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THE D.C. CIRCUIT AS A CONSEIL D'ÉTAT

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ABSTRACT

A storm is brewing in American administrative law. More and more federal judges, including a majority of the Justices of the Supreme Court, openly question longstanding doctrine. A throng of academics profess skepticism of the same. This formalist turn among judges, lawyers, and academics challenges the very legitimacy of the administrative state. But what does this tempest portend for the D.C. Circuit?

The D.C. Circuit is often described as the nation's second highest court, but its precise role in the federal judiciary is only fifty years old. As a member of that appellate court, now-Chief Justice John Roberts once admitted that the D.C. Circuit has a "special responsibility to review legal challenges to the conduct of the national government." But is that "special responsibility" contingent and perhaps evanescent? Is it formally and functionally in conflict with the nation's highest court? Or is it an inevitable feature of judicial review of agency action? The current composition of the D.C. Circuit and the Supreme Court, the fractious state of national politics, and the formalist turn in administrative law provoke questions about the proper role of the D.C. Circuit in shaping administrative law. This Article offers some answers by comparing that court to the highest administrative tribunal in France, the Conseil d'État.

The Article makes three contributions. First, the Article traces a crucial strand of recent critiques of the administrative state—namely an Anglophone suspicion of French administrative law stretching back to Albert Venn Dicey—and explains why that thinking relies on an outdated understanding of the Conseil d'État. Second, the Article develops a comparative analysis to uncover how the D.C. Circuit's docket, composition, and doctrinal development mark out its strange and special position in the federal judiciary. Third, the Article uses that institutional perspective on the D.C. Circuit to better understand the contours and consequences of three crucial controversies in administrative law, including agency independence, the major questions doctrine, and the shadow docket.

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The Article foregrounds an institutional arrangement upon which federal administrative law depends, namely the working relationship of the D.C. Circuit and the Supreme Court. For the foreseeable future, the former's specialized caseload will continue to clash with the latter's renewed interest in administrative law. Any administrative state as vast and variegated as that of the United States will necessarily generate intricate and unanticipated demands on courts—and by extension, courts attuned to those demands. Analogizing the D.C. Circuit to the Conseil d'État clarifies what might be lost in the federal courts in this new era of administrative law.

I. Introduction

CHIEF JUSTICE ROBERTS: . . . [Y]our position on vacatur, that sounded to me to be fairly radical and inconsistent with, for example, you know, with those of us who were on the D.C. Circuit, you know, five times before breakfast, that's what you do in an APA case.

. . .

> JUSTICE KAVANAUGH: . . . [Y]ou said the judges on the D.C. Circuit haven't paid attention to text, context, and history. I guess I would respectfully push back pretty strongly on that. I sat with judges like Silberman and Garland and Tatel and Edwards and Williams. They paid a lot of attention to that.
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> . . .
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> CHIEF JUSTICE ROBERTS: Justice Jackson?
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> JUSTICE JACKSON: Yes. As you might imagine, I would like to circle back to the concerns that the Chief Justice and Justice Kavanaugh raised about vacatur and the argument that you're making in this case. And –
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> JUSTICE KAGAN: Seems to be a kind of D.C. Circuit cartel.
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> (Laughter.)
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> JUSTICE JACKSON: It is. It is.
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> Transcript of Oral Argument at 35, 54, 66, United States v. Texas, 599 U.S. 670 (2023) (No. 22-58).

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On April 20, 2005, D.C. Circuit Judge John Roberts delivered a lecture at the University of Virginia School of Law.[1] A few months later, Judge Roberts would be nominated to the Supreme Court, and shortly thereafter confirmed as its Chief Justice.[2] But on that day in Charlottesville, Judge Roberts spoke of the court on which he currently served, not the one he would soon lead.

Then-Judge Roberts titled his lecture, *What Makes the D.C. Circuit Different? A Historical View*. During the lecture, the future Chief Justice admitted that the D.C. Circuit has a "special responsibility to review legal challenges to the conduct of the national government."[3] Judge Roberts recounted the history of the D.C. Circuit, focusing on its first 170 years. In Roberts's telling, the court was a forgettable cousin in the federal courts family for decades.[4] Roberts briefly surveyed how Congress channeled more review of agency action

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[1] *See* Mary Wood, *D.C. Circuit Has Special History Among Appeals Courts, Roberts Says*, Univ. of Va. Sch. of Law: News & Media (Apr. 26, 2005) https://law.dev.virginia.edu/news/2005_spr/roberts.htm [https://perma.cc/Y6HB-SD5H]. The *Virginia Law Review* published Judge Roberts's remarks the following year. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different – A Historical View*, 92 Va. L. Rev. 375 (2006).

[2] *See Current Members*, Sup. Ct. U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/LZ3P-XN3A].

[3] Roberts, *supra* note 1, at 389.

[4] *See id.* at 377–79; *see also* Erwin C. Surrency, History of the Federal Courts 436 (2d ed. 2002) (discussing how D.C. Circuit was not considered a judicial circuit nor represented on the Judicial Conference of the United States until 1948).

to the D.C. Circuit in the mid-twentieth century.[5] He then noted how the D.C. Circuit's focus on administrative law became almost exclusive when Congress deprived the court of its local jurisdiction in 1970.[6]

The most curious aspect of Judge Roberts's history is not where it begins or dwells, but rather where it ends. He devoted a sentence or two to the rulemaking revolution of the 1960s and 1970s which, in his words, "more than made up for the loss of this local jurisdiction by the D.C. Circuit."[7] Then he concluded the lecture.

Why did then-Judge Roberts cut his history short? Why omit the following thirty-five years, a period that includes most, if not all, of the D.C. Circuit's most celebrated, criticized, and influential decisions?[8] Perhaps Judge Roberts thought his audience was so familiar with the D.C. Circuit's recent past that he did not need to school them on his court's "unique role with respect to reviewing legal challenges and decisions of the national government."[9] Regardless of the motivation, the upshot of Judge Roberts's truncated history was that, as a sitting D.C. Circuit judge, he would not have to touch upon his court's more (in)famous decisions, including some authored by his then-colleagues. Nor would the judge reveal too much about his own thoughts on those crucial decisions, lest they signal his thoughts about their future fate.

Today, Chief Justice Roberts presides over the Supreme Court during arguably the most tumultuous period in administrative law since the New Deal.[10] More and more federal judges, including Chief Justice Roberts and five other Justices on the Supreme Court, seem bent on reworking administrative law.[11] These judicial developments correspond with reinvigorated formalism in administrative law scholarship.[12] This formalist turn in judicial reasoning and

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[5] *See* Roberts, *supra* note 1, at 387 (noting how jurisdictional grants to the D.C. Circuit put it on a course "to assume an important role as the country experienced a huge growth in the administrative state").

[6] *See id.* at 388.

[7] *See id.* at 392.

[8] *See infra* Part III.C.

[9] *See* Roberts, *supra* note 1, at 377.

[10] *See* Gillian Metzger, *Forward, 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 2 (2017).

[11] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (announcing major questions doctrine); Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (removing for cause protection for CFPB director); *see also* Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 Harv. L. Rev. F. 75, 77 (2022) (describing the current Supreme Court as "more structurally formalist and more skeptical of agency action than any of its predecessors since at least the New Deal era").

[12] *See, e.g.*, Philip Hamburger, Is Administrative Law Unlawful? 1 (2014); Richard Epstein, The Classical Liberal Constitution 13–14 (2014); Randy Barnett, Restoring the Lost Constitution: The Presumption of Liberty 132–33 (2013); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & Liberty 475, 509 (2016).

legal scholarship, including its focus on separation of powers, challenges the very legitimacy of the American administrative state.[13]

Evidence of doctrinal change in administrative law abounds. Over the last three years, the Supreme Court has repeatedly refused to defer to an agency's interpretation of its substantive statute because it raised a "major question."[14] In another line of cases, the Supreme Court has thrown out Congress's restrictions on presidential appointment and removal powers for agency heads and adjudicators alike.[15] Those decisions emboldened President Biden to fire the Social Security Administrator in clear violation of the Social Security Act.[16] And the Supreme Court's decisions to grant certiorari in *Loper Bright Enterprises v. Raimondo*,[17] *SEC v. Jarkesy*,[18] and *CFPB v. Community Financial Services Ass'n of America*[19] all but guarantee the Court will continue down this destabilizing path. In those three cases, the Court will consider whether to overturn *Chevron*,[20] whether to void or at least limit adjudication by Administrative Law Judges ("ALJs"),[21] and whether to strike down Congress's chosen method to fund the Consumer Financial Protection Bureau ("CFPB").[22]

The Roberts Court's preoccupation with administrative law provokes questions about the proper role of the D.C. Circuit, the court that arguably has done more to shape administrative law than any other over the last fifty years. In short, what does this new and uncertain era of administrative law mean for the D.C. Circuit? This Article offers answers to that question by taking an institutional and comparative approach.

