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COORDINATING JUDICIAL REVIEW IN ADMINISTRATIVE LAW

Harold H. Bruff*

Two centuries ago, Alexander Hamilton warned that a system of "[t]hirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."¹ Today, Hamilton's hydra is a reality in administrative law. Federal agencies implementing statutory programs confront thirteen courts of appeals² that wield final review authority in all but a handful of cases. The interaction of centralized executive agencies with decentralized reviewing courts has pernicious effects on the behavior of all the main participants in the system: private litigants, agency officers, and federal judges (including Supreme Court Justices). These effects include private forum-shopping, agency nonacquiescence in court orders, and distortions in judicial perspective on administrative problems.

The complexity of our government makes sound remedies for these ills difficult to prescribe. The effects on administrative law of the interaction of agencies and lower federal courts can be as obscure as they are profound. For that reason, organizational change often produces unintended influences on government operations. We must honor the old medical precept: "First, do no harm."

* I thank Professor Peter Strauss and Circuit Judges Patricia Wald and Alex Kozinski for their probing criticism of drafts of this Article. The editors of the UCLA Law Review have been unfailingly gracious and helpful throughout the progress of this Symposium.

1. THE FEDERALIST No. 80, at 500 (A. Hamilton) (B. Wright ed. 1961). The cure, he thought, was to make "the judicial power of a government . . . coextensive with its legislative."

2. These are the eleven numbered circuits, the D.C. Circuit, and the Federal Circuit. 28 U.S.C. § 43 (1988).

This Article begins by describing the tradeoffs associated with varying degrees of court decentralization. Dispersal of judicial authority fragments our national law and distorts judicial perspective by showing the judges small parts of large problems. Concentration of judicial authority, however, eliminates desirable distance between the branches and threatens the integrity of the courts by altering the appointments process.

There are five possible methods to calibrate the centralization and specialization of judicial review in search of the best accommodation of the competing concerns. Any of them could reduce the present disadvantages of decentralization without increasing Supreme Court intervention. First, the creation of a specialized Administrative Court could centralize this portion of the appellate docket. Second, the distribution of appellate jurisdiction among the regional circuits by subject matter could unify national law in a decentralized system. Third, the District of Columbia Circuit could achieve partial uniformity in the law by performing en banc review of panel decisions in other circuits. Fourth, a national panel of federal judges could review administrative law decisions of the regional circuits. And fifth, a national panel could allocate en banc review of appellate decisions to particular regional circuits. I recommend the last of these options. I propose the designation of a group of federal judges to decide which panel decisions need further review and to initiate limited en banc proceedings (usually of panels of seven judges) in particular regional circuits. The decisions of the en banc panels would be binding nationwide unless the Supreme Court chose to review them.

I. THE STRUCTURE OF JUDICIAL REVIEW IN ADMINISTRATIVE LAW

A. *Allocation of Administrative Review Authority to the Courts of Appeals*

The welter of agencies that we now call the "administrative state" evolved contemporaneously with their principal reviewing courts, beginning in the closing years of the nineteenth century. Administrative lawyers often date the birth of their field from the formation in 1887 of the first independent regulatory agency, the Interstate Commerce Commission. In 1891, creation of the courts of appeals made "the first structural modification in the federal judi-

cial system since its creation a hundred years before.”³ The Supreme Court had lost its capacity to review most federal court decisions.⁴ Lower federal judges had been denounced as “the greatest despot[s] of the land”⁵ because of the de facto finality of their rulings. Creation of the intermediate appellate courts allowed routine correction of trial court errors. Since only the Supreme Court could create uniform national law, however, the new system ultimately relied on the Court’s capacity to review decisions of the courts of appeals.

The contours of the present relationship between agencies and reviewing courts soon emerged. Congress placed review of formal administrative adjudication in the new appellate courts to avoid the duplication that would attend holding trial-type proceedings in both the agency and district court.⁶ Concepts of both agency procedure and judicial review crystallized early in the twentieth century, during a period of judicial accommodation to a new governmental entity that exercised adjudicative functions formerly vested in the courts.⁷ Under pressure of judicial hostility, agency process increasingly mimicked court procedure. Eventually, the courts deferred to agency processes that seemed reliable and arrived at a limited style of review that was meant to preserve both the rule of law and agency discretion.⁸ They have tried to walk that line ever since.

Passage of the broadly applicable Administrative Procedure Act (APA) in 1946 eased direct appellate review by requiring standardized agency procedures and records.⁹ The APA requires each

3. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 103 (1928).

4. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 148 (1976).

5. F. FRANKFURTER & J. LANDIS, *supra* note 3, at 80 (quoting 32 NATION 9 (1881)).

6. *E.g.*, the Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717, 719 (current version at 15 U.S.C. § 45(c) (1988)). The court of appeals was limited to issues of law, including whether sufficient evidentiary support underlay the agency’s order. See H.R. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914). Congress subsequently extended this approach to the orders of numerous agencies in the Administrative Orders Review Act of 1950, 28 U.S.C. §§ 2341–2353 (1988); see H.R. REP. NO. 2122, 81st Cong., 2d Sess. 3 (1950); S. REP. NO. 2618, 81st Cong., 2d Sess. 1, 3 (1950).

7. See Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1208–36 (1986).

8. The landmark case was *Crowell v. Benson*, 285 U.S. 22 (1932); see Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 466–67 (1989).

9. The APA’s trial-type adjudicative procedures apply when the agency’s statute provides for adjudication “on the record after opportunity for an agency hearing,” 5

agency order to rest on the exclusive basis of a record that is accompanied by findings and conclusions of fact, law, and policy.¹⁰ Agency rulemaking now frequently receives direct review in the court of appeals as well.¹¹ Modern "notice and comment" rulemaking under the APA generates an administrative record that can be accorded appellate review.¹² Indeed, as agencies have turned increasingly to rulemaking to administer complex modern statutes promoting public health and safety, appellate litigation over rules has taken center stage in administrative law.

Still, important roles remain for trial courts. Review usually begins in district court for "informal" adjudications, a broad residual category of case-by-case decisions that often lack any procedure specified by statute.¹³ Because the Supreme Court has held that these informal actions must be reviewed on the administrative record,¹⁴ direct appellate review could occur. Yet the administrative records that underlie informal actions vary in completeness. A district court is better able to supplement these records when it so desires than is an appellate court. Moreover, the courts entertain two-thirds as many challenges to informal actions as to formal adjudications and rulemakings.¹⁵ Diverting these cases to the courts of appeals would add substantially to existing caseload pressures there.

B. *The Decentralization of Judicial Review*

A fundamental difference in the organization of the executive and judicial branches affects many characteristics of judicial review of agency action. Although both of these constitutional branches are formally centralized, only the executive can interpret statutes with effective national uniformity. The judiciary, as it was a cen-

U.S.C. § 554(a) (1988), or when due process requires relatively formal procedures, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

10. 5 U.S.C. §§ 556-557 (1988). The court can probe both the evidentiary underpinnings of the agency's findings of fact and the persuasiveness of its conclusions of law and policy. See *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938).

11. The courts of appeals often stretch their authority to review agency "orders," a term traditionally referring only to adjudicative decisions, to include the review of rules. See 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 23:3, at 133-34 (2d ed. 1983).

12. See generally Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975) (suggesting a better way to achieve a record of rulemaking).

13. For examples of informal adjudications, see Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. B. NEWS & J. 383, 387 (1984).

14. *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

15. See *infra* note 49 and accompanying text.

tury ago, is actually decentralized, once again due to the Supreme Court's inability to review most lower court orders. There is, however, an historical irony in these otherwise similar situations. In 1891, perceptions that lower court finality fostered judicial arbitrariness led to the formation of the courts of appeals. Today, as we shall see, in administrative law a similar finality leaves the lower courts with less power, not more, than in a centralized system.

1. The Comparative Centralization of Agencies and Reviewing Courts

Agencies are structured hierarchically so that they can administer their statutes with national uniformity. Agency heads have the responsibility to coordinate their various regions and bureaus to form a single policy voice, though neither any particular agency nor the executive branch as a whole is monolithic.¹⁶ Although the executive branch is under the general supervision of the President, both practical and legal responsibility for statutory decisions rest in agency hands.¹⁷ Granted, policy may oscillate as time goes by—administrators are buffeted by pressure from congressional committees, executive agencies, interest groups, staff members, and the courts.¹⁸ Nonetheless, centralization typifies statutory administration.

In contrast, a combination of docket overload and regional division of authority has largely decentralized the federal judiciary. At the apex of the judicial branch, the capacity of the Supreme Court as presently constituted is essentially fixed at about 150 decisions per year after full briefing and argument.¹⁹ Because the Court controls its own docket, its problems center more on its ability to determine which cases require its review than on inundation with cases it must decide. At the bottom of the pyramid, district courts face such inundation. But because trial courts act independently of

16. Of course, a problem endemic to government is the extent to which an agency's formal policy is actually followed in the field. Agencies employ rules, policy guidelines, manuals, and the like in a constant effort to ensure uniform policy application.

17. See Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989).

18. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 227-46 (1984). These pressures are materially less for agency adjudication, with its procedural protections, than for rulemaking. But for the principal officers of an agency, they are never absent.

19. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

each other for most purposes, new district judgeships can be added fairly readily.

It is the middle, the appellate court level, that largely accounts for the air of crisis surrounding the federal courts.²⁰ As with the district courts, courts of appeals lack the discretion to turn away cases they do not wish to decide. But as with the Supreme Court, there are structural limitations to their size. Courts of appeals are collegial and cannot function well after they have reached a certain size. The D.C. Circuit, currently at twelve members, is of middling size; the Ninth Circuit, at twenty-eight, is the giant.²¹ Problems in administering large appellate courts, especially for en banc procedures, lead to calls for more circuit-splitting.²² Yet adding more circuits would exacerbate the current fragmentation of federal law.

The courts of appeals now receive over 40,000 appeals per year.²³ The caseload has risen much faster than the number of judges—from 1960 to 1987, the caseload per judge nearly tripled.²⁴ To handle the flood, these courts now decide almost half their cases without oral argument and rely upon growing squads of law clerks and staff attorneys. Able judges complain about the increasingly bureaucratic routine, which leaves little time for reflection on the path of the law.²⁵

Today, the Supreme Court's capacity to review and coordinate the activities of the courts of appeals is extremely limited. In 1924,

20. See REPORT OF THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH (1989) [hereinafter ABA REPORT] (the federal courts of appeals are absorbing the strain so that the Supreme Court can maintain its current caseload); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter STUDY COMMITTEE REPORT] (explaining that the number of cases in the federal courts of appeals increased more than tenfold between 1958 and 1988).

21. In the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5098-99 (amending 28 U.S.C. § 44(a) (1988)), Congress increased the size of some of the circuits. The First remains the smallest, at 6, and the Ninth the largest, at 28. All others are between 11 and 17 in number.

22. E.g., Moore, *Debating an Appeals Court's Boundaries*, 22 NAT'L J. 582 (1990).

23. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1990 tables B, G-2, [hereinafter 1990 AO REPORT] (42,364 filings in all circuits, including the Federal Circuit).

24. This paragraph summarizes the findings of the ABA REPORT, *supra* note 20, at 1-8.

25. E.g., R. POSNER, THE FEDERAL COURTS, CRISIS AND REFORM 94-129 (1985); Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259 (1981); Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766 (1983).

the Court reviewed about one in ten decisions of the courts of appeals; by 1984, the proportion had shrunk to about one in 200.²⁶ The implication is obvious—the thirteen courts of appeals are now almost always the final deciders of federal law. Of course, many of the cases that do not receive Supreme Court review do not merit it and are accorded only summary attention in the courts of appeals. But even if the fifty percent of the appellate caseload that receives summary adjudication is removed from the calculus, the Supreme Court reviews only one in one hundred appellate decisions. This is a tenfold decrease from the 1924 figure, an amount that cannot be inconsequential.

Scholars have debated whether the Supreme Court is able to resolve all the important conflicts that arise among the circuits.²⁷ In any event, the Court's remoteness has at least two inescapable effects. First, much time can pass while cases that present issues ripe for decision jostle in the queue.²⁸ Meanwhile, uncertainty breeds repeated litigation of the same issues in the lower courts²⁹ and hampers confident planning of life's affairs. Second, the Court's receding presence as manager of its branch of government increases slack in the system, allowing litigants and judges to treat the prospect of Supreme Court review as too unlikely to affect their behavior in routine litigation.³⁰ For the judicial branch as a whole, the capacity to articulate a coherent body of national law is vitiated.

26. Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1405-06 (1987).

27. Compare *id.* at 1406-07 (arguing that the Court is unable to perform this function) with S. ESTREICHER & J. SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* 102-03 (1986) (claiming the Court adequately handles the tasks); see also Strauss, *supra* note 19, at 1094 n.4; Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251 (1989). In Special Project, *An Empirical Study of Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 138 (1989), student researchers found that the Supreme Court eventually reviewed 12 of 56 tax cases involving some degree of conflict among the circuits.

28. M. GRAETZ, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 84 (2d ed. 1988); Baker & McFarland, *supra* note 26, at 1406-07.

29. A traditional function of lower court litigation is to ventilate issues fully to aid ultimate Supreme Court resolution. But diminishing returns soon occur as new insights become unlikely. Modern Supreme Court cases often cite many more lower court decisions than are needed to identify issues and arguments. *E.g.*, *Shearson/American Express v. McMahon*, 482 U.S. 220, 225 n.1 (1987); *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 519 n.12 (1984).

30. For an introduction to the role of slack in principal/agent relationships, see Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

2. Decentralization of Judicial Review of Administrative Law

To assess the Supreme Court's capacity to control the articulation of administrative law, we must distinguish between procedural and substantive issues. The Court probably does eventually decide most of the important issues of administrative procedure.³¹ The same cannot be said for important substantive issues concerning particular programs.³² The sheer size of the administrative state, with its wealth of highly detailed statutes, disables the Court from acting as the primary interpreter of legislation. In recent years the Court has devoted about sixteen percent of its docket, or about twenty-five cases per year, to administrative law cases of all kinds, including constitutional challenges to the statutes.³³ If the administrative law cases in the courts of appeals are halved to eliminate summary dispositions of minor issues, the Court reviews about one percent of the panel decisions.³⁴

Although the Solicitor General's office performs a winnowing function for the Court by selecting the cases that the government appeals, that office cannot attempt a global ordering of statutory issues meriting the Court's attention, because its time and knowledge are limited and it cannot control private petitions.³⁵ Not surprisingly, the Court devotes varying amounts of attention to particular statutes, and its choices are not always comprehensible.³⁶ Moreover, in major regulatory controversies, the size of administra-

31. Our casebook, G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* (3d ed. 1986), introduces students to issues of both regulatory policy and administrative procedure. Canvassing it reveals Supreme Court contributions on virtually every important issue of process, with, of course, much working out of detail left to the lower courts.

