theirs is not the last word on a matter take their work less seriously. See *supra* note 143; cf. Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 38-39 (1990) (suggesting that some trial judges in criminal cases might be inclined to rule in the government's favor to ensure that a superior court can decide a difficult legal question). Another possible indirect cost, which is specific to beginning judicial review in district courts, is geographical disuniformity in law. See Bruhl, *supra* note 99, at 762 ("[T]he sheer numerosity and heterogeneity of district courts threatens a particularly problematic form of geographic disuniformity."). For pre-enforcement challenges to agency rulemaking, however, venue rules can alleviate this concern. As explained above, in the current system of direct circuit review, when an agency rule is challenged in multiple venues, the cases are consolidated in one circuit. See *supra* notes 184-85 and accompanying text. The same rule could easily be adopted for a two-tier structure that begins in district courts, with the panel on multi-district litigation serving as the clearinghouse. See 15 CHARLES ALAN WRIGHT et al., FEDERAL PRACTICE & PROCEDURE § 3862 (4th ed. 2008) (providing overview of multidistrict litigation panel).

306. A related two-court (but not two-tier) option would be for two circuits to review the agency rulemaking simultaneously rather than sequentially. Cf. Stephenson, *supra* note 24, at 1474-75 (distinguishing simultaneous and sequential information acquisition mechanisms). Each circuit's decision would be embargoed from the other (and the parties) until both were ready. If the two circuits agreed, their decision would stand. If they disagreed, the case would be submitted to some further tribunal. While such a system would not feature the percolation or accountability advantages discussed

appeal of right to a different circuit. Such a system of intercircuit peer review is possible in rulemaking cases because, as we have seen, the first-tier court need not develop a record.³⁰⁷

Intercircuit peer review implicates each of the advantages of two-tier judicial structures. Accountability is, if anything, a stronger argument for intercircuit peer review than for two-tier review beginning in district court. When a reviewing circuit reverses, it produces an instant circuit split. It will likely expect this to mean close scrutiny by the Supreme Court.³⁰⁸ In intercircuit peer review, then, both the first-tier court and (when it reverses) the second-tier court would act under accountability.³⁰⁹

The percolation benefit of two-tier structures is also realized by intercircuit peer review. The decisional environment of a circuit court is such that we have hitherto thought it a fitting location for one-tier review. While I have criticized the one-tier design, the circuit courts are certainly

in Part II, the diversity and outside signals advantages would be at their apex, as the opportunity for an affirmance bias or an information cascade (between the courts) would be eliminated. Such a system would, however, raise difficult practical problems. For instance, when circuit courts invalidate agency rules, they sometimes include contextualized remedial orders. *E.g.*, *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (finding explanation for rule inadequate, but giving agency ninety days to justify it). It seems unlikely that even when two circuits agreed on invalidation, the remedies would be exactly the same. This would lead many cases that were agreements as a matter of substance to appear as disagreements.

307. See *supra* note 79. A basic design choice for a system of intercircuit peer review concerns the identity of the reviewing circuit. Jurisdiction to review the first tier could be assigned randomly on a case-by-case basis or circuits could be linked, with appeals always going to the next-numbered circuit. A special case of intercircuit peer review would locate all appeals in a single circuit, which would acquire expertise in rulemaking review. The obvious candidate would be the D.C. Circuit, which already functions as a semi-specialized administrative law court. See *supra* note 75. An extensive literature examines the costs and benefits of creating a specialized administrative court. Commentators have identified three principal benefits of such a court: the substantive and procedural expertise of its judges would lead to better decisions, the centralized nature of the court would eliminate disuniformity and uncertainty, and it would provide docket relief for generalist courts. Currie & Goodman, *supra* note 44, at 63–68; see also Revesz, *supra* note 75, at 1116–21. Against these benefits, commentators have identified several costs, including loss of “the generalist perspective” and the “diverse views” of multiple courts. Currie & Goodman, *supra* note 44, at 68–70; see also Bruff, *supra* note 97, at 330–31. Commentators have also suggested that specialized courts might be staffed by less capable or biased judges. Currie & Goodman, *supra* note 44, at 70; see also Bruff, *supra* note 97, at 331. More perniciously, the appointments process for specialized courts might be captured by interest groups with special concern for the court’s output. Revesz, *supra* note 75, at 1139–53; see also Bruff, *supra* note 97, at 331–32. This literature has examined the tradeoff between specialized and generalist courts deciding administrative law matters in a one-tier system. Changing the vantage from a one-tier system to a two-tier system with the specialized court at the top does not significantly alter the tradeoff.

308. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1575 (2008) (“Seventy percent of the Court’s caseload involves questions that have divided the lower courts, and the presence of a circuit split greatly increases the chances of having certiorari granted.”); see also Revesz, *supra* note 75, at 1156 (“Moreover, cases that produce a conflict among the circuits generally receive extensive scrutiny in the legal community, and judges are likely to want their decisions to stand up well to such scrutiny.”).

309. Of course, the flip side is that there may be an undue bias in favor of affirmance of the first-tier. Moreover, the second-tier’s accountability is not optimally structured because the judges know the identity of the reviewing Supreme Court Justices. See *supra* note 144.

capable of fleshing out and refining legal issues in a manner useful to another circuit.

Intercircuit peer review would likewise achieve the diversity benefit of two-tier structures. For statistical aggregation, intercircuit peer review doubles the number of judges involved in a case. By virtue of selection mechanisms, history, and caseloads, moreover, the circuits have distinct cultures.³¹⁰ This likely makes judges of different circuits diverse in their perspectives and heuristics. Whether circuit judges are *more* diverse from each other than they are from district judges is an open question, but variance among the circuits means that intercircuit peer review would likely realize the perspectival aggregation component of epistemic diversity.