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[13] *See* Metzger, *supra* note 10, at 31 ("[G]rowing judicial resistance to administrative government is supported by increasing academic attacks on the constitutional legitimacy of administrative government."); *see also* Aaron L. Nielson, *Confessions of an "Anti-Administrativist,"* 131 Harv. L. Rev. F. 1 (2017) (responding to Metzger); Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 Harv. L. Rev. F. 13 (2017) (same); Hickman, *supra* note 11, at 77 ("[T]he Roberts Court takes seriously formalist conceptions of separation of powers, rule of law, and nondelegation principles . . . at least as much as, if not more than, the substantive policies being pursued through agency action.").

[14] *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2374–76 (2023); *West Virginia*, 142 S. Ct. at 2609; Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665–66 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489–90 (2021); *see also infra* Part IV.A.2.

[15] *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021); *Seila Law*, 140 S. Ct. 2183; Lucia v. SEC, 138 S. Ct. 2044 (2018).

[16] *See* Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. Times (July 9, 2021) https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html [https://perma.cc/7HMA-FQEM]; *see also Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 Op. O.L.C. __ (July 8, 2021), available at https://www.justice.gov/olc/file/1410736/download [https://perma.cc/536F-JBNC] (concluding statutory removal restrictions were constitutionally unenforceable).

[17] 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (2023).

[18] 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

[19] 51 F.4th 616 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023).

[20] *See* Brief for Petitioner at i, *Loper Bright Enters.*, No. 22-451 (July 17, 2023).

[21] *See* Brief for Petitioner at I, *Jarkesy*, No. 22-859 (Aug. 28, 2023).

[22] *See* Brief for Petitioner at I, *Cmty. Fin. Servs. Ass'n*, No. 22-448 (May 8, 2023).

The D.C. Circuit is often described as the nation's second highest court, but its precise position in the federal judiciary is arguably only fifty years old.[23] For the last several decades, the D.C. Circuit has played an instrumental role in questions of administrative law, including agency independence, judicial deference, agency statutory and regulatory interpretation, government transparency, and presidential power.[24] Congress has repeatedly channeled agency litigation to the D.C. Circuit through exclusive jurisdictional statutes, including for pre-enforcement challenges of legislative rules.[25] Moreover, the judges who sit on the D.C. Circuit are routinely drawn from and return to the Executive Branch, while others, including four of the current Justices, are elevated to the Supreme Court.[26]

However, the last half century of the D.C. Circuit's leadership in shaping federal administrative law may be at an end. The Supreme Court increasingly relies not on the D.C. Circuit, but on other appellate courts, like the Fifth Circuit, to tee up administrative law cases.[27] And when the Supreme Court does hear cases from the D.C. Circuit, those cases are often drawn from the Court's shadow docket, depriving litigants of full briefing or oral argument.[28]

To better understand what is at stake for the D.C. Circuit and administrative law more generally, we need to understand the intellectual heritage of the formalist turn. One notable feature of this kind of formalist thought in the federal judiciary and legal academy is its insistence on a common law tradition of American administrative law that stretches back centuries to the United Kingdom.[29] In particular, formalists repurpose the work of the British legal academic Albert Venn Dicey.[30] At the turn of the last century, Dicey celebrated the struggle of English common-law judges against the Stuart kings in contrast to France's *droit administratif*, which did not subject government officials to the ordinary civil courts, but rather channeled those challenges to

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[23] *See, e.g.*, Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 146 (2013) (quoting Senators' references to D.C. Circuit as "second-highest" and "second-most important" court during confirmation hearings); Aaron L. Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court*, Yale J. Reg. Notice & Comment Blog (Sept. 4, 2015) https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson/ [https://perma.cc/8X8E-XESB] (canvassing characterization of D.C. Circuit and concluding that "the conventional wisdom is *probably* right"); *see also* Editorial Board, *The Homogenous Federal Bench*, N.Y. Times (Feb. 6, 2014), https://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html [https://perma.cc/PHT4-EUWM] (referring to the D.C. Circuit as "the second-most powerful court after the Supreme Court"); Joan Biskupic, *Analysis: Republicans Lead Obama in War for Judicial Dominance*, Reuters (Oct. 6, 2012) (noting "[t]he D.C. Circuit often has the last word on a president's domestic agenda").

[24] *See infra* Part III.C.

[25] *See infra* Part III.A.

[26] *See infra* Part III.B.

[27] *See infra* Part IV.

[28] *See infra* Part IV.

[29] *See supra* note 12.

[30] *See infra* notes 48 to 63 and accompanying text.

specialized administrative tribunals.[31] Relying on Dicey, some scholars have suggested that the American administrative state has drifted impermissibly from its common law roots.[32]

Regardless of American administrative law's provenance, though, the de facto administrative court in the United States, the D.C. Circuit, exhibits surprising affinities with the Conseil d'État, the top administrative tribunal in France.[33] The D.C. Circuit's composition, caseload, and role in doctrinal development suggest that it performs crucial functions in the American administrative state—ones that mirror other specialized administrative tribunals, including France's Conseil d'État.[34]

This comparison may strike some as inapt or inopportune. For formalists, the D.C. Circuit's resemblance to a foreign court (in a civil law jurisdiction, at that) suggests that there is something rotten indeed in the state of American administrative law. Others may seek to downplay any resemblance between the two tribunals, out of fear it will further provoke the ascendant formalists. Maybe that is why, despite extensive study of the D.C. Circuit—the most important court in American administrative law—no recent scholarship has compared it to its functional equivalent in France.[35] Yet this comparative inquiry can elucidate the D.C. Circuit's role within the federal judiciary. Along the way, the Article presses the claim that any administrative state as vast and variegated as that of the United States will necessarily generate intricate and

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[31] *See infra* Part II.A.

[32] *See, e.g.*, Hamburger, *supra* note 12, at 12–13; *see also* Adrian Vermeule, *'No' Review of Philip Hamburger, 'Is Administrative Law Unlawful?,'* 93 Tex. L. Rev. 1547, 1549 (2015) (identifying, in Hamburger's book, "passages reminiscent of Albert Venn Dicey's alarmism over *droit administratif*").

[33] *See* Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 Am. J. Comp. L. 859, 893 (2011) (discussing the "common law-*droit administratif* divide").

[34] While this Article necessarily must attempt the translation of French words and concepts into English, it does not translate the main legal institution, Conseil d'État.

[35] For such an example written during the New Deal, see Stefan Reisenfeld, *The French System of Administrative Justice: A Model for American Law?*, 18 B.U. L. Rev. 48 (1938). Since Reisenfeld's article, two other works of legal scholarship that discuss the D.C. Circuit's affinity with the Conseil d'État at length, one from thirty years ago and another from fifty. *See* Christopher F. Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy, 241–45 (1992) (offering the Conseil d'État as one of four institutional models with which to redesign American administrative law); Helen McCleave Cake, *The French Conseil d'État: An Essay on Administrative Jurisprudence*, 24 Admin. L. Rev. 315 (1972). And the only federal judge who has discussed the Conseil d'État in this context is Frank Easterbrook. *See* Roll Coater, Inc. v. Reilly, 932 F.2d 668, 670–71 (7th Cir. 1991) ("[T]he United States lacks an institution such as France's Conseil d'État that reviews statutes for consistency and technical correctness.") The analogy was not lost on Bruno Latour in his study of the Conseil d'État. *See* The Making of Law: An Ethnography of the Conseil d'État 29 n.35 (2010) (cautioning against "represent[ing] the Council as being too exotic" because "[i]n the United States, for example, the circuit of appeals courts for the [D]istrict of Columbia fulfils the same role as the Council, and the Office of Legal Counsel that of the Counsel Sections"). For a useful new intervention on the rise and demise of comparative administrative law in the United States, see Oren Tamir, *Our Parochial Administrative Law*, 97 S. Cal. L. Rev. (forthcoming 2024) (on file with author).

unanticipated demands on courts—and by extension, courts attuned to those demands.