32. Canvassing our casebook, *id.*, for substantive issues reveals that many issues of substantive policy are addressed mainly through court of appeals opinions.

33. Each November, the Harvard Law Review's summary of the last Term of the Supreme Court includes a statistical profile of the cases in table III. The November issues of Volumes 100-04 (1986-1990) show the following totals of cases under "Review of Administrative Actions" and "Other Actions by or Against the U.S. or its Officers" (excluding tax cases, which average about 5 a year, and pure constitutional challenges that do not appear to involve a statute): 1990, 22 of 137; 1989, 17 of 143; 1988, 28 of 142; 1987, 24 of 152; 1986, 29 of 159.

34. See *infra* notes 45-50. Including the Federal Circuit, the total for 1990 is 5,789.

35. See generally Meadows, *Forward*, 21 LOY. L.A.L. REV. 1047 (1988).

36. Surely the Court should not devote equal attention to each statute. Unhappily, there are signs that its priorities in selecting statutes to monitor suffer from the costs of obtaining enough information to ensure wise choices. See Sturley, *supra* note 27. For examples of variations in the intensity of the Court's interest in particular statutes, see Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1051-55 (1985); Hellman, *The Supreme Court, The National Law, and the*

tive records and the length of lower court opinions deter review by a busy Court. One might rejoin that Congress, not the courts, should clarify the statutes.³⁷ Yet no matter how well a busy legislature manages to patch the vast body of its work, a large interstitial role for lower federal courts will remain.

The decentralization of judicial review of administrative decisions depends on the breadth of possible venue and the propensities of litigants to select particular courts. Actions against the government in district court may be brought where the plaintiff resides, where the defendant resides (almost always in Washington), or where the cause of action arose (often in Washington).³⁸ Similarly, venue in the courts of appeals is typically broadly defined to include the petitioner's residence, the place where the cause of action arose, and the D.C. Circuit.³⁹ Some statutes make the D.C. Circuit the exclusive review venue.⁴⁰ If not, it is nearly always a proper one.

These venue rules, like those for general litigation, are meant to serve the convenience of parties and witnesses and to facilitate access to evidence.⁴¹ Yet administrative review has distinctive aspects that may suggest the need to modify the usual approach. Since review takes place on the agency's record, a local forum is not needed for witnesses and evidence unless the record must be supplemented. The government's convenience typically suggests venue in Washington, where most of its records and lawyers are found.

Private individuals and firms, however, may possess a different calculus. True, in many administrative cases venue mainly affects the attorneys, who can usually travel to major cities cheaply enough. A distant forum does disadvantage litigants in cases of

Selection of Cases for the Plenary Docket, 44 U. PITT. L. REV. 521, 609-14, 631-33 (1983).

37. Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987).

38. 28 U.S.C. § 1391(e) (1988). There is also a rarely invoked venue where real property lies, if any is involved in the action.

39. Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 764-70 (1989).

40. E.g., the Presidential Election Campaign Fund Act, 26 U.S.C. § 9011(a) (1988); the Safe Drinking Water Act, 42 U.S.C. § 300j-7 (1988); the Clean Air Act, 42 U.S.C. § 7607(b)(1) (1988); the Federal Communications Act, 47 U.S.C. § 402(b) (1988).

41. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 982 (1982); see also Note, *Venue for Judicial Review of Administrative Actions: A New Approach*, 93 HARV. L. REV. 1735 (1980).

small money value though.⁴² In 1962, Congress responded to this problem by authorizing plaintiffs to sue at home (previously, exclusive district court venue was in Washington).⁴³

Nevertheless, two considerations have created a tendency for litigants to select the D.C. Circuit even when others are available. First, specialized segments of the bar that handle administrative litigation, for example communications lawyers, cluster in Washington. Second, the Circuit's reputation as a relatively strict overseer of agencies has attracted challengers.⁴⁴

The interplay of venue law and litigant choice has partially concentrated administrative review in Washington. The D.C. Circuit hears almost thirty percent of direct appeals to the regional circuits from administrative agencies; the remainder are somewhat unevenly divided among the eleven other regional circuits.⁴⁵

To round out the picture, we must consider two other groups of administrative law cases. First, the Court of Appeals for the Federal Circuit (CAFC) hears about as many administrative appeals as does the D.C. Circuit, under a mixed group of jurisdictional grants that often make it the exclusive venue.⁴⁶ Second, some cases on appeal from district courts involve administrative law, for example attempts to enjoin agency programs. Since these appeals are not disaggregated in the caseload statistics, however, only a rough esti-

42. Centralized courts have sometimes ridden circuit to alleviate this problem. Examples are the Tax Court, the Court of Claims, and the Emergency Court of Appeals. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 169 (1973).

43. Mandamus and Venue Act of 1962, Pub. L. No. 87-748, 76 Stat. 744 (codified at 28 U.S.C. § 1361 (1988)). See generally *Stafford v. Briggs*, 444 U.S. 527, 533-45 (1980) (reviewing the legislative history and concluding that § 1391(e) does not apply to actions for money damages as opposed to injunctions or mandamus).

44. See *infra* text accompanying notes 105 & 125.

45. 1990 AO REPORT, *supra* note 23, table B-1. There were 2,578 administrative appeals in the regional circuits, 696 of them in the D.C. Circuit (27%). The next largest number of appeals was 451 in the Ninth Circuit, where the total caseload was 6,787 filings. The ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1989 ANNUAL REPORT OF THE DIRECTOR, table B-1 [hereinafter 1989 AO REPORT] showed 2,965 appeals from agencies to the regional courts of appeals, with 868 (29%) filed in the D.C. Circuit. The D.C. Circuit's administrative appeals dropped 19% from 1988, when they represented 1,066 of the nation's 3,043 administrative appeals, or 35%. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1988 ANNUAL REPORT OF THE DIRECTOR, table B-1.

46. In 1990, 1,466 appeals were filed in the CAFC, with the largest single group (687) comprising personnel matters from the Merit Systems Protection Board, many of which are decided summarily. 1990 AO REPORT, *supra* note 23, table G-2. For a description of the CAFC's activities, see Adams, *The Court of Appeals for the Federal Circuit: More than a National Patent Court*, 49 MO. L. REV. 43 (1984).

mate can be made of the administrative law component.⁴⁷ Statistics on district court caseloads provide some guidance. About forty percent of the civil cases in which the United States is a party appear to involve administrative law; they are rather evenly distributed around the nation.⁴⁸ If appeal rates are roughly the same for these cases as the others, the nation's appellate caseload from direct appeals must be increased by two-thirds to reflect all administrative review.⁴⁹ For the D.C. Circuit, adding this component of the caseload produces a total of about twenty percent of the nation's administrative law responsibility.⁵⁰

The D.C. Circuit's role as a semi-specialized administrative court has evolved since 1970,⁵¹ when Congress unleashed a flood of new regulatory statutes promoting public health and safety. The statutes posed more complex and technical issues for both regulators and reviewing courts than had more traditional economic regu-

47. Appeals under "Other U.S. Civil," which exclude prisoner petitions and bankruptcy matters, were 4,363 in 1990, with 415 (about 9%) in the D.C. Circuit. 1990 AO REPORT, *supra* note 23, table B-1. There were 4,284 nationally in 1989, with 335 (about 8%) in the D.C. Circuit. 1989 AO REPORT, *supra* note 45, table B-1.

48. 1990 AO REPORT, *supra* note 23, table C-2, showed 56,300 civil cases pending in the nation's district courts in which the U.S. was a party. As administrative law cases, I count: banking (293), civil rights (2,483), commerce (120), economic stabilization (10), deportation (49), intellectual property (30), securities (187), contract actions other than recovery of overpayments (2,705), statutory penalties (2,815), labor (1,155), social security (7,439), tax (2,600), environmental matters (513), freedom of information (343), and "all other statutory" cases (2,516), a total of 23,258, or 41%. I exclude overpayments cases (e.g., student loans), tort claims, real property, antitrust, bankruptcy, and prisoner petitions.

49. There were 4,363 "Other U.S. Civil" appeals for 1990, 40% of which is 1,745, or 67% of the 2,578 direct appeals nationwide. 1990 AO REPORT, *supra* note 23, table B-1.

50. Adding 40% of the Circuit's "Other U.S. Civil" appeals (166 of 415) to its 696 direct agency appeals totals 862, or 20% of the 4,323 administrative law cases nationwide. *Id.* Although administrative cases loom large in the D.C. Circuit, they account for only about 10% of the total caseload of the courts of appeals. Nationwide, there were 40,898 cases filed in 1990; 2,578 were administrative appeals. Adding 40% of the other U.S. civil cases (or 1,745 of 4,363) to the direct appeals would total about 10.5% of the docket. *Id.* Shunting some or all of them to other fora would reduce existing workload pressures but would not alone provide a long-term structural solution to the docket crisis. Hence, although current caseload pressures may provide the occasion for restructuring administrative review as part of a larger reorganization of the federal courts, the particular measures chosen for the administrative cases need not be primarily caseload-driven.

51. Traditionally, the Circuit exercised substantial local jurisdiction under Congress' power to legislate for the District of Columbia. U.S. CONST., art. I, § 8, cl. 17. In 1970, Congress eliminated that jurisdiction. District of Columbia Court Reform & Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 570 (1970); see *Palmore v. United States*, 411 U.S. 389 (1973).

lation of entry and prices in certain industries.⁵² Under the new statutes, the D.C. Circuit is always an eligible review venue and often an exclusive one.⁵³ Today, about fifty percent of the Circuit's docket involves administrative law.⁵⁴

Regulatory proceedings can readily produce administrative records of 10,000 pages or more, filled with conflicting material on technical issues of fact and policy. A judge must struggle just to understand the technical issues—evaluating the soundness of their resolution by the agency and deciding how far to probe are harder still.⁵⁵ Accordingly, D.C. Circuit judges decide fewer cases than do others: about 115 per year per judge, compared to a national average of 225.⁵⁶

Large administrative records not only take more time to master, but also engender longer judicial opinions.⁵⁷ By 1985, the D.C. Circuit's opinions were more than sixty percent longer than the average for the courts of appeals, with rulemaking and ratemaking cases accounting for most of the difference.⁵⁸ As these figures imply, the most complex and controversial administrative law cases cluster in the Circuit.⁵⁹ To offset these burdens, the judges have learned to skim quickly through briefs, appendices, and records for the important material.⁶⁰

52. C. SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 9–12 (1977); Lilley & Miller, *The New "Social Regulation"*, 47 *PUB. INTEREST* 49 (1977).

53. See G. BERMANT, P. LOMBARD & C. SERON, *THE CASES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT* app. A (1982) (table showing the Circuit's exclusive and shared jurisdiction).

54. In 1990, administrative appeals were 696 of 1,705 filings, or 41%; including 40% of the "Other U.S. Civil" cases coming from district court would add another 166, for a total of 50.5%. 1990 AO REPORT, *supra* note 23, table B-1.

55. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Wald, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 *GEO. WASH. L. REV.* 135 (1982); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 *CORNELL L. REV.* 375 (1974).

56. Wald, Verkuil, Rabkin, Cutler, Bonfield & Susman, *The Contribution of the D.C. Circuit to Administrative Law*, 40 *ADMIN. L. REV.* 507, 512–13 (1988) [hereinafter Panel] (remarks of Judge Wald).

57. R. POSNER, *supra* note 25, at 118.

58. Schuck & Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 *DUKE L.J.* 984, 1003, 1070.

59. G. BERMANT, P. LOMBARD & C. SERON, *supra* note 53, at 3–4, 43 (45% of all "high burden" agency cases are filed in the D.C. Circuit).

60. Panel, *supra* note 56, at 514 (also noting that because the Circuit's relationship to government counsel is relatively close due to repeat appearances, the resulting dialogue may feature more candor and cogency than one between strangers).

3. The Effects of Judicial Decentralization on Litigant Behavior

Notwithstanding the partial concentration of administrative litigation in Washington, D.C., most of the cases are scattered throughout the nation. In a decentralized system, uncertainty and slack affect both private and public litigants. Those challenging agency action possess both opportunities and incentives to engage in forum shopping. Private litigants amply displayed their perception of the value of a hospitable forum in the recently restricted "race to the courthouse."⁶¹ A statute provided that when multiple petitions for review of agency action were filed, the first eligible circuit court to receive a petition gained jurisdiction.⁶² Litigants anxious to vest review in particular circuits engaged in undignified (but ingenious) scrambles to be the first to file. These scrambles better suited the Oklahoma land rush than appellate litigation.⁶³ Congress finally set up a lottery system to stop the embarrassing races.⁶⁴ The effects of the statute, though, are mostly to improve decorum. Because the underlying incentives to seek a friendly forum are unchanged, litigants still file appeals in desired fora, hoping to win the lottery.⁶⁵

In ordinary litigation, forum shopping is not an unmitigated evil. Indeed, the plaintiff's opportunity to select venue is thought a natural and legitimate advantage, within bounds. To some extent, the same considerations apply in administrative law. Some plaintiffs who sue the government at home are simply pursuing the convenience that Congress intended to ensure. Still, as races to the courthouse show, influencing the outcome is a frequent goal.⁶⁶ A challenger will not choose a forum that has upheld an agency on a crucial issue, or that seems likely to do so.

For most agencies, private forum shopping creates real disadvantages. Successive challengers may seek review in many regional

61. See McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 304-05 (1980); Act of Jan. 8, 1988, Pub. L. No. 100-236, 101 Stat. 1731 (1988) (codified at 28 U.S.C. § 2112(a) (Supp. 1989)) (implementing Administrative Conference Recommendation for Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action, 1 C.F.R. § 305.80-5 (1985)).

62. Of course, the courts retained their usual power to transfer the case to promote convenience, but litigation often ensued over that decision. McGarity, *supra* note 61, at 332-42.

63. See *id.* at 319-22 for a vivid example, in which jurisdiction was timed to hundredths of a second.

64. Act of Jan. 8, 1988, Pub. L. No. 100-236, 101 Stat. 1731 (1988) (amending 28 U.S.C. § 2112(a)(3) (1988)).

65. See Note, *supra* note 41, at 1739-40, for more examples of forum shopping.

66. This purpose is evident whenever a litigant files in a forum that is inconvenient.

circuits until they find one which is hospitable to their claim. Litigants seeking convenience may add to the dispersal of review that attends strategic behavior. Agencies that limit their own venue choice find themselves at a strategic disadvantage, especially against wealthy parties who are able to travel to a forum thought hospitable.⁶⁷ Consequently, an agency seeking to administer its statutory programs in a nationally uniform fashion is likely to face skewed or conflicting interpretations of its duties from the various circuits.