Perhaps the greatest advantage of intercircuit peer review is external, in that it provides especially valuable signals to outsiders. When the reviewing circuit agrees with the first, outsiders have strong reason to believe in the legal validity of the agency's rule. By contrast, when the reviewing circuit reverses, the circuit split signals that additional work, beyond the two tiers, may be warranted. Circuit splits have become the dominant determinant of Supreme Court interest in legal issues.³¹¹ Because petitions for review of rulemaking are consolidated in a single circuit court, splits over the validity of a rule are rare.³¹² By creating the opportunity for instant circuit splits, intercircuit peer review would make the Supreme Court's primary proxy for legal importance available to rulemaking litigation without sacrificing consolidated venue.³¹³

What of the costs of intercircuit peer review? They again come in both direct and indirect varieties. The direct cost of intercircuit peer review—beyond the parties' expenditures on briefing and filing fees—is its impact on circuit dockets. Unlike mandatory en banc or Supreme Court review, the burden of intercircuit peer review would be spread among the circuits. Recall that there were 189 rulemaking petitions filed in the D.C. Circuit between July 2011 and June 2012, from which we can very roughly approximate that there were around 600 such petitions nationwide.³¹⁴ If peer review obligations are spread evenly among the circuits,³¹⁵ that

310. See *supra* note 172.

311. See Frost, *supra* note 308, at 1632 (“The Court’s focus on resolving lower court conflicts is obvious from the high percentage of certiorari grants involving questions over which the lower courts have differed.”).

312. See *supra* note 73.

313. See *supra* note 187.

314. See *supra* note 267 and accompanying text.

315. As they could be if the second tier is selected randomly using a weighted measure that accounted for the court’s workload. On the “next-circuit” approach, the distribution would be more problematic as the court reviewing the D.C. Circuit’s rulemaking docket would have a much larger

amounts to only about fifty additional cases per year. In 2013, 56,475 cases of all types were commenced in the twelve regional circuit courts.³¹⁶ Even if the losing litigant appealed every case (an unrealistic assumption), the resulting appeals would represent a small fraction of the overall circuit docket.

In some respects, the analysis of indirect costs parallels the analysis for review originating in the district court. The cost of delay and concomitant risk of ossification are unlikely to be materially different for intercircuit peer review. There are, however, additional potential indirect costs to consider. One is that judges in one circuit, as Harold Bruff notes, “might feel uncomfortable supervising their colleagues” in another circuit.³¹⁷ But while judges are not frequently called on to evaluate the work of their judicial equals, it does happen, for instance when a circuit judge sits as a district judge by designation,³¹⁸ when a circuit judge decides whether a colleague committed judicial misconduct,³¹⁹ and in a sense, on en banc review. Judges do not decry any of these situations as illegitimate. And even if judging one’s equals is discomfiting, it is unclear whether this counts as a *social* cost of intercircuit peer review. It would be a social cost only if it skewed outcomes. I cannot rule out the possibility that judicial discomfort would bias second-tier courts towards affirming erroneous first-tier judgments. Perhaps it would, but the baseline—no review of the first tier’s decision—must be kept in sight.

Another possible indirect cost is that intercircuit peer review could impede the development of precedent. For instance, say that the First Circuit adopts a rule about *Chevron* in case one and is affirmed by the Third Circuit. In a later case, the First Circuit applies the rule from case one but is reversed by the Eighth Circuit. Is the rule still binding law in the First Circuit?

While such complexities are real, they are not insurmountable. The doctrine of precedent could evolve to accommodate intercircuit peer review. One possibility is for the courts to adopt a rule that, absent Supreme Court intervention, a circuit ruling affirmed by another circuit is

share of second-tier cases. This could be addressed by assigning review of the D.C. Circuit to a large circuit or by adding judgeships to a particular court.

316. Admin. Office of the U.S. Courts, *U.S. Courts of Appeals – Judicial Business 2013*, USCOURTS.GOV, <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2013> (last visited Sept. 14, 2016).

317. Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1240 (1992).

318. Prominent recent examples involve the Federal Circuit. See, e.g., *Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014) (reversing, in part, decision of Judge Richard Posner); *Vedder, LLC v. Google, Inc.*, 744 F.3d 1376 (Fed. Cir. 2014) (vacating and remanding decision of Chief Judge Alex Kozinski).

319. See 28 U.S.C. §§ 351–54 (2012) (describing procedure for judicial misconduct complaints).

nationally binding.³²⁰ We ordinarily reject intercircuit *stare decisis* because it precludes percolation of legal issues.³²¹ A two-circuit rule, by contrast, would require percolation (between at least two circuits) before allowing national precedent to emerge. Considering how rarely the Supreme Court addresses the scope of arbitrariness review,³²² this opportunity for nationally binding precedent might even be a feature, rather than a bug, of intercircuit peer review.

CONCLUSION

Judicial architecture matters. For a vital category of administrative law litigation, our judicial architecture ignores that redundancy has both costs and benefits as an institutional design tool. By tasking a single court with giving the first and last word on agency rules, we forgo redundancy's epistemic value. The likely result is unwarranted judicial error, as the empirical studies of politicization seem to corroborate. Nothing about the logic of judicial review of rulemaking makes a one-tier structure inevitable. We could—and perhaps should—move towards a two-tier judicial architecture.

320. Cf. Vermeule, *supra* note 24, at 1469–74 (proposing an analogous “two opinion” rule, under which the Supreme Court must issue a holding twice before it becomes binding).

321. See Revesz, *supra* note 75, at 1155–58; see also *id.* at 1116 (“But implicit in the lack of intercircuit *stare decisis* is a view about the benefits of percolation . . . that many proponents of specialization would not disturb.”).

322. Compare *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983) with *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).