The formalist turn in administrative law risks placing comparative thinking out of bounds. In the practice of administrative law, there is no place for this kind of willful ignorance. American academics, industry leaders, public interest advocates, and regulators routinely look to and learn from other countries' experiences in antitrust, environmental, intellectual property, and labor and employment law.[36] This is not to say that those tasked with shaping applied administrative law should mindlessly follow foreign jurisdictions. Far from it. Rather, the experience of these varied fields suggests that refusing to consider other jurisdictions' attempts to solve the leading problems of the administrative state unnecessarily hamstrings our own. Why should our broader understanding of administrative law be so confined? If law is chiefly an enterprise bent on recovering received truth, one that applies only to a certain jurisdiction, society, or people, then the foibles and follies of another is of little use. But if administrative law is more about the mechanics of government, then surely the public law apparatus of another jurisdiction is worth more attention than a shrug. In that respect, this Article shares the spirit of other public law scholarship to expand, as Professors Elizabeth Fisher and Sidney Shapiro recently put it, "the current limits of administrative law imagination."[37]

With that context in mind, the Article makes three contributions to the scholarly literature—corresponding to each of its parts. First, the Article provides a comparative context to denaturalize the D.C. Circuit. It identifies a crucial strand of recent academic and judicial critiques of the administrative state—namely an Anglophone suspicion of French administrative law stretching back to Albert Venn Dicey—and explains why that thinking relies on an outdated understanding of the Conseil d'État. Second, the Article builds on that comparative context to uncover how the D.C. Circuit's docket, composition, and doctrinal development mark out its strange and special position in the federal judiciary. Third and finally, the Article cashes out the earlier institutional analysis for its doctrinal implications in this new era of administrative law. Once we see the D.C. Circuit anew, we can better comprehend the shape and stakes of three current controversies in administrative law: agency

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[36] *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department, Federal Trade Commission and European Commission Hold Second U.S.-EU Joint Technology Competition Policy Dialogue (Oct. 13, 2022) https://www.justice.gov/opa/pr/justice-department-federal-trade-commission-and-european-commission-hold-second-us-eu-joint [perma.cc/9SWP-4QA8]; Deborah A. Widiss, *The Hidden Gender of Gender-Neutral Paid Parental Leave: Examining Recently-Enacted Laws in the United States and Australia*, 41 Comp. Labor L. & Pol'y J. 723 (2021); Elena Lioubimtseva & Charlotte da Cunha, *Local Climate Change Adaptation Plans in the US and France: Comparison and Lessons Learned in 2007-2017*, 31 Urban Climate 100577 (2020); Mary LaFrance, *An Ocean Apart: Transatlantic Approaches to Copyright Infringement by Internet Intermediaries*, 47 AIPLA Q.J. 267, 267–68 (2019).

[37] Elizabeth Fisher & Sidney A. Shapiro, Administrative Competence: Reimagining Administrative Law 22–25, 178–80 (2020) [hereinafter Fisher & Shapiro, Administrative Competence].

independence, agency legal interpretation, and the Supreme Court's shadow docket. The Article concludes by drawing on both American and French law to identify ways Congress could entrench the D.C. Circuit's role in administrative law. Congress could further expand the court's exclusive and concurrent jurisdiction. Congress could also channel questions of law from other federal courts to the D.C. Circuit.

In the end, this Article highlights how the future of administrative law turns, in part, on the intra-branch dynamics of the D.C. Circuit and the Supreme Court. For the foreseeable future, the lower court's specialized caseload will continue to clash with the High Court's renewed interest in reshaping administrative law. Analogizing the D.C. Circuit to a civil law system's Council of State helps clarify the contours and consequences of that judicial hierarchy. It also adds a fresh perspective to the most pressing debates in administrative law today by emphasizing the institutional ramifications of these doctrinal disputes, especially for the federal courts.

II. A Comparative Context for the D.C. Circuit

How and to what extent should law constrain government? That has traditionally been the irreducible question of public law.[38] Every country needs to confront how government officials interact with its legal system. The traditional view is that common law countries, including the United Kingdom and the United States, have answered that question by subjecting government officials to litigation in ordinary courts. Civil law systems, on the other hand, typically rely on a separate and exclusive system of specialized administrative jurisdiction.[39] This notion of divergent public law paths in the common law and civil law traditions has shaped scholarship for decades. Recently, some

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[38] Scholars have questioned the field's emphasis on constraints, although that criticism seems to only underscore the question's dominance. *See, e.g.*, Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345 (2019); Fisher & Shapiro, Administrative Competence, *supra* note 37, at 10 (critiquing how in the field of administrative law, "law is understood to play only one role—limiting public administration—and nothing else"); *see also* Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy 7 (2019) ("What Tocqueville and Arendt failed to imagine, and what American Progressive thought and practice would first conceive, were forms of administration that cultivated rather than undermined political liberty."). For an earlier iteration, see Paul Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258, 279 (1978) ("It is equally important . . . to provide mechanisms that will not delay or frustrate substantive regulatory programs."). Whether that emphasis is wise, there are two features to this question of constraints. We often focus on the question of what rules should constrain government. The other question is who should make these rules: the framers of the Constitution, Congress, the President, the courts, or the agencies themselves. American administrative law practitioners and scholars tend to look to courts, and in particular, the D.C. Circuit. But what happens when the Supreme Court, which supervises the D.C. Circuit, acts on a renewed interest in reshaping administrative law doctrine?

[39] *See, e.g.*, Javier Barnes, *Towards a Third Generation of Administrative Procedures*, in Comparative Administrative Law 336, 340 (Susan Rose Ackerman & Peter L. Lindseth, eds. 2010).

judges and scholars have redeployed this supposed difference to justify, in part, their skepticism of the American administrative state.[40] This Part lays out that intellectual milieu from Albert Venn Dicey's famous formulation to the present day. It then explains why that Diceyian framework rests on a now out-of-date understanding of the highest administrative tribunal in France, the Conseil d'État.

A. The Received Diceyian Wisdom

Different countries and jurisdictions represent different legal traditions or legal families. One of the most enduring divisions is that which separates common law systems from civil law systems. Among the many differences between these two systems is how those legal traditions distinguish public law from private law.[41] Some have suggested that conceptualizing public law as distinct from private law was crucial to the development of the civil law tradition in continental Europe, a distinction unknown in common law nations.[42] That perceived difference in the treatment of public law is perhaps most associated with the scholarship of Albert Venn Dicey, an English academic who despite passing away a century ago, continues to influence administrative law scholarship and jurisprudence today.

Dicey spent decades teaching law at Oxford, eventually holding the Vinerian Professorship, an academic post first occupied by William Blackstone in 1759.[43] Dicey wrote several books, including a leading treatise on the conflict of laws.[44] He also sought to shape legal education in the United Kingdom and the United States.[45] Through his newspaper columns, he commented regularly on current events of his day, including as an apologist, if not advocate, of British imperialism, a skeptic of Irish independence, and an

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[40] *See supra* note 38.

[41] *See generally* John Bell, *English and French Law—Not So Different?*, 48 Current Legal Probs. 63, 64–65 (1995).

[42] *See, e.g.*, Carl Joachim Friedrich, The Philosophy of Law in Historical Perspective 215 (1963) (discussing "the distinction and differentiation between public and private law" as "so significant for the jurisprudence of Europe" but "not really part of the American legal system and thought").

[43] *See* Rupert Cross, *The First Two Vinerian Professors: Blackstone and Chambers*, 20 Wm. & Mary L. Rev. 602, 602–03, 623 (1979).

[44] *See* A.V. Dicey, A Digest of the Law of England with Reference to the Conflict of Laws (1896); *see also* Ole Lando, *Dicey & Morris, The Conflict of Laws: A Review*, 47 Int'l. & Comp. L.Q. 394, 394 (1998) (describing Dicey's treatise as "the leading work on private international law in England"); J.H. Beale, Jr., *Dicey's "Conflict of Laws,"* 10 Harv. L. Rev. 168 (1896) (reviewing the first edition).

[45] *See, e.g.*, A.V. Dicey, *The Extension of Law Teaching at Oxford*, 24 Harv. L. Rev. 1 (1910); A.V. Dicey, *The Teaching of English Law at Harvard*, 76 Contemp. Rev. 742 (1899); *see also* David Sugarman, *Review: The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science*, 46 Mod. L. Rev. 104 (1983) (reviewing Richard A. Cosgrove, The Rule of Law: Albert Venn Dicey, Victorian Jurist (1980) and describing how Dicey, along with his colleagues at Oxford, "helped to lay the foundation of modern legal science and scholarship in England and the United States").

opponent of women's suffrage.[46] When he died in 1922, Dicey was eulogized by fellow professor Harold Laski as "the most considerable figure in English jurisprudence since Maitland."[47]

Arguably Dicey's most significant work was his *Introduction to the Study of the Law of the Constitution*.[48] *Law of the Constitution* went through eight editions as well as a French translation in Dicey's lifetime.[49] This constitutional treatise showed Dicey to be a worthy successor of Blackstone. Dicey sought to systematize public law in his country by showing how its caselaw derived from a set of classically liberal principles.[50] Indeed, in writing *Law of the Constitution*, Dicey popularized the very concept of the "rule of law."[51] But Dicey's conception of the rule of law depended on a foreign foil, namely administrative law in France.[52]

In this—his most famous—work, Professor Dicey included a chapter entitled, "The Rule of Law Contrasted with *Droit Administratif*."[53] Dicey explained that "in many countries, and especially in France, servants of the State are in their official capacity to a great extent protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject to official law, administered by official bodies."[54] For Dicey, "[t]his scheme of so-called administrative law is opposed to all English ideas, and by way of contrast admirably illustrates the full meaning of that law which is an essential characteristic of our Constitution."[55] Dicey thought that the concepts underlying *droit administratif*, even its direct translation of "administrative

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[46] *See* Sugarman, *supra* note 45, at 102–03; Rivka Weill, *Dicey Was Not Diceyan*, 62 Cambridge L.J. 474, 488 n.3 (2003).