Agencies have increasingly responded by refusing to "acquiesce" in court orders issued below the Supreme Court level. Of course, agencies honor court orders for the litigating parties; nonacquiescence is the refusal to accord them any broader effect. This practice raises fundamental questions about the locus of responsibility for conforming administrative decisions to statutory requisites.⁶⁸ Courts can proclaim that "it is emphatically the province and duty of the judicial department to say what the law is."⁶⁹ Agencies can respond that a decentralized judicial system is incapable of announcing a single rule of law until the Supreme Court speaks.

The Court, acceding to its own limitations, indirectly supported nonacquiescence in *United States v. Mendoza*.⁷⁰ It unanimously refused to estop the government from relitigating issues it had lost in lower court cases against other parties.⁷¹ The Court feared "freezing the first final decision,"⁷² by which one district judge or (more likely) one panel of circuit judges could bind the nation. Instead, the Court favored the percolation that occurs

67. Estreicher & Revesz, *supra* note 39, at 764-70.

68. Nonacquiescence has spawned a large body of recent literature. See Diller & Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Reply to Estreicher & Revesz*, 99 YALE L.J. 801 (1990); Eichel, "Respectful Disagreement": *Nonacquiescence by Federal Administrative Agencies in United States Court of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463 (1985); Estreicher & Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990); Estreicher & Revesz, *supra* note 39; Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986); Schwartz, *Nonacquiescence*, Crowell v. Benson, and Administrative Adjudication, 77 GEO. L.J. 1815 (1989).

69. *E.g.*, Lopez v. Heckler, 725 F.2d 1489, 1497 n.5 (9th Cir.), *vacated and remanded*, 469 U.S. 1082 (1984) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

70. 464 U.S. 154 (1984).

71. Mendoza's support for nonacquiescence is indirect because an agency could conform its policy to an adverse ruling while seeking relitigation, although a suitable case would become harder to generate. In a companion case, *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984), the Court did estop the government from relitigating an issue it had lost in another circuit against the same party.

72. *Mendoza*, 464 U.S. at 160.

through litigation in multiple forums.⁷³ As the courts of appeals produce conflict or consensus on an issue, the Court discovers where to exercise its certiorari jurisdiction. Thus, judicial decentralization offsets its costs to uniformity with the contributions that diversity and competition make to development of the law.⁷⁴

Mendoza implies the legitimacy of intercircuit nonacquiescence, under which a loss in one circuit does not cause an agency to change its internal policy while it attempts to relitigate the issue elsewhere. If an agency were forced to conform its policy nationwide to the first adverse court ruling, it would lose the benefit of any subsequent victories, would be compelled to implement a policy which it disfavored (and which it would jettison at the first opportunity), and would experience difficulty relitigating the issue.⁷⁵ The alternative of requiring an agency to press for Supreme Court review of the first adverse decision would be little better. The case might be a poor vehicle for review. In any event, neither the Solicitor General nor the Supreme Court would likely favor the loss of an opportunity to resolve the issue by further lower court litigation.⁷⁶

Far more controversial is intracircuit nonacquiescence, by which an agency refuses to alter its policy within a circuit that has declared it illegal.⁷⁷ At times this practice is a product of broad venue—at the time of administrative decision, it is unclear where review will occur. Yet some agencies persist in nonacquiescence when venue will certainly be in a court that has already disapproved their policies. Not surprisingly, considerable judicial hostility often results.⁷⁸ Agencies respond that they are avoiding the inequality that results from administering the law differently in various circuits.⁷⁹ Also, there could be substantial inefficiencies from regionalizing policy. On the other hand, intracircuit nonacquiescence creates another inequality, between those who are wealthy enough

73. Nevertheless, for litigation, as for coffee, percolation can go on too long. See *supra* note 29.

74. R. POSNER, *supra* note 25, at 163.

75. See Estreicher & Revesz, *supra* note 39, at 735–41.

76. See Strauss, *supra* note 19, at 1109.

77. See Estreicher & Revesz, *supra* note 39, at 743–53 (discussing intracircuit nonacquiescence by agencies).

78. E.g., *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983), *aff'd in part and rev'd in part*, 725 F.2d 1489 (9th Cir.) (*preliminary injunction aff'd*), *vacated and remanded*, 469 U.S. 1082 (1984).

79. E.g., *Social Security Disability Insurance Program: Hearing Before the Senate Comm. on Finance*, 98th Cong., 2d Sess. 115 (1984); Uretz, *The Chief Counsel's Policy Regarding Acquiescence and Nonacquiescence in Tax Court Cases*, 14 TAX COUNS. Q. 129, 139 (1970).

to appeal agency orders (and receive nearly automatic reversals) and those who are not. Because wealth-based inequalities seem less justifiable than territorial ones, intracircuit nonacquiescence may be tolerable only as an interim measure while an agency seeks Supreme Court resolution of the issue.⁸⁰

The controversy that surrounds intracircuit nonacquiescence should not obscure its unusual nature. Few agencies openly practice it.⁸¹ For administrative law as a whole, intercourt nonacquiescence is much more significant, because it occurs frequently enough to fragment the law. The practice is a corollary of the absence of intercourt stare decisis.⁸² If the circuit courts will not treat each other's decisions as binding, why should an agency?⁸³ *Mendoza's* endorsement of percolation shows why stare decisis does not cross circuit lines. Indeed, stare decisis is shaky even within a circuit—panels are known to treat one another's decisions uncharitably.⁸⁴ To some extent, inconsistencies within (and among) appellate courts are irremediable, because there are inherent limits to the capacity of any collective decisionmakers to achieve consistency.⁸⁵ Until an en banc decision intervenes, then, agencies know that even intracircuit nonacquiescence is not wholly futile, especially if a case appears that presents a good vehicle for review.

What resolves nonacquiescence situations, if the Supreme Court cannot always do so? Most agencies take an ad hoc approach to relitigation and give up after a series of reverses.⁸⁶ Yet because persistence in the face of defeat in the courts of appeals sometimes

80. See Estreicher & Revesz, *supra* note 39, at 743–53.

81. See *id.* at 694, 713, 717–18 (identifying the agencies that practice intracircuit nonacquiescence as the Social Security Administration (SSA), the Federal Labor Relations Authority, the Federal Trade Commission, the Merit Systems Protection Board, and the Internal Revenue Service). The SSA has since changed its policy. It issues an "Acquiescence Ruling" following a circuit court decision at variance with its policy, announcing how the SSA will implement the decision in the circuit and reserving its right to appeal or relitigate. 20 C.F.R. §§ 404.985, 410.670C, 416.485 (1991).

82. See generally Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 413 (1972) (discussing lack of intercourt stare decisis).

83. For positions favoring intercourt stare decisis, see *Keasler v. United States*, 766 F.2d 1227 (8th Cir. 1985); *Divine v. Commissioner*, 500 F.2d 1041, 1049 (2d Cir. 1974); Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 87 YALE L.J. 1219 (1978).

84. See, e.g., *Field v. Trump*, 850 F.2d 938, 950 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Action for Children's Television v. FCC*, 564 F.2d 458, 474–77 (D.C. Cir. 1977).

85. Cf. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (showing that inconsistency is inevitable in the Supreme Court's decisions).

86. Estreicher & Revesz, *supra* note 39, at 713–18; see also Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 HOUS. L. REV. 1101,

leads to victory in the Supreme Court,⁸⁷ agencies have an incentive to undergo considerable abuse from reviewing courts as the price of keeping an issue alive. In the interim, policy remains uncertain and citizens receive unequal (not to say mystifying) treatment at the hands of the two branches.

Thus, the decentralization of judicial review vitiates the uniformity of administrative law. Agency nonacquiescence and private forum shopping exacerbate the problem. The resulting uncertainty about the law can only breed more litigation.

II. JUDICIAL PERSPECTIVE ON ADMINISTRATIVE PROBLEMS

Because each agency is centrally organized, it has an overall grasp of its programs and priorities that is unavailable to a court reviewing one of its decisions. Consequently, judicial review constantly risks impairing agency operations. To some extent, this problem inheres in the nature of American law. Litigation considers only fragments of larger social problems. Moreover, in the federal courts longstanding constitutional doctrines that define the parameters of justiciable cases have pressed courts to consider only those issues directly presented in the controversy at hand.

The creation of specialized courts can alleviate perspective problems caused by limited information. Even if each case presents only a small part of an agency's responsibilities, time will bring the full spectrum of issues before the court. Yet specialization introduces perspective problems of its own, as we shall see.

Although the regional courts of appeals are all theoretically generalists, variations in their administrative law caseload produce differing degrees of actual specialization. Decentralized venue means that reviewing courts will retain a generalist perspective, because administrative cases comprise only a small portion of a diverse docket. Centralized venue creates *de facto* specialization by enriching the diet of administrative cases. Hence the geographical distribution of cases affects the relationship of reviewing courts with particular agencies, as a brief overview of some typical agency programs will show.

1104 (1974) (reporting a Justice Department policy forbidding relitigation after three unanimous defeats in the courts of appeals).

87. *E.g.*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

A. *Degrees of Court Centralization and the Nature of Judicial Review*

The Social Security Administration's (SSA) disability benefits program exemplifies the federal government's massive social welfare "entitlements" programs. An agency that must struggle to control its own elaborate bureaucracy confronts highly decentralized judicial review. Not surprisingly, the courts are unable to meld their many voices into a coherent set of commands that can realistically hope to compete with the SSA for control of program administration.⁸⁸ Here, judicial review is at its least powerful and least helpful.

Each year, SSA considers well over a million new claims for benefits and holds over 200,000 hearings before administrative law judges (ALJs) to determine whether claimants are too disabled to work.⁸⁹ After the SSA's Appeals Council makes the agency's final decisions, judicial review begins in the district courts, and now totals about 7500 cases per year.⁹⁰ These cases are spread around the nation.⁹¹ As the statistics reveal, judicial review touches only a tiny fraction of SSA orders. Frequently the issue is the case-specific one of whether substantial evidence supports the agency decision; no programmatic question arises. Nor is there any way for a court to inform the particular bureau within SSA whose decision it overturns that an error has been made or to provide incentives to change the bureau's behavior.⁹² What does affect decisions in the lower reaches of the bureaucracy is the agency's own monitoring activity—internal quality review of decisions,⁹³ regulations of general applicability, budget and staffing levels, and the like.

88. J. MASHAW, *BUREAUCRATIC JUSTICE, MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 185-90 (1983); see also J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, *SOCIAL SECURITY HEARINGS AND APPEALS* (1978).

89. SOCIAL SEC. ADMIN., *EXECUTIVE HANDBOOK OF SELECTED DATA* 25, 30 (1986).

90. 1990 AO REPORT, *supra* note 23, table C-2 (7,048, including SSI). For a report of the large recent fluctuations in these cases, see Galanter, *The Life and Times of the Big Six: Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 929-31.

91. 1990 AO REPORT, *supra* note 23, table C-3.

92. Koch & Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U.L. REV. 199, 261 (1990).

93. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 791-804 (1974).

Faced with constant, nationwide judicial review and a massive federal and state bureaucracy to supervise, SSA formerly chose to administer its statute uniformly. Thus, SSA's nonacquiescence extended to intracircuit cases,⁹⁴ producing regular clashes with courts that had invalidated some aspect of its program.⁹⁵ After a storm of controversy in the early 1980s, SSA abandoned its nonacquiescence policy.⁹⁶

Judicial review is hampered by the court's exposure to slices of very complex and subtle issues about agency management. For example, the need to process many thousands of disability cases requires the agency to make delicate tradeoffs between the accuracy of any particular decision and the efficiency with which it can handle them all.⁹⁷ Any lawsuit that attempted to monitor the program as a whole would likely run afoul of doctrines of standing or reviewability.⁹⁸

In decentralized review of high-volume programs, the federal courts are at a great disadvantage. They cannot be sure that their review of individual orders promotes consistent outcomes because they do not see the cases in bulk as the agency does. Nor can they review agency policy surehandedly. The courts can, however, perform two seemingly modest tasks that are nonetheless critical to the legitimacy of the program. They can assure that the substance of the agency's policy is rational and consistent with the statute.⁹⁹ And they can review the agency's procedures for compliance with due process.¹⁰⁰

94. Estreicher & Revesz, *supra* note 39, at 692-704.

95. See Strauss, *supra* note 19, at 1112-13.

96. See *supra* note 81.

97. The Supreme Court has recognized the significance of this problem. See *Heckler v. Campbell*, 461 U.S. 458, 468 (1983).

98. See *Allen v. Wright*, 468 U.S. 737 (1984).

99. See generally Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 557 (1985) (discussing the hard look doctrine); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 203-05 (arguing that deregulation, like regulation, is subject to judicial review).

100. The leading case, *Mathews v. Eldridge*, 424 U.S. 319 (1976), arose in the disability program. This case requires a court to balance three factors. First, it must consider the strength of private interest that will be affected by the official action. Second, it must weigh the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Finally, it must examine the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 340-49. See generally J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 107-08 (1985) (discussing the *Mathews* factors and their application).

By contrast, the Federal Communications Commission provides an example of an agency whose policies have been deeply influenced by relatively centralized judicial review.¹⁰¹ Since 1934, the FCC, acting largely through adjudication, has fleshed out a bare statutory command to issue broadcast licenses in the "public interest, convenience and necessity."¹⁰² The courts have felt themselves on firm ground in reviewing agency action, partly because of the relatively limited number of licensing proceedings and the nontechnical nature of many issues in broadcast regulation (such as the fairness doctrine).

Also aiding close judicial control is the almost total concentration of FCC litigation in the Court of Appeals for the D.C. Circuit.¹⁰³ Review of certain important FCC orders, such as license denials, is vested exclusively in that court by statute.¹⁰⁴ Practical considerations that also bring cases to the D.C. Circuit include the concentration of the communications bar in Washington and the court's reputation for comparative strictness with the agency.¹⁰⁵ The district courts, hearing few cases, have played a comparatively minor role, with a consequent increase in the centralization of review.¹⁰⁶

The relationship of the courts with the FCC has sometimes been described as a "partnership," a term that would not spring to mind for their relationship with the SSA.¹⁰⁷ By turns, the courts

101. A great deal of both communications law and administrative law has resulted. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971). See generally L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 167-90 (1987) (discussing the courts' relationship with the FCC).

102. 47 U.S.C. § 307(e)(1) (1988).

103. In 1989, 82 of the nation's 85 appeals of FCC decisions were filed in the D.C. Circuit. 1989 AO REPORT, *supra* note 45, table S-1.

104. 47 U.S.C. § 402(b) (1988). Review of many other orders is placed in the courts of appeals generally. *Id.* § 402(a). An exception exists for orders imposing monetary penalties, which are reviewable in the district courts. *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977).

105. See Robinson, *The Judicial Role*, in *COMMUNICATIONS FOR TOMORROW: POLICY PERSPECTIVES FOR THE 1980s*, 415, 416 (G. Robinson ed. 1978).