[47] *Events of the Week*, Nation and Athenaeum, Apr. 15, 1922, at 77.

[48] *See* Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (4th ed. 1893).

[49] *See* Weill, *supra* note 46, at 475 n.4 (relying on eighth edition "since it was the last that Dicey himself edited").

[50] *Cf.* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205, 231–34 (1979) (critically analyzing Blackstone's "categorical scheme").

[51] *See, e.g.*, James E. Pfander, *Dicey's Nightmare: An Essay on The Rule of Law*, 107 Calif. L. Rev. 737, 744 (2019) (discussing Dicey's definition); Joseph Raz, *The Rule of Law and Its Virtue*, 93 Law Q. Rev. 195, 201 n.7 (1977) (lamenting that "English writers have been mesmerized by Dicey's unfortunate doctrine for too long").

[52] *See* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 Harv. L. Rev. 852, 859 (2020) (describing how Dicey "famously, or infamously, contrasted the rule of law in the common law tradition with what he saw as the despotism of Continental public law, exemplified by the French *droit administratif*"); Christian R. Burset, *Redefining the Rule of Law: An Eighteenth-Century Case Study*, 70 Am. J. Comp. L. 657, 689 (2022) (characterizing Dicey's arguments in *Law of the Constitution* as "relentlessly anglocentric" and arguing that "French *droit administratif* played [an] aversive role" in the analysis); Pfander, *supra* note 51, at 740 n.11 ("Dicey was keen to distinguish the ordinary superior courts of law and equity from specialized tribunals such as the French Conseil d'Etat."); *see also* Paul A. Gowder, *Is Criminal Law Unlawful?*, 2023 Mich. St. L. Rev. (forthcoming) (manuscript at 5, 13, 45, 57–58), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218077 [https://perma.cc/8389-DF22] (repeatedly referencing Dicey for the "classical" or "traditional" rule of law formulation).

[53] Dicey, *supra* note 48, at 306–33.

[54] *Id.* at 306.

[55] *Id.*

law," were "unknown" not only in the United Kingdom, but also "in countries which, like the United States, derive their civilization from English sources."[56]

Dicey certainly focused on the liability of officers of the state in his exploration of French administrative law, but he also identified two related dimensions of *droit administratif*: "the civil rights and liabilities of private individuals in their dealings with officials as representatives of the state" and "the procedure by which these rights and liabilities are enforced."[57] For Dicey, understanding administrative procedure in France necessitated an inquiry into which courts or tribunals heard administrative law cases. Dicey characterized French civil courts as having "no concern with any matter of administrative law."[58] Rather, French administrative law "is administered by administrative [c]ourts, at the head of which stands the Council of State."[59] For Dicey, the Conseil d'État epitomized a divergent approach to administrative law, one wholly foreign to the Anglo-American legal tradition.[60]

This Article does not aim to settle whether Dicey's study in contrasts of Anglo-American public law and French public law was accurate at the time he wrote it or revised it. Others have already done so.[61] Moreover, the arguments that follow do not rest on settling that historical controversy. Instead, it is enough to point out that Dicey's contrast between French administrative law, on the one hand, and public law in the United Kingdom and the United States, on the other, has had remarkable staying power in American legal thought.[62] Indeed, one way to think of the formalist ascendancy is as a Diceyian revival.[63] The persistent influence of Dicey's analysis reminds us that transatlantic intellectual currents still shape today's debates over the legitimacy of the American administrative state.

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[56] *Id.* at 306–07.

[57] *Id.* at 309.

[58] *Id.* at 313.

[59] *Id.* at 315.

[60] *Id.*; *see also* Pfander, *supra* note 51, at 744–45 (discussing Dicey's view of the Conseil d'État).

[61] *See* Pfander, *supra* note 51, at 740 n.11 (collecting sources and concluding that "[m]odern scholars have come to give the Conseil more credit than did Dicey for ensuring the legality of the administrative state in France").

[62] *See, e.g.*, Pojanowski, *supra* note 52, at 859 (discussing Dicey's influence on American jurisprudence); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 Harv. L. Rev. 718, 735 (2016) (same); Kevin M. Stack, *Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation*, 65 J. Legal Educ. 28, 31 (2015) (discussing role American legal education has played in the bench's and bar's commitment to the Diceyian framework). *But see* Pfander, *supra* note 51, at 740 (arguing that Dicey's *Law of the Constitution* "strikes the modern reader as more relevant to issues of constitutional design in the United Kingdom and the Commonwealth than to those of constitutional evolution in the United States").

[63] *See* Giulio Napolitano, *The Rule of Law*, *in* The Oxford Handbook of Comparative Administrative Law 420, 426 (2021) (describing how "attempts to revive the alleged distance between administrative law" and the rule of law "periodically emerge" especially in the United States); *see also* Kevin Stack, *Overcoming Dicey in Administrative Law*, 68 U. Toronto L.J. 293 (2018) (discussing "resurgent Diceyian critiques of administrative law").

B. A French Administrative Law Primer

The ascendant formalists, inspired by Dicey's original analysis, insist there is no truly administrative law in the United Kingdom or the United States resembling that of the civil law tradition exemplified by France. Whether Dicey got it right then does not answer the question of whether that framework is accurate now. This Section provides needed context for French administrative law generally and the role of the Conseil d'État specifically. It then highlights how the Conseil d'État's role in the French administrative state has changed in the twenty-first century. An overview of recent changes in French administrative law, including the changing role of the Conseil d'État, suggests the Diceyian framework obscures ways in which the French administrative law system has become more similar to ours here in the United States.

1. A Brief History of the Conseil d'État

The Conseil d'État has survived and thrived throughout France's modern history, continuing through revolution, empire, and five republics. Its origins stretch back centuries. From the late thirteenth century, the French King deployed counsellors of state (*conseillers d'État*).[64] These functionaries combined to form the King's Council (the *Conseil du Roi*), and repeatedly clashed with the nobility-led *parlements*.[65] Centuries of political conflict among the *Conseil du Roi* and the *parlements* produced, among other legal developments, the Edict of St. Germain-en-Laye in 1641.[66] In that decree, the French King prohibited ordinary courts from hearing administrative law cases.[67] That seventeenth-century precedent was adopted during the French Revolution. In 1790, the Revolutionary law of 16 and 24 August 1790 proclaimed that "[j]udicial functions are distinct and remain always separate from administrative functions" and forbade any interference by civil judges in "administrative functions."[68] Another revolutionary government in 1795 reaffirmed that principle.[69] As the French Revolution gave way to military conquest, Emperor Napoleon faced a dilemma: how to honor the longstanding prohibition on judicial interference in governmental administration while securing some legal mechanism to review administrative actions. Napoleon's solution was to create a judicial section of the Conseil d'État (*commission du contentieux*).[70]

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[64] Bernard Stirn & Eirik Bjorge, Toward a European Public Law 133 (2017).
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *See* Leon Duguit, *The French Administrative Courts*, 29 Poli. Sci. Q. 385, 388 (1914) (detailing the role of the Revolutionary government in 1790).
[69] L. Neville Brown & John S. Bell, French Administrative Law 46 (5th ed. 1998) (quoting the Decree of the Convention of 16 Fructidor An III (2 September 1795)).
[70] *See* décret du 11 juin 1806 [Decree of June 11, 1806]; *see also* Justice J.C.S. Burchett, *Administrative Law — The French Comparison*, 69 Austl. L.J. 977, 977–78 (1995) (arguing that Revolutionary government's "complete ban on judicial interference with the administration

Under this system, for much of the nineteenth century, the Conseil d'État remained an advisory council for the Executive. Its actions were mere recommendations for decisions by the Executive itself,[71] but this system of "reserved justice" (*justice retenue*) still allowed for the development of significant caselaw, especially after 1830.[72]

In 1872, the Conseil d'État became a recognizably modern court.[73] The Act of 24 May 1872 made the Conseil d'État a sovereign court with final jurisdiction to decide cases "on behalf of the French People," shifting the legal basis from one of reserved to "delegated justice" (*justice déléguée)*.[74] The 1872 Act made clear that the Conseil d'État's decisions were no longer mere recommendations to the Executive. Rather, the court would henceforth make "the final ruling on appeals concerning administrative claims, and on repeal applications citing abuse of power against laws made by various administrative authorities."[75]

After the 1872 Act, administrative law in France developed in ways that resemble those of common law jurisdictions—namely through caselaw developed by the Conseil d'État.[76] Over time, the Conseil d'État developed general principles of French administrative law (*principes généraux du droit*).[77] Further changes in the twentieth century solidified the Conseil d'État's role in the development of French administrative law. Early in the twentieth century, the Conseil d'État empowered individuals to invoke its jurisdiction without first seeking relief from the relevant minister, which greatly increased the opportunities for the Conseil to further develop its general administrative law

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led to the development of a new specialised judiciary with an unconfined jurisdiction over the administration . . . much more general in scope and deeper in penetration than the ordinary courts have ever claimed in England").

[71] George A. Bermann & Etienne Picard, Introduction to French Law 59 (2008).

[72] William Rohkam, Jr. & Orville C. Pratt, IV, Studies in French Administrative Law 15–16 (1947).

[73] *See* Loi du 24 mai 1872 relative au Tribunal de conflits [Law of May 24, 1872 Relating to the Conflicts Tribunal]; *see also* Etienne Picard, *The Public-Private Divide in French Law Through the History and Destiny of French Administrative Law*, *in* The Public-Private Law Divide: Potential for Transformation? 17, 20 (Matthias Ruffert ed., 2009).

[74] Loi du 24 mai 1872 relative au Tribunal de conflits [Law of May 24, 1872 Relating to the Conflicts Tribunal], art. 9.

[75] *Id.*; *see also* Eva Steiner, French Law: A Comparative Approach 173 (2d ed. 2018) (discussing the 1872 Act).

[76] *See, e.g.*, John Bell & François Lichère, Contemporary French Administrative Law 5–6 (2022) (arguing that French administrative law is "more like the common law" because "the general principles of *droit administratif* . . . and administrative procedure were not codified at the same time as private and criminal law were in the Napoleonic period"); Susan Rose-Ackerman, Peter Lindseth & Blake Emerson, *Introduction*, *in* Comparative Administrative Law 10 (2d ed. 2018) ("Conventionally, administrative law in France has been understood as *jurisprudentiel*—that is, a product of the case law of the *Conseil d'État* in its judicial mode."); Latour, *supra* note 35, at v–vi (2010) (noting that "of all the branches of Continental law, [French administrative law] is the one that most resembles Common Law in the way it is elaborated and arrayed in reasoning").

[77] *See* Napolitano, *supra* note 63, at 423.

principles.[78] Following World War II, the Conseil d'État's role in disputes was enumerated as follows: The tribunal "is a common-law court in administrative matters; it is a court of appeal for decisions made by administrative courts of first instance; [and] it hears final appeals (*recours en cassation*) against decisions made by [other] administrative courts."[79] That framework survived the establishment and fall of the Fourth Republic and remains largely in place in the current regime of the Fifth Republic in France. But to better understand the current place of the Conseil d'État in French administrative law today, one must contemplate its position in France's judicial hierarchy, its composition, and its functions.

2. The Conseil d'État Today

Now that we have a better sense of the Conseil d'État's history, we can better comprehend where that tribunal fits in French public law today. While the Article lacks space to cover all the features of the Conseil d'État, it can sketch its position in the hierarchy of the French state, its composition, and its functions.

a. The Conseil d'État in the French Judicial Hierarchy.

In France, "there is no court which covers all the others and the entire legal system."[80] Rather, the Conseil d'État is the highest court in the administrative system (*ordre administratif*), and the *Cour de cassation* is the highest court in the civil legal system.[81] A separate court, the *tribunal des conflits*, adjudicates possible conflicts of jurisdiction between ordinary and administrative courts.[82] Neither the Conseil d'État nor the *Cour de Cassation* can rule on the constitutionality of internal laws and treaties.[83] Instead, constitutional judicial review is reserved for the *Conseil constitutionnel*, the highest constitutional court.[84] However, only since 1971 has the *Conseil constitutionnel* reviewed the constitutionality of statutes.[85] While the Conseil d'État cannot rule on constitutional questions directly, it can pass on cases that present such

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[78] *See* Conseil d'État [CE] [Highest Administrative Court] Cadot, Dec. 13, 1889, Rec. Lebon 1148; *see also* Steiner, *supra* note 75, at 173 (explaining how the *Cadot* decision abandoned the administrative exhaustion requirement to invoke the Conseil's jurisdiction (known as *le ministre-juge*)).

[79] Ordonnance 45-1708 du 31 juillet 1945 portant sur le Conseil d'État [Ordinance 45-1708 of July 31, 1945 Relating to the Council of State], art. 32.

[80] Steiner, *supra* note 75, at 55.

[81] *See* Ministère de la Justice, The French Justice System 2–3 (2007), https://franceintheus.org/IMG/pdf/Justice_ag.pdf [https://perma.cc/VVN4-YGSV].

[82] *See* Bell & Lichère, *supra* note 76, at 131–32.

[83] *See id.* at 9.

[84] *See id.*

[85] *See* Stirn & Bjorge, *supra* note 64, at 128–32 (discussing rise of *Conseil constitutionnel* after World War II).

questions to the *Conseil constitutionnel*.[86] This procedure of preliminary questions (*question préalable de constitutionnel*) has made the Conseil d'État into a kind of gatekeeper for the *Conseil constitutionnel*.[87] As will be discussed later, that procedure has also allowed France's constitutional court to influence administrative law.

As for the Conseil d'État and the lower courts, the hierarchy of administrative courts in France today would be somewhat familiar to an American lawyer. At the base of the judicial system, there are the general administrative courts (*tribunal administratif*), from which an individual can appeal to appellate administrative courts (*cour administrative d'appel*), and then finally the Conseil d'État.[88] There are also some specialized administrative courts whose decisions bypass the intermediate appellate courts and go directly to the Conseil d'État, such as the recently created court for claims brought by refugees (*la Cour nationale du droit d'asile*).[89]

General administrative courts or the appellate administrative courts can also request that the Conseil d'État address a new and difficult legal question.[90] This procedure has two American analogs: when federal courts in the United States certify questions of law to state supreme courts and when federal appellate courts permit interlocutory appeals from federal district court decisions on a controlling question of law.[91] As with the former mechanism in the United States, the Conseil d'État does not render a judgment in those cases, but simply issues an opinion on the matter (*avis contentieux*).[92] The Conseil d'État can also be a court of first instance either because another court has referred the matter to the Conseil d'État or because no other competent tribunal can hear a challenge to the government's action.[93]

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[86] *See* BELL & LICHÈRE, *supra* note 76, at 9–10.

[87] *Id.*

[88] The *tribunaux administratifs* date to 1953, the *cour administrative d'appel* to 1987. *See* Décret 53-934 du 30 septembre 1953 portant réforme du contentieux administrative [Decree 53-934 of September 30, 1953 Relating to Reforms of Administrative Litigation]; Loi 87-1127 du 31 décembre 1987 portant réforme du contentieux administrative [Law 87-1127 of December 31, 1987 Relating to Reforms of Administrative Litigation]. Prior to the creation of these generalized administrative courts, the Conseil d'État heard appeals of specialized administrative courts. *See* STIRN & BJORGE, *supra* note 64, at 140.

[89] BELL & LICHÈRE, *supra* note 76, at 78–79 (describing origins, caseload, and appeal procedure of the *Cour nationale du droit d'asile*).

[90] Code administratif [C. ADM.] [Administrative Code] art. L113-1 (Fr.).

[91] *See* 28 U.S.C. § 1292(b) (allowing district courts to certify a "controlling question of law" to the relevant court of appeals); Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (discussing how certification of questions of state law "save[s] time, energy, and resources, and helps build a cooperative judicial federalism").

[92] Pierre Delvolvé, *Le Conseil d'État, cour supreme de l'ordre administratif* [*The Council of State, the Supreme Court of the French Administrative System*], 123 POUVOIRS 51, 53 (2007) (quoting law of December 16, 1999).