106. For an exception, see *Writers Guild, West, Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

107. The term originated in Judge Leventhal's opinion in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971). The term is criticized as blurring the distinctiveness of the judicial role in Robinson, *supra* note 105, at 419-20; see also Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books*, 75 COLUM. L. REV. 800 (1975).

have endorsed broad FCC discretion,¹⁰⁸ prodded it to exercise that discretion in the public interest,¹⁰⁹ and curtailed perceived abuses.¹¹⁰ Responding to the perceived intrusiveness of review, the FCC has sometimes resisted unpalatable court orders.¹¹¹ The FCC and the D.C. Circuit have engaged in prolonged squabbles over format regulation and the criteria for license renewal.¹¹² The pattern of FCC nonacquiescence in the orders of its primary reviewer shows that interbranch tensions can offset centralization in the judiciary,¹¹³ even though the FCC is much more amenable to judicial oversight than is the SSA.

The effects of a partly centralized and partly decentralized system of judicial review are shown by the Environmental Protection Agency's early administration of the Clean Air Act.¹¹⁴ The division of review responsibilities between the district and appellate courts undermined the formation of coherent policy under the Act.¹¹⁵ EPA's regulations are reviewed in the courts of appeals, usually the D.C. Circuit.¹¹⁶ In a series of decisions favorable to environmentalists, the relatively centralized appellate courts successfully pressed EPA to adopt strict national standards. Enforcement of these standards, however, occurred in civil actions brought by EPA in the decentralized district courts. Here factors of cost and feasibility that the appellate courts would not countenance led to decisions favoring affected industries by easing strict compliance with the standards.¹¹⁷ The overall effect was to foster regulatory standards

108. *NBC v. United States*, 319 U.S. 190 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

109. *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953).

110. *E.g.*, *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

111. *See, e.g.*, *ITT World Communications, Inc. v. FCC*, 635 F.2d 32, 43 (2d Cir. 1980).

112. The stories are told in G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 31, at 325-49, 396-412.

113. The FCC has denied that it has a policy of nonacquiescence. *Estreicher & Revesz, supra* note 39, at 717.

114. 42 U.S.C. §§ 7401-7642 (1988).

115. Unless otherwise noted, the conclusions in this paragraph are drawn from R. MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* ch. 10 (1983).

116. In 1989, 99 of 141 appeals of EPA decisions were filed in the D.C. Circuit; the next largest number of filings in a particular circuit was 9. 1989 AO REPORT, *supra* note 45, table S-1.

117. The Supreme Court supported this dual approach in *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976).

whose promises far outstripped their performance.¹¹⁸ Although well aware of the difficulty of understanding technical issues, courts were poorly situated to understand administrative issues about this complicated program because each level of the lower courts saw only a portion of the issues relevant to administering the program.¹¹⁹

These three agency programs have suffered in different ways from the structure of judicial review. The SSA, facing extremely decentralized review, has tried to impose its own statutory order at the cost of threatening the rule of law, yet without an obviously better alternative in sight. The courts, seeing glimpses of a giant bureaucracy, have been unable to improve the SSA's overall operation significantly.

In sharp contrast, the FCC, facing quite centralized judicial review, has acquired an unwanted "partner" in the D.C. Circuit. The relationship has revealed the potential for a court to become too familiar with an agency and its policies. A court that reviews most of an agency's actions can easily see itself as an overall monitor of agency action, aping (and usurping) that role of Congress and the executive.¹²⁰ It is difficult, however, to know whether the Circuit's review has been too stringent. The FCC has had a reputation for excessive responsiveness to the broadcast industry and to congressional committees.¹²¹ Perhaps the Circuit, trying to break those ties, has improved FCC performance. Nevertheless, the FCC has been willing—and sometimes able—to resist even a centralized reviewer that was not final.

For the EPA, the division of authority between trial and appellate courts has been mirrored by differences in judicial perspectives. Poor lines of communication between courts reviewing different stages of agency action have created artificial gaps in program administration. Also, even partial concentration of appellate review

118. R. MELNICK, *supra* note 115, at 345 ("The narrow focus of the adjudicatory process has allowed courts hearing enforcement cases to ignore their effect on air quality and courts hearing cases on general policy to ignore questions of cost and feasibility. Decentralization has prevented the courts from taking a more unified view of the regulatory process and the public interest.").

119. *Id.* at 388, 393; see G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 31, at 624-50 (illustrative case study involving regulation of powerplant emissions). The case is extensively analyzed in B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

120. In *Allen v. Wright*, 468 U.S. 737 (1984), the Court, invoking separation of powers principles, emphatically rejected such a role for the federal courts.

121. L. POWE, *supra* note 101, ch. 10.

has not prevented inconsistent judicial directives to the EPA that have burdened its operation.¹²²

B. *Doctrinal Effects of the Structure of Judicial Review*

The structure of judicial review has produced a struggle over administrative law doctrine between the semi-specialized Court of Appeals for the D.C. Circuit and the generalized Supreme Court. The relationship between the Circuit and the Court has been uneasy, and often unpleasant, for years.¹²³ The Court has taken—and reversed—substantially more cases from the D.C. Circuit than from others.¹²⁴ Repeatedly, the Court has disapproved what it perceived as overly stringent review by the Circuit.¹²⁵ In this relationship between an angry principal and an unruly agent, both parties deserve blame—and praise.

A simple explanation for the persistent clashes between these courts is ideological—that a group of liberal judges on the court of appeals lost touch with a more conservative Court.¹²⁶ This difference between the courts has eroded with turnover on the Circuit. Ideology does appear to account for some of the disparity in outlook between the two courts in the cases discussed below. Unfortunately, it cannot be isolated from influences stemming from the differing responsibilities of the two courts. Although specialization may encourage activist review, its impact may be swamped by the predilections a judge brings to the bench. Hence it is not possible to assign a single cause for the clash.

122. See *infra* text accompanying note 137.

123. See Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

124. Panel, *supra* note 56, at 507; Note, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048 (1984).

125. The landmark cases discussed in the text below, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*infra* text accompanying notes 135–148), *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (*infra* text accompanying notes 151–160), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (*infra* text accompanying notes 149–150) all rebuked the Circuit for infringing agency discretion. See also *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983). On the other hand, the Court has also reversed the Circuit for restricting standing to challenge agency action. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *UAW v. Brock*, 477 U.S. 274 (1986).

126. See Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 304; Note, *supra* note 124, at 1048. But see Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985).

As Justice Scalia has put it, "[a]s a practical matter, the D.C. Circuit is something of a resident manager, and the Supreme Court an absentee landlord" in administrative law.¹²⁷ Although the D.C. Circuit is drawn from a more national pool of nominees than are the other regional circuits,¹²⁸ it works "inside the beltway" in a city suffused with information about federal government operations. Life in the capital, together with a docket heavy in administrative law, encourages the judges to believe they are best situated among reviewing courts to perceive emerging administrative law issues, detect questionable patterns of agency behavior, and produce informed opinions.¹²⁹

The Supreme Court, also residing in the capital, may regard itself as the Circuit's equal in understanding government. The Court may perceive that its more comprehensive docket produces a sounder perspective on the place of regulation in the nation's life. Thus, Court generalists display impatience with what appears to be tunnel vision and meddling by Circuit specialists. For their part, the specialists may find the generalists too busy to develop an understanding of the "real" problems.

The Supreme Court also has an institutional responsibility for the operation of the federal courts that tends to produce conflict with the Circuit. As with ideology, it is difficult to isolate the effects of this difference between the courts from the effects of specialization. The Court often crafts doctrine that a decentralized judiciary can apply with minimum disruption to the agencies, whether or not that doctrine is the best way for a particular court to review an agency decision.¹³⁰

The Circuit struggled throughout the 1970s and '80s to discharge its administrative review functions capably. In doing so, it displayed the experimental style of a specialist looking for the best way to perform repetitive functions, a style easy to reconcile with the common law tradition of our judicially generated administrative law doctrines. For the Circuit, the vexing issues have concerned review of rulemaking and informal adjudication. The APA provides only rudimentary procedures for rulemaking and none at all

127. Scalia, *supra* note 123, at 371.

128. Other circuits gain some local flavor from the requirement that district judges reside in their district, and from the practice of executive consultation of a state's senators in choosing both district and circuit judges.

129. See Panel, *supra* note 56, at 512 (remarks of Chief Judge Wald, claiming these attributes for the Circuit, but not claiming comparative advantage over the Supreme Court).

130. This thesis is persuasively advanced by Strauss, *supra* note 19.

for informal adjudication; for neither function does it define a record for judicial review. The Supreme Court's directive in *Citizens to Preserve Overton Park, Inc. v. Volpe*¹³¹ to review these actions on the administrative record under the APA's generic "arbitrariness" scope of review¹³² led to extended lower court experimentation, especially in the D.C. Circuit.

The Circuit found itself in a position of leadership both in defining the scope of review and in applying it to new and dauntingly complex agency functions. Both tasks were formidable. *Overton Park*, like a bad general, issued cryptic marching orders.¹³³ Showing a poor grasp of the problems before it, the Supreme Court did not clearly define either the administrative record that courts were to review or the meaning of arbitrariness review. So the Circuit has done its best, producing some opinions that very thoughtfully explore the issues.¹³⁴ Episodically, the Supreme Court has intervened with correctives, often in unfairly harsh terms.

In three landmark cases the Court has reversed the Circuit for engaging in unduly intrusive review. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹³⁵ the Court instructed reviewing courts to defer strongly to an agency's interpretation of its statute. The case involved the EPA's "bubble" approach to air pollution control, which allows the aggregation of emissions from separate facilities within the same factory, so that increases from one facility can be offset by decreases from another.¹³⁶ Two courts of appeals, demonstrating the disadvantages of decentralization, had disagreed on the legality of the bubble, forbidding the approach in one part of Clean Air Act administration but requiring it in another. The resulting difficulties for EPA may have spurred the Supreme Court to diminish lower court authority to interpret stat-

131. 401 U.S. 402 (1971).

132. 5 U.S.C. § 706(2)(A) (1988).

133. See Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975); Pedersen, *supra* note 12, at 62-64.

134. E.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-36 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976).

135. 467 U.S. 837, 844-45 (1984); see also *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985). See generally Pierce, *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988) (suggesting a "strong" reading of *Chevron*).

136. See generally Landau, *Chevron, U.S.A. v. NRDC: The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 ENVTL. L. 285 (1985) (supporting EPA's approach).

utes. The Court called for a two-part inquiry.¹³⁷ First, courts are to determine whether "Congress has directly spoken to the precise question at issue"¹³⁸ in the text or legislative history of the statute. If so, of course Congress's will must govern. If not, the second inquiry is whether the agency interpretation is "reasonable."¹³⁹ If so, the court must defer to it.

The *Chevron* test reduces the potential for inconsistent interpretations of statutes by the lower courts precisely where they are most likely to occur—on doubtful issues of law.¹⁴⁰ Instead, the agency's nationally uniform policy will prevail. *Chevron* itself involved a technical issue imbedded in a complex statutory scheme. Here, as the courts of appeals had inadvertently demonstrated, law and policy tend to intertwine in ways that cause decentralized judicial review to risk undue interference with administration. It is easy for any one reviewing court to focus on the issues at hand and ignore the effect on the agency of independent statutory interpretations by the other circuits.

Nevertheless, *Chevron*'s approach is oversimplified. Administrators rarely fly in the face of clear statutory text or legislative history. In the interstices, where most litigated policies lie, the courts (including the Supreme Court) have routinely decided difficult issues of statutory interpretation that depend on the overall structure and purposes of the statute. On these issues, the courts have sometimes deferred to agency interpretation, and sometimes not.¹⁴¹ The apparent inconsistencies may reflect not only judicial indiscipline but also variations in the appropriate judicial approach to particular statutes.¹⁴²

The D.C. Circuit's specialization has immersed it in a series of complex and important regulatory controversies, often in the shadow of strict, "agency-forcing" statutes.¹⁴³ Certainly, repeat litigation has made the Circuit familiar with statutes as complex as the Clean Air Act. Perhaps, in a way that specialization invites, the

137. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 285 (1986).

138. *Chevron*, 467 U.S. at 842.

139. *Id.* at 845.

140. Strauss, *supra* note 19, at 1121-22.

141. See generally G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 31, at 155-57 (discussing variations in deference).

142. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

143. See generally B. ACKERMAN & W. HASSLER, *supra* note 119 (comparing these statutes with the broad delegations that typified the New Deal era).

Circuit has drifted into an active role of enforcing the "spirit" of these statutes, instead of limiting itself to reconciling agency action with policies found in statutory text, structure, and history. A generalist court may provide a better buffer between government and the regulated.¹⁴⁴ Thus, the Supreme Court, well aware of its own unfamiliarity with complex statutory schemes, has sometimes urged caution in reviewing their administration.¹⁴⁵

A much less deferential approach might be appropriate, however, for nontechnical subject matter or statutes intended to curb agency abuses. If *Chevron* means that lower courts must defer strongly regardless of the context, it may disable needed review.¹⁴⁶ Thus, institutional considerations suggest that lower courts may resist *Chevron*'s instructions, especially when the courts are specialized enough to acquire familiarity with particular statutes. In the immediate wake of *Chevron*, agency affirmance rates did rise substantially in the courts of appeals.¹⁴⁷ But they eventually sank back toward preceding levels.¹⁴⁸

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,¹⁴⁹ the Supreme Court sharply rebuked the D.C. Circuit for requiring agencies to adopt rulemaking procedures not prescribed by statute. The Court, condemning what it perceived as procedural tinkering, emphasized the resulting unpredictability of judicial review and its tendency to force agencies to increase procedural formality in self-defense. Yet the Court left the door open for substantive remands that could encourage agencies to engage in similar defensive formality, this time through elaborate justification of even minor substantive decisions.¹⁵⁰

This apparent anomaly was confirmed in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,¹⁵¹ in which the Court ratified a strict, "hard look" review of the substantive rationality of agency policy that had developed in

144. R. POSNER, *supra* note 25, at 155, 159.

145. Strauss, *supra* note 19, at 1126-29; see, e.g., *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984).

146. Later cases reveal some concern within the Court over *Chevron*'s simplicities. See, e.g., *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

147. Schuck & Elliott, *supra* note 58, at 1029-42.

148. *Id.*

149. 435 U.S. 519 (1978).

150. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

151. 463 U.S. 29 (1983).

the D.C. Circuit.¹⁵² *State Farm* instructed lower courts to probe the factual and policy bases of agency decisions to ensure that they are persuasively supported by the administrative record. Lower court judges have complained that while *Chevron* disables them from the law-interpreting function that they are suited to perform, *State Farm* mandates an inquiry into agency policy that will often exceed their competence.¹⁵³ The Court's management responsibilities may explain the apparent inconsistency. *State Farm* allows stringent review when varying lower court instructions to an agency have limited effects on overall agency programs. Invalidation of a particular rule for arbitrariness does not directly affect other aspects of administration in the way that a statutory interpretation usually does. Therefore, misapplication of the Court's test is less likely than conflicting interpretations of the statute to disrupt agency programs.¹⁵⁴ *Vermont Yankee* invites a similar explanation. A lower court order to an agency to employ a procedure not found in any statute would send ripples to other statutory programs of a roughly similar nature that are administered by numerous agencies.

Yet the *Vermont Yankee* Court's nightmares afflict *State Farm* too. First, review is unpredictable, because some reviewing courts will overstep their role by substituting their judgment for that of the agency. Second, agencies must pad their records and explanatory documents to avoid remands for insufficiently considering some issue that becomes important only through advocates' arguments on appeal. It is possible that "hard look" review has constricted agency policymaking, even driving some agencies to avoid rulemaking in favor of the supposedly more burdensome procedures of adjudication.¹⁵⁵ Agency affirmance rates in the courts of appeals are substantially higher for adjudication than for rulemaking.¹⁵⁶

152. Although the Court endorsed a relatively strict form of substantive review that the D.C. Circuit had led in developing, it disapproved the Circuit's use of an even stricter test for some deregulatory actions. See Garland, *supra* note 99; Sunstein, *supra* note 99.

153. E.g., Breyer, *supra* note 142, at 397.

154. Strauss, *supra* note 19, at 1129-31. Of course, one should not minimize the possible disruption of an agency's mission that is caused by remand of an especially important matter, such as the passive restraints regulation in *State Farm*. Years of effort can go to waste.

155. Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987); Pierce, *supra* note 126. The presence of rulemaking review by OMB may also have this effect. See generally Bruff, *supra* note 17 (discussing the OMB review program).

156. Schuck & Elliott, *supra* note 58, at 1021-22 (60% of adjudications affirmed; 40% of rulemakings affirmed in one recent period). These aggregate figures must be

Having developed hard look review, the specialized Circuit might be expected to be insufficiently attentive to its costs. Yet *State Farm* provided the generalist Court a poor opportunity to detect such costs, since the agency's record entirely failed to address a major issue, the suitability of mandatory restraints such as airbags. The Supreme Court, with its episodic exposure to administrative law, is vulnerable to perspectives presented by particular cases, whatever the bulk of them would show. And the Court is poorly situated to reconcile cases that appear to present distinct issues but actually have similar potential impacts on agencies, unless litigants call the Court's attention to the connection.

Doctrinal effects may flow not only from the Court's generalist nature and limited review capacity, but also from its concern with overall caseloads in the federal courts. This concern may have contributed to recent decisions restricting standing to seek review,¹⁵⁷ expanding implied preclusion of review,¹⁵⁸ and holding that agency decisions not to take enforcement actions are presumptively unreviewable.¹⁵⁹ The D.C. Circuit seems to have caught the spirit, and has taken a newly strict approach to these threshold issues.¹⁶⁰

Perhaps we can adjust the structure of judicial review to allow administrative law doctrine to develop free of the distorting influences that have affected both the Circuit and the Court as well as the inconsistencies inherent in decentralization. Part III proposes remedies for these problems.

III. STRUCTURAL REMEDIES

A. *Methods for Centralizing Judicial Decisions*

As we have seen, conflicting decisions can arise both within and among the circuits. The actual amount of intracircuit conflict is debatable. Nevertheless, litigant perception that panels disagree is enough to foster repeat litigation.¹⁶¹ Moreover, without direct

approached with caution, however, because many of the remands are partial or minor in nature.

157. *E.g.*, *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

158. *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984).

159. *Heckler v. Chaney*, 470 U.S. 821 (1985).

160. Panel, *supra* note 56, at 524-25 (remarks of Chief Judge Wald).

161. See Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343 (1979) (surveying judges and attorneys and reporting perceptions of substantial conflicts).

disagreements, a series of panel decisions can create sufficient legal disarray to engender litigation-producing uncertainty.¹⁶²

The traditional response to intracircuit conflict is en banc procedure.¹⁶³ Unfortunately, the disincentives to holding en banc hearings are considerable and increase with the size of the circuit.¹⁶⁴ These proceedings are very difficult to convene and to administer.¹⁶⁵ Extraordinary amounts of time and effort must be devoted to considering whether to grant review, assembling the judges, discussing the decision, and circulating opinions.¹⁶⁶

Consequently, en banc proceedings are rare today—they comprise less than one percent of court of appeals decisions.¹⁶⁷ Ironically, the Supreme Court reviews more court of appeals panel decisions than do all the circuits sitting en banc.¹⁶⁸ Surely, more than one percent of appellate decisions merit more than a panel's attention. This is especially true in large circuits, since intracircuit conflicts become more likely as the number of judges increases.¹⁶⁹ The D.C. Circuit's twelve judges can be combined into 220 panels; the Ninth Circuit's twenty-eight judges, into 3,276.¹⁷⁰ Obviously, a court the size of the Ninth Circuit is extremely cumbersome.¹⁷¹ A uniform "law of the circuit" becomes very difficult to secure.

Accordingly, the courts of appeals have begun to experiment with simplified procedures for promoting uniformity, such as the

162. See Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 595 (1989) (surveying Ninth Circuit cases and finding much disarray but little actual conflict).

163. En banc review occurs when ordered by a majority of the active judges in a circuit. 28 U.S.C. § 46(c) (1988). Its purposes are "to secure or maintain uniformity of . . . decision" or to consider "a question of exceptional importance." FED. R. APP. P. 35(a).

164. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 4, at 161–63, 200–02.

165. For complaints of the Ninth Circuit judges about the difficulty of holding en banc proceedings, stated when that circuit was about half its present size, see Wasby, *supra* note 161, at 1364–66.

166. *Id.* at 1365–66.

167. Solimine, *Ideology and En Banc Review*, 67 N.C.L. REV. 29, 46 (1988).

168. ABA REPORT, *supra* note 20, at 25.

169. COMMISSION ON REVISION OF THE FED. COURT APPELLATE SYS., *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* 57–59 (1975), reprinted in 67 F.R.D. 195, 264–66 (1976) [hereinafter *RECOMMENDATIONS FOR CHANGE*].

170. ABA REPORT, *supra* note 20, at 25–26 (noting that these figures are understated because they omit the frequent presence of senior or visiting judges).

171. See generally J. CECIL, *ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT* (1985) (discussing problems that prompted the Ninth Circuit to reform its procedures).

circulation of draft panel opinions that might create either a conflict or an important precedent to the rest of the judges for review and comment.¹⁷² Such informal procedures dampen disagreement through norms of collegiality, which are reinforced by each judge's awareness that the cooperation of others will be necessary in the future. Clearly, though, substantial amounts of slack remain in the system, allowing panels to depart from preferences that the whole circuit would display.¹⁷³

When they do occur, en banc hearings do not necessarily serve their purposes of curing conflict and deciding important questions clearly—en banc decisions are much more likely than panel decisions to produce fragmented opinions.¹⁷⁴ In a recent period, two thirds of D.C. Circuit en banc decisions contained a dissent; the rate for the Circuit's panel decisions was about six percent.¹⁷⁵ The Circuit tends to use en banc procedure to decide important issues rather than to resolve conflicting precedents.¹⁷⁶ Understandable as it is, this practice preserves disuniformity in the law and probably accounts for some disharmony as well, as judges become unwilling to suppress their differences in important cases. Also, the size of a court matters—the number of separate agreements necessary to produce unanimity rises exponentially as the number of deciders increases.¹⁷⁷

These difficulties have led to statutory authorization for limited en banc review.¹⁷⁸ Any circuit having fifteen or more members may employ any number of judges prescribed by local rule in place of the usual practice of using all active judges.¹⁷⁹ The Ninth Circuit has implemented this authority by providing for en banc hearings of eleven judges, consisting of the chief judge and ten others drawn by lot. The Circuit's implementation has led to a doubling of its en

172. Bennett & Pembroke, "Mini" In Banc Proceedings: A Survey of Circuit Practices, 34 CLEV. ST. L. REV. 531, 544-57 (1986); see also Hellman, *supra* note 162, at 547.

173. See Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82, 107-15 (1986) (arguing that the decisions of multimember courts may be consistent while lacking logical coherence).

174. Solimine, *supra* note 167, at 46-47.

175. Bennett & Pembroke, *supra* note 172, at 541.

176. *Id.* at 537 (surveying cases). The Ninth Circuit appears to follow the same practice. See Hellman, *supra* note 162, at 549.

177. R. POSNER, *supra* note 25, at 14.

178. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 4, at 203-04.

179. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (codified at 28 U.S.C. § 46 (1988)).

banc decisions and a halving of the time from their submission to decision (from 349 to 175 days).¹⁸⁰

Limited en banc review alleviates problems of appellate court size, but it does not cure them. Instability inheres in any review by less than a full court, since the excluded voices may later be heard in panel decisions that resist the circuit's law or even try to overturn the first outcome.¹⁸¹ These defections from a limited en banc decision could have a compensating advantage by signaling the Supreme Court that an issue merits its attention. Since a panel will usually hide its defections, however, a dissent pointing out the inconsistency may be needed to attract outside attention. In any event, stability and efficiency act in opposition as one considers the optimum proportion of a court to employ: the inefficiency of larger numbers is offset by the stability of decision gained by approaching the participation of the full court.

Whatever the success of the courts in minimizing intracircuit conflict through limited en banc procedures, problems of intercircuit conflict will remain. And it is the effects of our regional scheme of court organization that most hamper the development of uniform administrative law. Here too, reform proposals abound. These focus on ameliorating the overall effects of decentralization on our national law, not merely the administrative cases.¹⁸²

In particular, debate has focussed upon proposals to create a national court of appeals to relieve the Supreme Court of some of its burdens by resolving conflicts among the circuits. Advanced in variant forms by the Freund Committee,¹⁸³ the Hruska Commis-

180. J. CECIL, *supra* note 171, at 43.

181. As of 1985, the Ninth Circuit had yet to invoke its procedure for reconsideration of a limited en banc decision by the full court. *Id.* The stability of these decisions may be aided by the Circuit's requirement that all active judges vote on whether to hold a limited en banc hearing. Also, judges on a limited panel appear to feel an obligation to consult the other judges in an effort to assure the acceptability of their product. *Id.* at 44.

182. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225 (1985). For a series of imaginative possibilities, outlined but not advocated, see STUDY COMMITTEE REPORT, *supra* note 20, at 116-24. See also ABA REPORT, *supra* note 20, at 10-24.

183. The Committee recommended a seven member court staffed by circuit judges serving staggered three year terms; the court would be empowered to screen petitions for Supreme Court review, refer some to the Court, review others itself, and dismiss the rest. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (Federal Judicial Center 1972), reprinted in 57 F.R.D. 573 (1973). For a sampling of the resulting controversy, see 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3510, at 46 n.9 (1984); Hufstедler, *Bad Recipes for Good Cooks—Indigestible Reforms of the Judiciary*, 27 ARIZ. L. REV. 785, 795-800 (1985);

sion,¹⁸⁴ and Chief Justice Burger,¹⁸⁵ the idea has yet to prevail or die.¹⁸⁶ The Federal Courts Study Committee, made cautious by the criticism that met broader proposals, has advanced an experimental model¹⁸⁷ under which the Supreme Court would refer selected cases to en banc courts of appeals, chosen on a random basis, for decisions that would be nationally binding (if the Court let them stand).

Criticisms of these proposals have centered on several predicted problems.¹⁸⁸ Adding another layer of review could delay federal litigation while offering little improvement in the law's stability (if rotating panels are used). The prestige of the courts of appeals could erode due to their perceived demotion, lowering the quality of prospective circuit judges. The Supreme Court's workload could increase by screening cases for the new court and monitoring its activity closely.

If a new layer of review is to be avoided, a structural means to promote uniformity of decision in each of the circuits is subject matter organization.¹⁸⁹ The court could be divided into permanent panels of manageable size (e.g., five, seven), each with a perma-

Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 914 n.9 (1983); Note, *Congressional Prerogatives, the Constitution and a National Court of Appeals*, 5 HASTINGS CONST. L.Q. 715, 716 n.7 (1978).

184. Responding to criticism that the Freund proposal would divest the Supreme Court of control over its docket, the Commission recommended a national court of appeals staffed permanently with seven Article III judges; the court would decide cases referred to it by the Supreme Court or a court of appeals. RECOMMENDATIONS FOR CHANGE, *supra* note 169, 5-39, 67 F.R.D. at 208-47. For commentary, see Haworth & Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REF. 201, 206-08 (1979); Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327 (1976); Note, *supra* note 183, at 739-44.

185. Drawing on earlier bills considered in Congress, Burger proposed an Intercircuit Panel to be composed of one judge from each of the thirteen courts of appeals; the court would hear cases involving conflicts between circuits referred to it by the Supreme Court. W. BURGER, 1985 YEAR-END REPORT ON THE JUDICIARY 13; Burger, *The Time Is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86, 88. The proposal was favored by Baker & McFarland, *supra* note 26, at 1416, and opposed by Ginsburg & Huber, *supra* note 37, at 1435.

186. For discussions of these and other studies and proposals, see S. ESTREICHER & J. SEXTON, *supra* note 27, at 15-31; Baker, *supra* note 182, at 238-43.

187. STUDY COMMITTEE REPORT, *supra* note 20, at 125-29.

188. See S. ESTREICHER & J. SEXTON, *supra* note 27, at 111-15, for a summary of these problems.

189. This paragraph summarizes a scheme advocated in Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REF. 471 (1983). See also P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 4, at 167-84; Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989) [hereinafter Meador, *Challenge*].

nently assigned jurisdiction that is diverse enough to be interesting. The judges would rotate among the panels at a rate designed to balance stability of decision with freshness of viewpoint. This would preserve judicial generalization because a particular judge eventually would exercise all of the court's jurisdiction.

Used in Europe, subject matter organization appeared in the United States in modified form in 1982 with the creation of the Court of Appeals for the Federal Circuit (CAFC).¹⁹⁰ Congress combined a number of specialized fora in an effort to create a court with "a varied docket spanning a broad range of legal issues."¹⁹¹ The CAFC, whose jurisdiction includes patents, international trade, claims against the government, and personnel matters,¹⁹² shows some early signs of success.¹⁹³

Nearly two decades of crisis and debate have confirmed that judicial reform is "no sport for the short-winded." With the prospects for overall restructuring of the judiciary still uncertain, I focus here on the narrower, but still important, needs of administrative law.

Existing proposals that the courts of appeals be reorganized on a subject matter basis to relieve docket pressure¹⁹⁴ can be adapted to further the coordination of administrative law. If exclusive venue for cases arising under designated statutes were assigned to each of the regional courts of appeals, it would be possible to articulate uniform national law short of the Supreme Court. Existing concentrations in the caseload suggest how this could be done. For example, securities cases tend to gather in the Second Circuit,¹⁹⁵ immigration appeals in the Ninth.¹⁹⁶ A circuit having responsibility for interpreting a set of statutes could be expected to develop substantial expertise about them.¹⁹⁷ This remedy also has the virtue of relative simplicity.

190. Federal Courts Improvements Act, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in scattered sections of 28 U.S.C.).

191. H.R. REP. NO. 312, 97th Cong., 1st Sess. 19 (1981).

192. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1126 n.65 (1990).

193. See Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989) (concluding that CAFC's patent jurisdiction shows signs of success).

194. See *supra* text accompanying notes 189-193.

195. Meador, *Challenge*, *supra* note 189, at 614.

196. 1989 AO REPORT, *supra* note 45, table S-1 (154 of 285).

197. See McGarity, *supra* note 61, at 365-67 (noting this effect could follow use of the transfer mechanism to concentrate cases).

Several difficulties would ensue, however. First, allocation of statutes to particular circuits would be a politically charged event, as interest groups shopped in advance for a favorable forum. The stakes would be high because it would be necessary to allocate substantially all cases arising under a particular statute to a single court to achieve coordination.¹⁹⁸ For example, where should the Endangered Species Act be assigned—to the Ninth Circuit, currently the locale of a standoff between environmentalists and loggers,¹⁹⁹ or to the D.C. Circuit, relatively insulated from local political pressure?

Moreover, once statutory allocations were decided, appointments to the regional circuits could be skewed by interest group pressure. To offset this tendency, it would be necessary to ensure a rich enough mix of jurisdiction for each circuit to generalize its docket. The administrative law cases could be varied by assigning unrelated statutes affecting disparate interests, for example by mixing entitlements and regulatory statutes. Some sacrifice in expertise would result, though. It should be possible to prevent the administrative cases from dominating any regional court's docket because they comprise only about ten percent of the total caseload and most of the regional circuits are about the same size.²⁰⁰ Thus, the size of the courts would not be altered, but the regional circuits would receive no caseload relief.

Another disadvantage of subject matter organization would be inconvenience. Most litigants would have to travel, except to the extent that statutory allocations reflected natural concentrations in the caseload (for example, securities cases in the Second Circuit). Hence this method of coordination would impose substantial burdens on litigants, perhaps unnecessarily and unfairly deterring appeals in routine cases of small money value. However, there would be some compensating gains for the courts, since forcing all appellate cases arising under a particular statute into one forum would ensure judicial familiarity with issues of administration and would promote judicial efficiency by maximizing expertise. Nevertheless, coordination is most needed only for the fraction of the cases that present major issues of statutory interpretation or that result from forum shopping.

198. Coordination could not be complete without bifurcating litigation, because some cases raise issues under more than one statute. Instead of bifurcation, existing lottery procedures for assigning cases filed in more than one circuit could be adapted to the allocation of complex cases. See *supra* note 64.

199. See *supra* note 22.

200. Except for the First Circuit (6 judges) and the Ninth (28), all the regional circuits have between 10 and 17 judges. See 28 U.S.C. § 44(a) (1988).

B. *Specialized Review: An Administrative Court?*

Specialized courts present a tantalizing, yet ultimately disappointing, prospect to the judicial reformer.²⁰¹ Although they can redress all of the systemic ills that I have identified so far, they do so at a price that has led Congress to be sparing in their use. Nevertheless, there has been sufficient experience with these courts so that their general benefits and costs are well known.²⁰²

First, specialized courts relieve the caseload burdens of other courts, perhaps substantially. Shunting all administrative cases from federal court would alleviate, but not eliminate, the current caseload crisis, since such cases comprise only ten percent of the docket. Gauging workload relief is not, however, a matter of simply counting filings shifted from one court to another. What matters is the amount of time and effort spared the judges. As the experience of the D.C. Circuit shows, major administrative law cases impose exceptional burdens on the courts. Yet devotion of scarce resources to these cases implies their importance and counsels caution in diverting them.

Second, specialized judges can become expert in the substantive and procedural issues surrounding particular programs, especially highly technical ones. More accurate decisions should result. Expertise can take several forms. Some subjects draw on extralegal training, for example, the use of engineering and science in patents or environmental law. Much of this sort of expertise relates to issues of fact and policy. Although it would not be efficient for generalized courts to emphasize expensive training in the background of their judges or staff, the opposite may be true of specialized courts. Legal expertise, as in tax, may depend on long study of a complex body of law. Here also, a generalized court may waste knowledge that a specialized one could seek—or could develop through exposure to its docket.

Third, because of their expertise and a limited caseload, specialized courts can produce expeditious decisions. As in Adam Smith's pin factory, division of labor avoids wasteful duplication of

201. The discussion in this section of the general benefits and costs of specialized courts substantially repeats the analysis in Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330-32 (1991).

202. The general considerations that I outline in text are explored in R. POSNER, *supra* note 25, at 147-60; Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 63-71 (1975); Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377, 377-84; Jordan, *Specialized Courts: A Choice?*, 76 NW. U.L. REV. 745, 747-48 (1981); Revesz, *supra* note 192, at 1116-21.

training for specialized tasks. And the number of judges can be adjusted to the historical caseload. There is, however, some special vulnerability to exogenous factors affecting the underlying controversies. For example, a special court for bank fraud would have been sleepy in the seventies and inundated in the eighties.

Finally, specialized courts reduce or eliminate intercourt conflicts, promoting a uniform national body of law. They have traditionally been established in response to a perceived rise in conflicting court orders, uncertainty about the law, and forum shopping. The goal of decreasing intercourt conflict carries special importance now that caseloads have effectively decentralized the federal courts by reducing the likelihood of Supreme Court review of most court of appeals decisions. A single, specialized court can articulate a consistent body of law in a way that thirteen courts of appeals cannot.

A primary cost of specialization is loss of the generalist perspective. A premise of our nation's usual resort to courts of general jurisdiction is that sound decisionmaking results from exposure to a wide range of problems, rather than from initiation into an arcane set of mysteries. Generalization has two related benefits. Exposure to loosely related legal issues may produce new insights. More often, a wider perspective aids judgment by forestalling the exaggerated sense of importance that long immersion may lend to some social problem. A broadened perspective may be especially important for those who review the action of bureaucracies that are themselves narrowly focused.

Also, specialization may diminish the prestige of a court. The fear persists that a specialist court will be staffed by lower caliber judges, drones who can tolerate life in the pin factory. Part of a court's success in obtaining compliance with its mandates flows from the respect others have for it. And depending on the subject matter that is segregated, there is also a risk of impairing the remaining generalist courts by leaving them with less interesting fare.

Specialization can produce bias problems in two ways. First, the appointments process may be distorted as nominees are selected and confirmed for their views on specific issues. Pressure on the appointing authority will come from two sources. Interest groups affected by the court's decisions will have a strong incentive to advance their allies. Agencies reviewed by the court will proclaim the understanding and eminence of their own alumni. Even if initially disinclined to lobby for favorable appointments, both interest groups and agencies may be driven to adopt such behavior to offset

the activities of the other. The pool of eligible candidates may seem limited to a quite narrow group of former agency staff and a specialized segment of the bar. To the extent that qualifications for the court converge with those for the principal executive positions in the agency reviewed, excessive convergence of perspective in agency and court may also occur. These problems of litmus tests and limited pools do not usually confront generalist courts.

Second, specialization can distort application of the review standard. Growing expertise may lead courts to substitute their judgment for that of an agency, creating an overly dominant oversight body. On the other hand, such a court can become too friendly with an agency that it reviews regularly or with interests that dominate it. Moreover, it is difficult for those monitoring the court from outside, for example in Congress, to identify these effects. Although gross rates of reversal may be suggestive, the frame of reference is suspect. For example, a high rate of reversal compared to generalist courts with similar responsibilities (if there are any) may mean that review is too stringent or only that the agency is unusually inept.

1. Administrative Court Proposals

From the New Deal through the early 1960s, administrative lawyers advanced recurrent proposals for specialized courts to exercise original rather than review jurisdiction. The purpose was to strip agencies of their adjudicative responsibilities and to vest them in one or more administrative courts. Proponents have included elements of the American Bar Association,²⁰³ members of the early Attorney General's Committee on Administrative Procedure,²⁰⁴ the presidential Hoover Commission,²⁰⁵ and certain prominent members of independent regulatory agencies.²⁰⁶ Unconvinced of the

203. See Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966, 971 (1936).

204. ATTORNEY GEN. COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 186, 76th Cong., 3d Sess. 203-12 (1941).

205. COMMISSION ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, REPORT TO THE CONGRESS ON LEGAL SERVICES AND PROCEDURE 84-88 (1955); see also TASK FORCE ON LEGAL SERV. & PROCEDURE, COMMISSION ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, REPORT ON LEGAL SERVICES AND PROCEDURE 1-50 (1955). For a critique, see Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U. L. REV. 1273, 1283-89 (1955).

206. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Minow, *Suggestions for Improvement of the Administrative Process*, 15 ADMIN. L. REV. 146 (1963). For critiques, see Auerbach, *Some Thoughts on*

fairness of agency adjudication, these critics charged that agencies insufficiently insulated adjudicators from contacts with prosecutorial and policy-making personnel.²⁰⁷ As a maturing administrative law has improved separation of functions protections,²⁰⁸ the rationale for these proposals has weakened.²⁰⁹ Moreover, it is increasingly clear that many agencies need both rulemaking and adjudication at their disposal to make effective policy.

The 1971 Ash Council Report contained an odd variant of the earlier proposals: it proposed a single administrative court to review decisions of independent agencies in transportation, power, and securities matters.²¹⁰ Although the court was to be formally limited to review of agency adjudication, very short deadlines for administrative action made it likely to displace original agency discretion in practice. With so narrow a jurisdiction yet so invasive a charter, this proposal met fatal opposition.²¹¹

An approach that is broader than that of the Ash Council, yet still selective, can be envisioned. A new administrative court could take on most or all existing review responsibilities of the federal courts.²¹² Such a court could take a variety of forms.²¹³ It could include agencies administering major health and safety regulation and some aspects of traditional economic regulation, but not high

the Hector Memorandum, 1960 WIS. L. REV. 183; Cary, *Why I Oppose the Divorce of the Judicial Function from the Federal Regulatory Agencies*, 51 A.B.A. J. 33 (1965).

207. H. FRIENDLY, *supra* note 42, at 179-80.

208. See generally Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981) (surveying current agency separation of functions).

209. Since separation of functions remains incomplete, however, these proposals persist; e.g., Marquardt & Wheat, *The Developing Concept of an Administrative Court*, 33 ADMIN. L. REV. 301 (1981).

210. PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORG., *NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES* (1971).

211. See the influential *Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization*, in 2 ADMINISTRATIVE CONFERENCE OF THE U.S., *RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES* 27 (1973). See also Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996 (1971), for especially withering criticism. Actually the court appeared to be a half-baked afterthought to a broader government reorganization proposal that had defects of its own. The reorganization is trenchantly criticized in Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947 (1971).

212. See H. FRIENDLY, *supra* note 42, at 183-89, for an outline of such a court and a suggestion that it be considered in the future.

213. For example, specialist or generalist judges could be selected; they could join the court by designation or on rotation; panels could be allocated particular subject matter; they could ride circuit. Currie & Goodman, *supra* note 202, at 75-76.

volume adjudicatory programs in which the need for separate review or a local forum is strong, such as social security.²¹⁴

There is reason, however, to oppose the creation of an administrative court with restricted jurisdiction. Consider the environmental court proposal that arose as environmental law burst on the scene in the 1970s.²¹⁵ The proposal died after the Nixon administration persuasively objected that the jurisdiction of any specialized court should be broad enough to reduce special interest pressure on appointments, to avoid judicial overfamiliarity with the issues and the litigants, and to keep the court's prestige high.²¹⁶ We should not mourn the environmental court idea or its analogues. Regulation in fields such as environmental quality, nuclear safety, labor relations, and occupational health and safety leads individuals to align themselves with one side or another. A specialized court assigned to any of these fields would probably suffer from wars over appointments and cynicism about decisions. The fact that agencies such as EPA and OSHA have jurisdiction over many industries is not likely to matter very much. The relevant political dispositions—favoring the environment or growth, workers or management—could still be sought in nominees and could be expected to transcend particular industries affected by the agency.

2. The Nature of an Administrative Court

An administrative court with wide review jurisdiction could capture some advantages and avoid some disadvantages of specialization. First, even though administrative cases are not a major portion of federal court caseloads, a specialized court with broad jurisdiction would maximize the relief provided. The offsetting disadvantage is that the potential for judges to develop substantive expertise in particular programs diminishes as the court's jurisdiction broadens. Still, there are similarities, often close ones, among federal programs. Congress, pressed for time, often borrows yester-

214. See *id.* at 78–82 for an outline but not an endorsement of such a scheme.

215. Legislation mandated a study. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 9, 86 Stat. 816, 899 (codified as amended at 33 U.S.C. §§ 1251–1387 (1988)). See Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973).

216. PRESIDENT, ACTING THROUGH THE ATTORNEY GEN., REPORT ON THE FEASIBILITY OF ESTABLISHING AN ENVIRONMENTAL COURT SYSTEM (1973); see also Hines & Nathanson, Preliminary Analysis of Environmental Court Proposal Suggested in the Federal Water Pollution Control Act Amendments of 1972, reprinted in PRESIDENT *supra*, app. C.

day's approach for today's statute.²¹⁷ For example, regulatory schemes often follow a "cooperative federalism" model; entitlement programs also have parallel structures. Moreover, there is a rapidly expanding body of literature on such generally applicable subjects as statutory interpretation²¹⁸ and theories of regulation.²¹⁹ Finally, restricted expertise has its advantages for a court—a certain distance from the agency and its programs is desirable. Somewhere there is a happy medium between knowledge and coziness.

The APA's standards for substantive review require courts to determine whether formal agency adjudications are supported by "substantial evidence," or whether rulemaking and informal adjudications are "arbitrary [or] capricious."²²⁰ These standards are difficult to apply confidently—the subtleties involved have spawned a voluminous literature.²²¹ Reading or deciding a lot of cases seems to be the only way to grasp these terms of art. Thus, a specialized court could bring valuable expertise to administrative law.

In addition to the subtleties attending the APA's review standards, special difficulties arise in reviewing technically based regulatory decisions. I touched on this topic above in conjunction with the D.C. Circuit's struggles to develop methods to review such programs. A specialized court could concentrate the benefits of such a process of trial and error and Congress could provide it technical assistance that other courts do not need.