[93] *See, e.g.*, *id.* at 58 (discussing this phenomenon in the case *Dugoin* (Oct. 17, 2003), referred to the Conseil d'État by the Court of Auditors (*Cour des comptes*)). This residual reviewability of administrative action has a constitutional basis. *See* STIRN & BJORGE, *supra* note 64, at 140 (discussing the Conseil d'État's decisions in *d'Aillieres* (Feb. 7, 1947) and *dame Lamotte* (Feb. 17, 1950)).

b. The Conseil d'État's Composition

The Conseil d'État's composition presents a striking contrast with the federal courts in the United States. First of all, with over 200 members, the Conseil d'État appears quite large to an American lawyer.[94] Not all of the Conseil's members are active, and even those who are active may not be hearing cases, but it is still a marked contrast to, say, the Ninth Circuit, whose twenty-eight active judges preside over a geographic area with roughly the same population as France.[95]

Second, legal education is not a necessary prerequisite for membership in the judicial corps from which the Conseil d'État draws its members.[96] Indeed, while more than fifty years ago close to ninety percent of the Conseil's members had studied law before entering government service, in the twenty-first century only about half hold a law degree.[97] This statistic is a bit misleading considering that many members of the Conseil who do not have a law degree might still have studied law as part of their education. In France, many programs in economics and other social sciences offer legal training, including at Sciences Po, the institution that, as of 2008, graduated two-thirds of the Conseil d'État's members.[98] But nevertheless, the fact that membership to the bar is not the sole or even principal professional arena from which the Conseil draws is certainly foreign to an American lawyer.

The third notable difference is that members of the Conseil d'État are not nominated to the Conseil in any way that resembles the federal judiciary in the United States. Rather, there are three ways to enter the Conseil d'État. The first and most common is through the *Ecole Nationale d'Administration* (ENA), the national academy for civil servants in France. Currently, about three-quarters of the members of the Conseil d'État graduated from ENA.[99]

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[94] *See The Members*, Conseil d'État, https://www.conseil-etat.fr/en/the-members [https://perma.cc/7GH2-6M6L].

[95] *Compare id.*, *with The Judges of This Court in Order of Seniority*, U.S. Cts. for the Ninth Circuit (2023), https://www.ca9.uscourts.gov/judicial-council/judges-seniority-list/ [https://perma.cc/5N5U-JQ9C].

[96] Bell & Lichère, *supra* note 76, at 85 (explaining that "most of [the Conseil's] recruits are not lawyers").

[97] Luc Rouban, *Le Conseil d'État 1958-2008: Sociologie d'un Grand Corps*, 49 Sciences Po, May 2008, at 33 ("Tout d'abord, la réduction considérable de la part prise par les études de droit : les juristes, quel que soit leur niveau, constituaient près de 87 % des membres du Conseil en 1958 contre 48 % dans les années 2000.").

[98] *Id.* at 34 tbl.4.

[99] Bell & Lichère, *supra* note 76, at 85. For the earlier history, see Charles Bosvieux-Onyekwelu, *Professionalising a Grand Corps by Capturing an Idea: Public Service in the French Conseil d'État (1872-1940)*, Sociologie Du Travail, Oct. to Dec. 2018, https://doi.org/10.4000/sdt.8069 [https://perma.cc/AU4H-9N7Z]. It is unclear how this pipeline will operate going forward, however. In 2021, President Macron closed ENA and replaced it with a new Public Service Institute (*L'Institut national du service public*). *See* Benjamin Dodman, *Macron Announces Closure of ENA, the Elite 'School for Presidents' that France Loves to Hate*, France24 (Apr. 4, 2021), https://www.france24.com/en/

Incidentally, like Sciences Po, ENA includes law courses in its curriculum.[100] The 1,200 or so judges of the *tribunaux administratifs* and the *cours administratives d'appel* make up a separate judicial *corps*, which is a distinct body of civil service.[101] These judges cannot simply be promoted to the Conseil d'État, but they can be selected through a competitive process.[102] Finally, a small number are appointed via political nominations, referred to as the *tour extérieur*, which tends to include academics and politicians.[103] To translate this into a scenario an American lawyer might understand, it would be as if a federal administrative court was staffed largely by civil servants and in small part via nominations by elected officials.

c. The Conseil d'État's Judicial and Consultative Functions

The Conseil d'État is not simply a court but rather a tribunal that has both judicial and consultative functions.[104] This Article focuses on the Conseil d'État's judicial role, in which the Conseil d'État shapes administrative law doctrine and supervises France's administrative courts.[105] The Conseil d'État hears administrative law cases (*le contentieux administrative*)—through its jurisdiction of *statuant au contentieux*—which involve litigation between individuals and the government.[106] This focus should not obscure or minimize the consultative role. Indeed, the Conseil d'État has been described as the "primary legal advisor to the government."[107] This legal advice plays out in two ways. Members of the Conseil d'État lend their technical expertise to proposed legislation. In this role, members make sure the statutory text is intelligible and coherent, a role similar to the House and Senate Offices of the Legislative Counsel in the U.S. Congress.[108] The Conseil d'État also

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france/20210408-macron-announces-closure-of-ena-the-elite-school-for-presidents-that-france-loves-to-hate [https://perma.cc/DP5C-FX3Y].

[100] Bell & Lichère, *supra* note 76, at 86.

[101] *Id.* at 83–84 (describing how *tribunaux administratifs* and the *cours administratives d'appel* comprise one judicial *corps*, and *corps* of the Conseil d'État is separate).

[102] *Id.* at 84.

[103] John Bell, Sophie Boyron & Simon Whittaker, Principles of French Law 177 (2008) (concluding that an administrative judge in France "has a distinctive formation in administration and personal experience of how it works").

[104] Bell & Lichère, *supra* note 76, at 69–75 (describing the Conseil d'État's multiple roles in the French state); s*ee also* Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940, 9, 22–27, 142–43 (2014) (exploring this dynamic using the German conception of a *Rechtsstaat*).

[105] Bell & Lichère, *supra* note 76, at 70 (explaining how currently "the Conseil d'État is largely an appellate court dealing with points of law" whose "function is to decide difficult cases and also to maintain the unity of approach within the body of administrative courts"); *see also id.* (pointing out that the Conseil d'État is "distinctive" because "it is the only national court in the hierarchy of general administrative courts").

[106] Bell & Lichère, *supra* note 76, at 70.

[107] *Id.* at 72.

[108] *See* Jesse Cross & Abbe Gluck, *The Congressional Bureaucracy*, 168 U. Pa. L. Rev. 1541, 1563–66 (2020) (discussing the Office of the Legislative Counsel in both chambers of the U.S. Congress).

makes sure the text conforms to existing legal rules, not unlike how the Office of Information and Regulatory Affairs ("OIRA") reviews proposed federal regulations in the United States.[109] But the Conseil d'État's consultative functions exceed that of any office in Congress or the White House, for the Conseil d'État also ensures that proposed legislation comports with the French Constitution.[110]

One of Dicey's main criticisms of *droit administratif* was the Conseil d'État's location within the Executive itself.[111] Some scholars have argued that Dicey's criticism "ceased to be valid when the Conseil d'État and the other administrative courts established in continental Europe were separated from the monarchy and gained the status of true judges."[112] Formalists may continue to have separation of powers concerns that civil jurisdictions' Councils of State, including France's, often retain a consultative function. But the Conseil d'État has erected barriers between the judicial and consultative departments, which have become only more rigid in recent years.

The longstanding *de facto* separation between the Conseil d'État's judicial and consultative functions has now become *de jure*. As a matter of caselaw and custom, the Conseil d'État has prohibited its members from overseeing proceedings in its judicial section that involve challenges to the legality of a statute or regulation over which they previously deliberated as part of one of the consultative sections. In 2008, the Conseil d'État made this prohibition explicit by decree.[113] A year later, the European Court of Human Rights ruled that so long as no member of the relevant judicial section of the Conseil d'État previously participated in the consultative section on the legal text at issue, there is no basis for challenging the independence and impartiality of the judicial section.[114] Interestingly enough, the fact that the judges of the Conseil d'État rotate into positions in the administration does not necessarily make them more deferential to the government's positions when presiding over cases. Indeed, the literature suggests that this

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[109] *See, e.g.*, Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1844–47 (2013).

[110] BELL & LICHÈRE, *supra* note 76, at 72.

[111] *See supra* notes 53–61 and accompanying text.

[112] *See* Napolitano, *supra* note 63, at 431.

[113] Décret 2008-225 du 6 mars 2008 relatif à l'organisation et au fonctionnement du Conseil d'État [Decree 2008-225 of March 6, 2008 Relating to the Organization and Functioning of the Council of State], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 7 2008; *see also* STIRN & BJORGE, *supra* note 64, at 142.