On the procedural side, gains from specialization appear to be substantial. Insights about process that are gained under one program often transfer readily to another.²²² Although the APA's procedures are relatively simple and straightforward, after more than forty years of interpretation the spare text of the statute has accumulated a considerable body of case law that applies to most agencies. There are other government-wide statutes that appear regularly in administrative litigation, such as the Freedom of Infor-

217. For example, the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)), were closely modeled on the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (current version at 42 U.S.C. §§ 7401-7642 (1988)).

218. *E.g.*, W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 569-828 (1988).

219. See Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* (R. Noll ed. 1985).

220. 5 U.S.C. § 706 (2)(A), (E) (1988).

221. For example, our casebook devotes about 60 pages to the scope of review, and many later pages consider refinements. G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 31, at 141-200. The effect is to exhaust the students but not the topic.

222. See Nathanson, *supra* note 211, at 1013.

mation Act,²²³ the Privacy Act,²²⁴ the Government in the Sunshine Act,²²⁵ and the Equal Access to Justice Act.²²⁶ Also, the framework for constitutional due process analysis is universal.²²⁷

A government-wide administrative court should be able to avoid problems in the appointments process. Ranging over many agencies and industries, the court would consider a rich mix of issues. The simplest available litmus tests for appointees would probably be whether they were favorable or hostile to the government or to regulation, but at this level of generality such an inquiry approaches the usual consideration of general political orientation. Also, the subject matter should be interesting and important enough to attract highly able nominees, as the roster of the D.C. Circuit confirms.

Another primary advantage of a general administrative court would be its contribution to uniform national law. Exclusive venue could produce clearer legal doctrine by reducing the cacophony of judicial voices articulating it. Eventually, litigation should diminish as counseling and settlement become less uncertain. Doctrinal distortions that have resulted from decentralized review could evaporate. Agency nonacquiescence and private forum shopping could be squelched.

A cost of concentrated review would be loss of the opportunity for issues to percolate through various courts. Still, the difficulties of obtaining consistency within a circuit allow some percolation even there. The Supreme Court might even find it easier to monitor a single font of administrative law rather than thirteen, although the signaling effect of splits in the circuits would be lost. Certainly the Court has proved its capacity to supervise the D.C. Circuit closely.

Jurisdictional overlap between an administrative court and others would be difficult to eliminate entirely (for example, for constitutional issues). The critical jurisdictional need is to centralize interpretation of each affected agency's organic statute, because that is where disuniformity problems arise. Here, overlap can be minimized by ensuring that jurisdiction over all suits in which issues about administration regularly arise—pre-enforcement challenges,

223. 5 U.S.C. § 552 (1988). See generally Robinson, *Access to Government Information: The American Experience*, 14 FED. L. REV. 35 (1983).

224. 5 U.S.C. § 552(a) (1988).

225. *Id.* § 552(b) (1988).

226. Act of Aug. 5, 1985, Pub. L. No. 99-80, 99 Stat. 183 (codified at 5 U.S.C. § 504 & 28 U.S.C. § 2412 (1988)). See generally Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 ARIZ. ST. L.J. 229 (1987).

227. Currie & Goodman, *supra* note 202, at 73-74.

direct appeals, and enforcement defenses—is conferred on one court. As we saw with the EPA, separating review of the various stages of agency action can create clashing judicial perspectives on administrative problems, hampering the formation of sound law and policy. A centralizing statute should refer specifically to the particular agencies and actions that are included.

Issues within a specialized forum's competence that arise in other litigation, for example as defenses, can be shunted to it. A statute now authorizes the transfer of an action that is filed in a federal court lacking jurisdiction to the proper forum.²²⁸ Enacted as part of the legislation that created the Court of Appeals for the Federal Circuit, this provision was intended to relieve jurisdictional confusion in administrative law generally.²²⁹ Unhappily, it has not fully succeeded in resolving jurisdictional problems even within the CAFC. That court has taken a cautious view of its own jurisdiction, thereby allowing cases raising issues pertinent to it to remain in others.²³⁰

It would be undesirable, however, to bifurcate litigation by assigning administrative law issues to the specialized court and leaving other issues elsewhere. Unhappy past experiences with this approach suggest that the entire litigation should transfer or remain, depending on its center of gravity.²³¹ If this approach is taken, current statistics on the numbers of administrative law cases would understate the new court's potential caseload, since some cases not now denominated as administrative law would be transferred to the court. And some administrative law issues would remain outside the court's purview, although probably not a sufficient number to pose a serious threat to unification of the law.

The greatest obstacles to creation of a specialized administrative court, however, would be the added inconvenience to litigants and the court's large size. These issues are best considered in conjunction with the obvious candidate for conversion to an administrative court, the D.C. Circuit.

The exact size needed for an administrative court is uncertain. The nationwide total of administrative law cases approaches the

228. 28 U.S.C. § 1631 (1988).

229. S. REP. NO. 275, 97th Cong., 1st Sess. 11 (1981), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 11.

230. *See* Dreyfuss, *supra* note 193, at 30–37.

231. *See* Dreyfuss, *supra* note 202, at 412–14 (reporting jurisdictional problems of the Temporary Emergency Court of Appeals).

caseload of the Ninth Circuit, which has twenty-eight judges.²³² Yet the D.C. Circuit's judges presently handle only half the caseload of their colleagues due to the concentration of time-consuming administrative cases in Washington. Perhaps enough of the most complex administrative cases are already in the Circuit so that adding the others would not require a doubling of the court's size for a numerically equal caseload. Also, the docket could be reduced by shunting some high-volume district court litigation that usually does not present programmatic issues, such as immigration and social security matters, to specialized fora.²³³ But the savings from that transfer would not be very great. Let us assume, then, that the D.C. Circuit could become a national administrative court by dropping the rest of its caseload and expanding to a size comparable to that of the Ninth Circuit.

Several serious disadvantages would attend creation of such a court. First, as I have noted, centralized review creates the potential for a court to become either overbearing or uncritical. The D.C. Circuit is far more open to charges of the former sin than the latter, but time can alter relationships in unpredictable ways. True, a court knowing that it has almost complete control of an agency's fortunes can become too much the senior partner, as the D.C. Circuit may have been to the FCC. On the other hand, repeat relationships can build cooperation and trust,²³⁴ undermining judicial neutrality. At the least, the new court could have a diet overrich in administrative law—it would lose the generalist perspective and leavening effect provided by the Circuit's other cases.

A second major disadvantage of the new court would be inconvenience to litigants. Of course, the current concentration of administrative law cases in Washington is partly voluntary, given the usual presence of venue choice. Yet for some litigation, the inconvenience that originally led Congress to provide venue outside the District of Columbia would be manifest. If all litigants had to

232. In 1990, the Ninth Circuit received 6,787 filings of all kinds. 1990 AO REPORT, *supra* note 23, table B-1. That year, there were 4,323 administrative cases in the eleven regional courts of appeals and the D.C. Circuit. The Federal Circuit adds another 1,466, for a total of 5,789. Nationwide, there were 40,898 cases filed in 1990; 2,578 were administrative appeals. Adding 40% of the other U.S. civil cases (or 1,745 of 4,364) to the direct appeals would total about 10.5% of the docket. *Id.*

233. See Bruff, *supra* note 201.

234. See Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). See generally R. AXELROD, THE EVOLUTION OF COOPERATION (1984) (explaining that cooperation is fostered by repeated interactions).

travel to Washington, the rich would enjoy a comparative advantage.²³⁵ So, too, would agencies that tend to decide cases of small money value, however important the cases may be to persons affected. To alleviate these fairness problems, some circuit-riding plan might be attempted, such as periodic sittings in a few major cities. However, circuit-riding might require a further increase in the number of judges.

Finally, a court the size of the Ninth Circuit must struggle to maintain consistency. A court charged with promulgating uniform national law would have heightened responsibilities in this regard. As noted above, resort to limited en banc procedures can alleviate but not cure this problem.

The disadvantages of overcentralization, inconvenience, and cumbersomeness appear to doom proposals for a national administrative court.²³⁶ Part IV considers whether we can reap most of the advantages of centralized, specialized review while avoiding most of the disadvantages. Several innovative structures are possible. I next consider three related methods to achieve partial coordination of the administrative cases, in search of a system more flexible and less subject to political abuses than is subject matter organization.

IV. A COORDINATING COURT FOR ADMINISTRATIVE LAW

Any institution for coordinating administrative law should have the optimum level of familiarity with problems of administration and law, the practical capacity to monitor administrative law developments in the regional circuits, and the credible power to mold a uniform national law (subject to Supreme Court supervision). No institution will discharge such daunting functions perfectly, but we should be able to improve on present conditions.

Congress could establish any of three mechanisms on an experimental basis. First, the D.C. Circuit could provide limited en banc reconsideration of any administrative law panel decision in any regional circuit. Second, a special national panel of federal judges could discharge the same function. Third, a national panel could decide which regional decisions merit further review and could assign them to limited en banc review in a designated circuit. I recommend this last option.

235. Dreyfuss, *supra* note 202, at 421.

236. STUDY COMMITTEE REPORT, *supra* note 20, at 72-73 (criticizing consolidated review of federal administrative agency orders).

The three mechanisms considered here would have several essential features in common. Any published panel decision in a regional circuit that involves administrative law would be eligible for review. Any party could petition; the government would be required to do so or to acquiesce in the panel ruling. The decision whether review should be granted would require no materials beyond the panel opinion and a short and plain statement of its importance and deficiency. The power to grant review would be committed to the unreviewable discretion of the screening court, to avoid jurisdictional litigation. Review would be by a number of judges representing the optimal balance between efficiency and stability of decision. The result would bind the nation, pending possible Supreme Court review.

At present, there are about 5,800 administrative law decisions per year in the courts of appeals. The number of petitions for review might be proportionate to those now filed for en banc rehearing of all decisions in the appellate courts. In 1985-87, about thirteen percent of panel decisions nationwide produced rehearing requests.²³⁷ Yet in the D.C. Circuit, the figures were forty-six percent in 1985, seventeen percent in 1986, and nineteen percent in 1987.²³⁸ Occurring at the close of a period of turbulence in the Circuit,²³⁹ the very high number for 1985 might be disregarded as aberrational. Even so, a figure approaching twenty percent is significantly above the national average. The high rate may reflect the concentration of important administrative cases in the D.C. Circuit, or may constitute an informal poll of attorneys' perceptions of circuit homogeneity. If the latter is the case, the D.C. Circuit's recent reputation for discord has produced procedural burdens for the judges.

Let us suppose that about 1,000 petitions for review would reach the court annually. If all were accepted, a caseload similar to the D.C. Circuit's current administrative law docket would emerge. Presumably, however, the court would control its docket as the Supreme Court does, granting petitions that impress a specified number of judges. In that way the court could view the emerging landscape of administrative law and decide where to concentrate review efforts.

237. Solimine, *supra* note 167, at 47.

238. *Id.* Other circuits also displayed substantial divergence from the average (e.g., the Third hovered around 25%; the Second stayed under 10%).

239. See *supra* text accompanying note 126.

Such docket control would be not only desirable but necessary. Not all panel decisions that displease the litigants merit review. Also, a new reviewing entity could attract a much higher rate of petitions than the regional circuits receive for en banc review. At present, petitioning may be chilled by attorney awareness of the rarity of en banc review.²⁴⁰ If the coordinating court accepted a substantial proportion of petitions, it would provide an incentive to appeal. Moreover, an opportunity for forum shopping would arise. A losing party trapped in an unfavorable regional circuit might like nothing better than to escape to any differently constituted review forum.

Accordingly, one should not underestimate the review court's potential volume of petitions. The court might somewhat reduce their number by adhering to a policy of granting review only in cases that present important statutory issues or an opportunity for the court to deter forum shopping. Still, processing 1,000 petitions per year would entail substantial administrative burdens, although lesser ones than the Supreme Court endures.²⁴¹ It would be necessary to use staff attorneys or law clerks to evaluate the petitions and recommend to the judges which ones should be accepted. This particular bureaucratic feature of the federal courts receives a bad press nowadays;²⁴² it could be ameliorated by hiring persons experienced in administrative law or having sufficient tenure with the court to promote good judgment.

How many cases should the reviewing court hear and decide? Each D.C. Circuit judge, burdened by large administrative controversies, now hears about 115 cases per year. Mutually offsetting factors suggest that this might be a fair estimate of a single coordinating panel's ultimate capacity. Unlike the D.C. Circuit, the court would receive no relief from unimportant cases that can quickly be decided. On the other hand, it could avoid the single most time-consuming task in modern administrative law—searching massive records to see whether there is sufficient support for an agency's conclusions of fact and policy. The coordinating court should focus on broader issues of law and process, which involve less drudgery to decide.

240. But it is not chilled very much. There is a 13% request rate for such review nationwide, even though the review rate is only 1%.

241. In 1982, the Court received about 5,000 requests for review. S. ESTREICHER & J. SEXTON, *supra* note 27, at 1.

242. *E.g.*, ABA REPORT, *supra* note 20, at 36–38; R. POSNER, *supra* note 25, at 102–19.

Disposition of 100 cases per year would quadruple the present capacity of the Supreme Court to coordinate administrative law.²⁴³ Acceptance of one in ten petitions for review should allow the court to control the most important developments in the regional circuits. Some percolation in the circuits could precede the court's decision of an important issue. Review capacity would not be confined by the docket limitations of a single panel, however, if the coordinating entity were made large enough to break into separate panels, or if it were to assign cases to regional circuits for decision. If the latter system were adopted, overall caseloads in the circuits would provide the ceiling to review capacity.

A. *The D.C. Circuit as Coordinating Court*

At the threshold, comity problems with designating one circuit to review the product of others might doom use of the D.C. Circuit as a coordinating court.²⁴⁴ The fear would be of creating a Supercircuit, instantly reducing former equals elsewhere to Circuit Judges, Junior Grade. Moreover, D.C. Circuit judges might feel uncomfortable supervising their colleagues. Yet for four reasons, I think these obstacles could be overcome. First, all concerned should realize that there is a quid pro quo for the regional circuits—the creation of a mechanism that could stop government nonacquiescence in their decisions and fundamentally increase judicial power over the agencies. The government could reasonably be expected to seek review in the D.C. Circuit or to acquiesce in a panel decision.²⁴⁵ It is not realistic to expect the government to seek certiorari automatically. Second, litigant manipulation of the courts through forum shopping would decline to the extent that the coordinating court actually announced and enforced uniform law. Third, the other circuits should recognize the real expertise that the D.C. Circuit already possesses due to its semi-specialization. And

243. See *supra* text accompanying note 33.

244. I presented this idea to the Federal Courts Study Committee, which rejected it on the grounds that incremental gains in uniformity would not be justified because the court would be excessively large and costly. STUDY COMMITTEE REPORT, *supra* note 20, at 73. I analyze that objection below. See *infra* text accompanying notes 245–252. The only proposal similar to this one that I can find is in Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 605–06 (1969) (suggesting that a specialized court might have en banc revisory power over a generalized one).

245. If the coordinating court denied review, the government could practice inter-circuit nonacquiescence as it does now.

fourth, the supervision would be quite partial in nature, covering only a tiny portion of the appellate caseload.

Additional, and perhaps insurmountable, political problems would attend increased concentration of administrative review in the D.C. Circuit, however. In the early 1980s, serious proposals circulated in Congress to increase the decentralization of administrative review by placing venue in the regional circuits at the expense of the D.C. Circuit.²⁴⁶ Part of the "sagebrush rebellion," these proposals reflected a perception that the Circuit issued too many "liberal" decisions favoring environmental groups and suppressing development in the West. Today, however, eight years of the Reagan administration have changed the face of the lower federal courts.²⁴⁷ The D.C. Circuit now stands in close internal balance.²⁴⁸ By the time the Bush administration leaves office, the Circuit may be widely viewed as conservative.

Because political winds are fickle, federal judicial structure should withstand, not follow, their momentary direction. Moreover, although the D.C. Circuit would control the most important aspects of administrative law development short of the Supreme Court, it would not decide most administrative litigation. The regional circuits and their district courts would do that, and would retain a full opportunity to add their insights. To protect their role—and their sensibilities—the regional circuits could be authorized to escape review in the D.C. Circuit if they engaged their own en banc procedures.²⁴⁹ Nevertheless, this proposal would inescapably increase the power of an already powerful circuit, and might well founder on that reef.

The size needed for the Circuit to discharge coordinating responsibilities is problematic but not insuperable, given the availability of limited en banc procedures. Reasonable minds could disagree over the optimal number of judges to use for an en banc proceeding that would provide binding national precedent. One possibility would be to use all twelve of the Circuit's judges. Yet full en banc hearings have become very rare in the Circuit, as elsewhere.²⁵⁰ True, the Ninth Circuit holds limited en banc hearings with a simi-

246. *But cf.* Sunstein, *supra* note 41, at 982–85 (arguing in favor of centralized review in the D.C. Circuit in a 1982 essay).

247. *See* Solimine, *supra* note 167, at 30.

248. *See id.* at 31; *cf.* Pierce, *supra* note 126, at 307.

249. Where a case involved important issues other than administrative law, this exception would allow the originating circuit to police its own product and enforce internal consistency.

250. *See supra* text accompanying notes 167–168.

lar number of eleven, but that is a second best solution in a gigantic court, and en banc procedures are still infrequent there. Since the point of authorizing this procedure is to use it, a somewhat lesser number seems preferable.

Nine has proved a politically maximum number for the Supreme Court.²⁵¹ From a managerial perspective, the Court seems reasonably successful at hearing and deciding the principal cases it selects. It does seem desirable to have a majority of the full Circuit to aid stability of decision, although the Ninth Circuit operates with a lower proportion. A court of seven would need a majority of four circuit judges to override a unanimous panel decision of three judges in a regional circuit.²⁵² Fewer than that would lack sufficient clout to support a decision overturning the law of a coequal circuit and binding everyone until the Supreme Court intervenes. More than seven might require a substantial expansion in the D.C. Circuit to perform its coordinating duties.

For the Circuit to discharge this responsibility effectively, a modest increase in its size and a transfer of its other responsibilities might be necessary. The transfer would be unfortunate because of its cost to the court's generalist perspective. The Fourth Circuit would be the natural repository for the D.C. Circuit's other cases. Although the initial burdens of the new function for the D.C. Circuit are necessarily uncertain and might be substantial, their exact extent would lie in the discretion of the Circuit itself. There is room for some expansion in its personnel: adding two judges to the Circuit would mean that a limited en banc panel of seven would still be half the court.

Better reasons for seeking an alternative to the D.C. Circuit as coordinating institution lie in the perspective problems that any pure administrative court would encounter, and that the Circuit may suffer already. A primary virtue of a national panel of judges would be flexibility. The panel's size and its regional balance could be adjusted precisely and could change over time.

B. *A National Administrative Law Panel*

Proposals for a national court of appeals with a general jurisdiction have provoked three principal objections: that the court

251. No one seriously proposes increasing the number of Justices; perhaps the lesson of Franklin Roosevelt's Court-packing plan has been overlearned. For summary and discussion of the plan, see P. SHANE & H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 274-79 (1988).

252. ABA REPORT, *supra* note 20, at 28.

would cause delay, diminish the prestige of the existing courts of appeals, and unduly burden the Supreme Court. A national panel for administrative law should be able to avoid these disadvantages. First, substantial delay would be added only by those cases that the coordinating court accepted for review and that were ultimately destined for the Supreme Court. Existing procedures for certiorari before decision in the lower courts could be extended to allow the Court to truncate activity in the coordinating court in cases of exceptional importance.²⁵³ The delay that would attend appeals terminating in the coordinating court would be offset by the unifying force of the court's opinions, which should eventually reduce administrative law litigation. Delays caused by fruitless petitioning to the coordinating court could be reduced if that court initially rationed access by establishing fee requirements and punished frivolous petitions by imposing costs.²⁵⁴

Second, the threat to circuit court prestige that would be posed by part-time, specialized review of a limited portion of appellate activities is much less than that of a new, general tier of review. And as I have noted, the coordinating court would benefit the present courts by enforcing their mandates.

Third, the new court should reduce, rather than increase burdens on the Supreme Court. No new screening responsibility for the Court is contemplated here. Indeed, the existing burdens of certiorari petitions would be reduced somewhat if the Court presumed nearly conclusively that any case denied the coordinating court's attention was unworthy of its own.²⁵⁵ To be sure, the importance of the cases granted review in the new court would warrant close monitoring of its decisions. But it is much easier to oversee those cases than the vastly larger pool of panel decisions from which they would be winnowed.

The actual contribution of a coordinating court to a stable and uniform body of administrative law lies within the control of its architects. First, the appointments process must ensure that the court will possess prestige, expertise, and the confidence of the

253. Presumably, however, the Court would often welcome ventilation of the issues in an expert forum before it took a case.

254. For a discussion of money controls over access to the courts, see R. POSNER, *supra* note 25, at 131-39. Of course, there should be a provision for fee waivers for the impecunious.

255. If the Court required petitions for certiorari to reveal whether the coordinating court had previously denied review, it could identify petitions it would almost certainly deny. The alternative of making such cases ineligible for Court review might raise the objection that the Court was being stripped of docket control. See *supra* note 184.

Supreme Court. A national administrative law panel could be composed of sitting federal judges serving temporary terms, perhaps five years. District judges could be included to provide their perspective. Rotating the panel members after a substantial period of service (for example, five years) would balance stability of decision and growth of expertise against renewal of ideas and equality of judicial status.²⁵⁶

The panel could be of a size (seven or nine) that could handle the caseload while sitting en banc. Alternatively, a somewhat larger court could sit in panels of five or seven, depending on the minimum number thought appropriate for overriding a regional panel decision. A panel too large to hear all cases en banc could make many more decisions than a smaller one, but would have consistency problems of its own, necessitating at least occasional resort to full en banc procedures.

Experienced and distinguished judges would have the best chance of persuading their colleagues and the Supreme Court to honor their judgments. If the panel has no claim to expertise, it will lack intrinsic authority.²⁵⁷ Acquaintance with administrative law is therefore required. Today's bench includes judges with varying backgrounds in Congress, the executive branch, and academe. And of course service on the D.C. Circuit provides an ample education in administrative law for all its judges, regardless of their previous experience. The statute creating the panel could provide that several of its members be drawn from that Circuit.²⁵⁸

As some of the D.C. Circuit's unhappy experiences have demonstrated, the national panel would need to be broadly compatible ideologically with the Supreme Court to reduce friction and reversals. If the panel is known to be in constant jeopardy of reversal, it will receive little respect—and provide the Court little relief. There are two basic strategies to this end. Even with a requirement that several of the panel members be drawn from the D.C. Circuit,

256. A slowly rotating national administrative law panel hearing all its cases en banc would probably be somewhat more stable than the shifting, limited en banc panels of the D.C. Circuit.

257. R. POSNER, *supra* note 25, at 102.

258. If two or three judges of a seven-member panel, or three or four of a nine-member panel, were to come from the Circuit, and if one of them was to be a district judge, it might be necessary to increase the number of circuit judges by up to three to compensate for the lost services of those on the panel.

either one would be flexible enough to allow pursuit of compatibility.²⁵⁹

First, selection of the panel members could be by the President with the advice and consent of the Senate. Placing the appointment power in the same entities that select the Justices would tend to produce roughly congruent results, depending on turnover rates in both courts. Also, if the Presidency and the Senate continue to be in the hands of different parties, there would be pressure to avoid ideologically extreme appointments of any kind.

On the other hand, selection of the panel would differ from the usual appointments process because it would assess the track record of sitting judges for a specialized docket. It is much easier to predict behavior in such a situation than in selection of any generalist judge, even on a promotion to a higher court. Given the heavy separation of powers component of modern administrative law, the institutional interests of both the executive and Congress would be engaged. Success of either branch in stacking the panel would threaten a fundamentally pernicious effect on our national law by converting the judges from umpires to players in separation of powers controversies. At the least, the President and the Senate might well find themselves at loggerheads, with each branch advancing its partisans. The vacancies that have recently plagued the D.C. Circuit might be common. Over the long run, though, the President would probably have the advantage, due to his party power in Congress and because the Senate tires of repeatedly refusing its consent.

The natural alternative selection process is designation by the Chief Justice. Because there is no assurance that the Chief will prove representative of the Court, however, designation could be with the consent of a majority of the Associate Justices.²⁶⁰ The result should be a panel that the Court could trust. And the Court should be able to monitor the panel's activity. The panel's diet, like that of en banc circuits and the Court itself, should be important and controversial enough to produce plenty of disharmony and dissent. We might hope, then, that the panel could adequately coordinate administrative law without stultifying it.

259. For example, if three circuit judges were to be selected, the appointing entity would be concerned with their interaction and contribution as a group. The twelve members of the D.C. Circuit can presently be combined into 220 three-judge panels, allowing an ample range of choice. See *supra* text accompanying note 170.

260. See Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881, 912-13 (1975).

C. *A National Panel Assigning Review to Regional Circuits*

A more limited function for the coordinating panel could ameliorate concerns about appointments distortions and provide a much higher review capacity than a single court possesses. The panel, consisting of perhaps three circuit judges and two district judges from the D.C. Circuit, could receive petitions, decide which ones merit review, and allocate them to the regional circuits for limited en banc decision.²⁶¹ The panel could be selected by either of the appointment methods just discussed.²⁶² Placing screening responsibility in the D.C. Circuit and decisional responsibility mostly elsewhere should minimize potential tensions between the beltway and the sagebrush.²⁶³

A court's authority depends on its consistency and its ability to elaborate and to enforce its decisions in later cases.²⁶⁴ Can allocation of review among the regional circuits meet these needs? By scanning all the petitions for review, the screening panel would gain a vantage point to see developing issues. The parties would possess incentives to point out the forum shopping or nonacquiescence consequences of existing law. Indeed, the screening panel could dampen forum shopping in the initial filing of appeals if it were vested with the authority to determine venue in cases of multiple filing, or even in cases of filing in one circuit where inconvenience is alleged.²⁶⁵

The panel could assign cases for partial subject matter concentration in each circuit, without the exclusivity that attracts appointments abuses. It could follow existing distributions of subject matter in an effort to maximize both judicial expertise and convenience to the litigants.²⁶⁶ Thus, the choice of a circuit for a decision on the merits could be designed to promote consistency. As with formal subject matter organization in the appellate courts, fragmentation of national law would not be a disadvantage of spreading the cases around the nation, since interpretive issues under separate

261. As with the preceding proposals, the circuits could use panels of seven judges, except that the First Circuit would presumably use its full complement of six.

262. The panel's workload might require a modest increase in the size of the D.C. Circuit by a judge or two.

263. Tensions might surround allocation of review to the D.C. Circuit itself. These could be minimized by a policy of limiting that review principally to a set of statutes known in advance, such as the APA and other procedural statutes.

264. See Ginsburg & Huber, *supra* note 37, at 1419 n.13.

265. For a review of venue problems, see Sunstein, *supra* note 41, at 994, 1000.

266. Convenience would be served to the extent that existing caseload patterns already reflect geographical distribution of certain controversies.

statutes are independent of one another.²⁶⁷ Also, there would be a much higher capacity for decisions on the merits than a single panel or court can produce.²⁶⁸ Since there is no way to know in advance just how many coordinating decisions would be necessary or desirable, this flexibility is a prominent advantage of decentralized review. Informal concentration of subject matter by circuit could also allow courts to police an agency's compliance with past decisions and to pursue the law's train of implications in related cases.

Random selection of courts of appeals to form national law, such as that proposed by the Federal Courts Study Committee, would forfeit the opportunity to develop expertise within the regional circuits. The same is true of most existing proposals for intercircuit stare decisis—a typical plan would require any circuit in which a panel had created a conflict to use en banc procedures that would then bind everyone.²⁶⁹ Random choice of forum, by multiplying contributing voices, inhibits the articulation of a coherent body of law. It is also subject to temporary fluctuations in either the caseloads or the political composition of the regional circuits. The former can cause uneven distribution of cases; the latter, friction with the Supreme Court.

CONCLUSION

Whatever the prospects for a new national court of appeals with general jurisdiction, there is special need for a coordinating institution in administrative law. To be sure, all the regional variations in federal law caused by intercircuit conflicts impose costs. Yet to some extent legal diversity is built into our federal system—an interstate actor often faces disparate state law mandates. So not all intercircuit conflicts are intolerable;²⁷⁰ when they are tolerable, they promote the values of diversity and percolation. Yet federal agencies are charged with administering their statutes uniformly, and routinely do so in the face of intercircuit disarray. Without a ready mechanism for resolving these conflicts, the rule of law suffers

267. Even partial geographical distribution of panel decisions can fragment national law. See *supra* text following note 136. That effect can be eliminated by according binding effect to the limited en banc decisions.

268. Where issues other than administrative law were present, the circuit giving limited en banc review could decide these as well. See *supra* note 249.

269. See, e.g., Note, *supra* note 83. But cf. S. ESTREICHER & J. SEXTON, *supra* note 27, at 124–25 (critiquing such proposals); Baker & McFarland, *supra* note 26, at 1413–14 (same).

270. See S. ESTREICHER & J. SEXTON, *supra* note 27, at 66; Leventhal, *supra* note 260, at 897–900 (1975); Sturley, *supra* note 27.

as equally situated citizens hold differing rights and liabilities against their government.

At the outset I emphasized the need for caution in institutional prescription. In light of the danger that institutional change may disrupt essential relationships between the branches and alter the overall balance of power among them, I have sought the least drastic remedies for the ills of the present system of judicial review.