[114] *Union fédérale des Consommateurs Que Choisir de Côte d'Or v. France*, No. 39699/03, Eur. Ct. H.R. (2009); *see also* Jean Massot, *The Powers and Duties of the French Administrative Law Judge*, *in* COMPARATIVE ADMINISTRATIVE LAW 435, 437 n.8 (2d ed. 2018) (noting that the decision of the Conseil d'État "had been issued long before the decree of March 6, 2008 came into effect," which "confirm[s] that the C[onseil] respected the now-codified rule as a matter of custom and practice").

government experience may make them less likely to defer to arguments based on the agency's expertise.[115]

In light of this overview, perhaps the D.C. Circuit is not, by itself, the American analog to the Conseil d'État, but rather the analog to the Conseil's judicial department (*le Section du Contentieux*). The title of the article would be more accurate (and more cumbersome) if it were the "D.C. Circuit as the Section du Contentieux du Conseil D'État." OIRA more closely resembles the consultative section of the Conseil d'État. Maybe Professor Christopher Edley was right when he suggested, decades ago, that a D.C. Circuit that also performed OIRA's role would roughly approximate the Conseil d'État.[116] Formalists, of course, will balk at such an equation, but if members of the Conseil d'État never judge a statute or rule they helped to craft, the distance between judicial review in American and French administrative law tends to shrink the closer we look.

3. Changes and Challenges to the Conseil d'État

In recent years, French administrative law has become more codified, constitutionalized, and Europeanized. Each of these three developments has reshaped the role of the Conseil d'État. In an effort to update the American understanding of the Conseil d'État, this section explores each of these three developments in turn.

a. Codification

In 1999, France enacted the *Code des Relations entre le Public et l'Administration* ("CRPA"), legislation that gave the national government the power to codify various aspects of administrative procedure, along with other areas of procedural law.[117] But France only adopted an administrative procedure act in 2015.[118] In this aspect of administrative law, France was con-

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[115] *See, e.g.*, Paul Craig, *Judicial Review of Questions of Law: A Comparative Perspective*, *in* Comparative Administrative Law 389, 401 (2d ed. 2018) (suggesting that judges of the Conseil d'État are "less likely to be swayed by arguments of relative expertise" because of their own experience).

[116] *See* Edley, Jr., *supra* note 35, at 241–45.

[117] Delvolvé, *supra* note 92, at 53 (quoting law of December 16, 1999). Commentators have pointed out that the 1999 Act resembled how other civil law jurisdictions established supreme administrative courts. *See id.* (comparing French experience with that of Germany and Portugal).

[118] *See* Ordonnance 2015-1341 du 23 octobre 2015 relatif aux dispositions législatives du code des relations entre le public et l'administration [Ordinance of October 23, 2015 Relating to the Legislative Provisions of the Code of Relations Between the Public and the Administration], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 1, 2016; Ordonnance 2015-1342 du 23 octobre 2015 relatif aux dispositions réglementaires du code des relations entre le public et l'administration (Décrets en Conseil d'Etat et en conseil des ministres, décrets en Conseil d'Etat et décrets) [Ordinance of October 23, 2015 Relating to the Regulatory Provisions of the Code of Relations between the Public and the Administration (Decrees in the Council of State and in the Council of Ministers, decrees in the Council of State and decrees)], Journal Officiel de la République Française [J.O.] [Official Gazette of

spicuously late. All but five of France's fellow EU member states had already enacted codes of administrative procedure.[119] The United States has had an administrative procedure act since 1946.[120] Many other countries have had similar statutes for decades.[121] France's lagging administrative codification is all the more interesting because France is the historic leader in codification generally and remains an active codifier in other areas of law.[122]

France's codification efforts must not be overstated, as they have been characterized as a restatement.[123] Nor does the code encompass administrative litigation (*le contentieux administratif*).[124] Instead, the *code de la justice administrative* ("CJA"), dating to 2000, has been a source of procedural rules. France has no statutory equivalent to the American Administrative Procedure Act ("APA") that lays out the availability and scope of judicial review.[125] However, the CRPA made explicit many procedural rules that an American administrative lawyer would recognize, including a right to request that an agency review its initial decision and the principle that such a request tolls the statute of limitations pending judicial review of the same.[126]

b. Constitutionalization

In addition to codification's constraints, the Conseil d'État is no longer the only tribunal making administrative law in France. France's constitutional court, the *Conseil constitutionnel*, is now more active in administrative law.[127]

France], Jan. 1, 2016. *See generally* Dominique Custos, *The 2015 French Code of Administrative Procedure: An Assessment*, *in* Comparative Administrative Law 284 (2d ed. 2017) (describing the act as "allow[ing] French administrative law to catch up with a global codification trend" as well as "formaliz[ing] a significant reconfiguration of the French sources of law"); *see also* Bell & Lichère, *supra* note 76, at 23 (describing the CRPA as "a compilation of texts, rather than a systematic framework").

[119] *See* Custos, *supra* note 118, at 284; *see, e.g.*, Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, Bundesgesetzblatt [BGBl] [Federal Law Gazette], BGBl Teil I at 686, last amended by Gesetz [G], June 21, 2019, BGBl at 846, art. 5 (Ger.); *cf.* Peter Cane, Administrative Law 25–26 (2011) (explaining United Kingdom continues to lack an administrative procedure statute).

[120] 5 U.S.C. §§ 551–59.

[121] Custos, *supra* note 118, at 284.

[122] *See* Stéphane Braconnier, *France*, *in* Codification of Administrative Procedure 323 (Jean-Bernard Auby ed., 2013) (discussing the codification process in France); Giacinto della Cananea, *Administrative Procedure in Europe*, The Regul. Rev., Oct. 2022, at 8, 10, https://www.oecd.org/gov/regulatory-policy/41882845.pdf [https://perma.cc/32W6-F6T2].

[123] Custos, *supra* note 118, at 287 (describing CRPA as "a codification of the law as it stands (*codification à droit constant*)" and noting that statute "amounts primarily to a restatement and contains only a few novelties"). American lawyers who are familiar with administrative law need not be reminded of how this question has dogged the APA for decades.

[124] Bell & Lichère, *supra* note 76, at 46.

[125] 5 U.S.C. §§ 701–06.

[126] *See* Code des relations entre le public et l'administration (CRPA) [Code of Relations Between the Public and the Administration]; Code administratif [C. adm.] [Administrative Code] art. L411-2 (Fr.); Code administratif [C. adm.] [Administrative Code] art. L410-1 (Fr.).

[127] *See* Bermann & Picard, *supra* note 71, at 72–74 (noting that "administrative law has become more dependent on constitutional law than before" and positing that the *Conseil constitutionnel*'s activity partially explains this development).

The *Conseil constitutionnel* made a series of decisions that entrenched long-standing aspects of French administrative law, including the independence of the administrative courts and their separation from the civil courts.[128]

The *Conseil constitutionnel*'s increased activity in administrative law does not necessarily mean that it is in conflict with the Conseil d'État. Indeed, the President of the Conseil d'État's judicial department (*le Section du Contentieux*) from 2004 to 2018 recently explained how the *Conseil constitutionnel* and the Conseil d'État have collaborated in developing the constitutional principles of French administrative law.[129] That is because the Conseil d'État has increasingly passed on administrative law cases that raise constitutional questions through its procedure of preliminary questions (*question préalable de constitutionnel*).[130]

c. Europeanization

Perhaps even more apparent than the trends of codification and constitutionalization, French administrative law now develops in concert with the law of the European Union.[131] Indeed, EU law's insistence on an independent adjudicator helps explain the Conseil d'État's aforementioned decree separating their judges' involvement in the tribunal's consultative and judicial roles.[132] Decisions from the European Court of Human Rights have also shaped the more public character of the hearings, including the roles of the *commissaire du gourvernment/rapporteurs*.[133]

Furthermore, the influence of the law of the European Union extends not just to the Conseil d'État's decisions but also to the recent codification of French administrative law. For instance, Article L211-2 of the CRPA enumerates "the right of any person to be informed without delay of administrative

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[128] *See* Bell & Lichère, *supra* note 76, at 9 (discussing the *Conseil constitutionnel*'s decisions in 1980 and 1987).

[129] *See* Bernard Stirn, *Constitution et droit administratif*, 37 Nouveaux Cahiers du Conseil Constitutionnel 6, 16 (2012)*; see also* Bell & Lichère, *supra* note 76, at 9 (discussing this "spirit of cooperation" between the two judicial bodies).

[130] *See* Olivier Fandjip, *Le nouveau visage de la décision préalable en contentieux administratif français*, 12 Les Annales de droit 141, 146 (2019).

[131] *See* Bell & Lichère, *supra* note 76, at 12 (discussing "the sincere adhesion of the Conseil d'État to EU law"); *see also* Custos, *supra* note 118, at 284 (discussing "the growing importance of the national, European and international legislation that has, since the 1970s, displaced the quasi-monopoly of the *Conseil d'État* as the primary source of French administrative law").

[132] *See supra* notes 113–115 and accompanying text; *see also* Massot, *supra* note 114, at 437 (describing the "longstanding tension between the [European Court of Human Rights] and various councils of state throughout Europe," including France, "that has flowed from the dual role these bodies generally play as both policy advisers to their governments and judges of the legality of their governments' administrative acts"); Delvolvé, *supra* note 92, at 53 (describing the separation of the Conseil d'État's functions as "reinforced under the influence of the European Court of Human Rights" and specifically the *Procola* judgment of September 28, 1995).

[133] *See* Stirn & Bjorge, *supra* note 64, at 144–45 (discussing EU influence on the role of the *rapporteur* and France's 2009 and 2015 reforms in response).

decisions which are adverse to them."[134] That provision of France's new administrative law code includes a duty to give reasons, which dates to the 1951 treaty that created the European Coal and Steel Community as well as the EU's Charter of Fundamental Rights.[135] As the authors of the leading English language monograph on French administrative law put it, the *Conseil constitutionnel* and the European Court of Human Rights "have become major judicial forces in defining standards for the protection of human rights in France," and as a result, those courts have "inevitably reduced the role of the Conseil d'État, which is effectively (though not formally) a hierarchically inferior court."[136]

These three factors—the codification of administrative procedure, the increase in administrative law decisions by the constitutional court, and the influence of European law—have made the Conseil d'État less supreme in its sphere of administrative law.[137] Instead, it is one institution among many, albeit a crucial one, in the development of French administrative law.[138] The Conseil d'État looks different than it did not only in Dicey's time, but also than it did just twenty years ago. Today, the Conseil d'État's role in French administrative law has more in common with that of the D.C. Circuit, the court to which this Article now turns.

III. What Makes the D.C. Circuit Different? An Institutional View

It is no easy task to systematize meaningful judicial review in an administrative state. Administrative agencies serve up too many controversies in too many contexts for an apex court to provide meaningful ex post oversight of agency policymaking. As a result, judicial review of agency action often falls to a court lower in the judicial hierarchy. As we saw in Part II, France formalized that arrangement through the Conseil d'État. Other countries, like Germany, have created specialized administrative law courts. Common law jurisdictions are more mixed, but they too rely heavily on non-apex courts

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[134] Bell & Lichère, *supra* note 76, at 230 (describing how this "inclusion of a formal principle in the CRPA of 2015 reflects both domestic and European influences").

[135] *Id.*

[136] *Id.* at 21.

[137] *See id.* (describing the reduced role of the Conseil d'État in French administrative law).

[138] The Conseil d'État looms large not only in France but also in other countries' administrative law. *See* Massot, *supra* note 114, at 435 n.2 (pointing out that "at the ceremonies in 1999 celebrating the bicentennial of the founding of the French *Conseil d'État*, nearly 50 countries were represented"); *see also* Emerson, *supra* note 38, at 5 (describing the Conseil d'État as "perhaps the world's foremost administrative institution"). The French tribunal model is replicated in other countries, including Belgium, Greece, Italy, and the Netherlands. *See* Stirn & Bjorge, *supra* note 64, at 135–36 (describing similarities between other courts' combined judicial and consultative functions over the course of history).

for developing administrative law.[139] So too in the United States. As this Part explains, the D.C. Circuit, with its distinctive caseload, composition, and doctrinal development, has served an instrumental role in administrative law. In the words of then-Professor Antonin Scalia, penned forty-five years ago and before he joined either court, when it comes to judicial review of agency action "the D.C. Circuit is something of a resident manager, and the Supreme Court an absentee landlord."[140] For agencies, it is the D.C. Circuit, not the Supreme Court "that must be satisfied, on a day-to-day basis."[141] One burning question for federal administrative law is whether the Supreme Court has returned and decided to displace its manager. Considering the D.C. Circuit anew reminds us of what might get lost in the formalist turn in administrative law jurisprudence and scholarship.

The history of the D.C. Circuit—shaped and reshaped as it has been by Congress—suggests that the court is not an ancient, august common law court, but rather a dynamic tribunal created to improve the machinery of an expansive, energetic national government.[142] The federal courts in D.C. served as both trial and appellate courts until 1893, when Congress created a district court and an appellate court for Washington, D.C.[143] These D.C.-based federal courts dated to the second Judiciary Act of 1801. When President Jefferson and his congressional allies abolished the other circuit courts, they left the Circuit Court for D.C. alone.[144] While the D.C. Circuit was spared, its judges subsequently experienced various slights. For some time, the court had to sit

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[139] It would be worth analyzing the roles of the High Court versus the Federal Court and Administrative Appeals Tribunal in Australia. *See* Peter Cane, Controlling Administrative Power 135–40 (2016) (describing Australia's Constitution and system of government). In the United Kingdom, the Upper Tribunal has been characterized as functioning as the "new administrative appeals court" and "the Court of Appeal and the Supreme Court will defer to some extent to the Upper Tribunal's judgment on the law that [administrative] tribunals apply." Timothy Endicott, Administrative Law 486 (2021). Importantly, Timothy Endicott defends the United Kingdom's new system of relying on an "administrative appeals court that is not part of the ordinary courts" as still operating within Dicey's rule of law framework. *Id.* at 497. I am grateful to Liz Fisher for a conversation on this topic.

[140] Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 371 (1978).

[141] *Id.*

[142] *See* Jeffrey Brandon Morris, Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuits xvii (2001) (explaining how "from the outset, the major court for the District of Columbia was an unusual hybrid"); *see also* Carl Stern, *The Evolution of the Courts of the D.C. Circuit*, Historical Soc'y of the D.C. Circuit (Apr. 2013), https://dcchs.org/wp-content/uploads/2018/12/evolution-of-the-courts.pdf [https://perma.cc/2XP9-HKTH] (detailing how "Congress repeatedly reorganized the District of Columbia courts" in response to "the needs of a growing population and an increasingly complex federal government" and that today's D.C. Circuit "emerged in [its] current role in 1971"); Theodore Voorhees, *The District of Columbia Courts: A Judicial Anomaly*, 29 Cath. U. L. Rev. 917, 919 (1980) (recounting D.C. courts' handling of federal and local matters).

[143] Act of Feb. 9, 1893, ch. 74, 27 Stat. 434 (codified at 28 U.S.C. § 41); *see* Morris, *supra* note 142, at 59–60; E. Barrett Prettyman, Jr., D.C. Cir., History of the United States Court of Appeals for the District of Columbia in the Country's Bicentennial Year 1–6 (1977).

[144] *See* Roberts, s*upra* note 1, at 377.

in D.C.'s City Hall.[145] Congress cut their salaries.[146] The United States Code did not include the D.C. Circuit as one of the federal courts of appeals until 1948.[147] Still, well before Congress began channeling certain challenges to agency action to the D.C. Circuit, that court had asserted a special procedural prerogative in hearing challenges lodged against the federal government.[148]

In a way, the D.C. Circuit's rise coincides with the rise of the American administrative state more generally. It was not until the New Deal that Congress started directing more administrative law cases to the D.C. Circuit. There have been high-profile proposals to create some kind of national administrative court, including in the 1930s,[149] 1950s,[150] and 1970s,[151] not to mention proposals for subject-specific specialized courts.[152] Those proposals never

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[145] *See* Morris, *supra* note 142, at 177.

[146] *See* Susan Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 Geo. L.J. 549, 560–61 (2002) (discussing Congress's salary reduction of federal judges in D.C.).

[147] Act of June 25, 1948, ch. 646, 62 Stat. 869, 970 (codified at 28 U.S.C. § 41); *see also* Roberts, *supra* note 1, at 386 (noting that the D.C. Circuit was excluded from the Evarts Act of 1891, which created the current structure of the federal circuits).

[148] Roberts, *supra* note 1, at 381 (pointing out that D.C. Circuit "[f]or the next 125 years . . . would be the only court that could issue writs of mandamus challenging official conduct by the new national government"); *see id.* at 389 (suggesting that 1870 patent jurisdiction was a "prototype[] for a succession of legislative grants of authority to review decisions" of a host of agencies).

[149] *See Report of the Special Committee on Administrative Law*, 61 Ann. Rep. A.B.A. 720, 760–63 (1936) (proposing a United States Administrative Court); *see also* Louis G. Caldwell, *A Federal Administrative Court*, 84 U. Pa. L. Rev. 966, 979–81 (1936) (discussing the proposal by the Special Committee on Administrative Law of the American Bar Association to establish a federal administrative court); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 Tulsa L.J. 221, 222 (1996) (discussing the 1939 Walter-Logan Bill and its channeling of review to the D.C. Circuit).

[150] The Second Hoover Commission proposed an Administrative Court of the United States. *See* Comm'n on Org. of the Exec. Branch of Gov't, Legal Services and Procedure: A Report to The Congress, Recommendation No. 51, at 87–88 (1955) (outlining the recommendation for an Administrative Court of the United States); *see also* Joanna L. Grisinger, The Unwieldy American State: Administrative Politics Since the New Deal 212–22 (2014) (recounting the history of the Second Hoover Commission); Robert W. Minor, *The Administrative Court: Variations on a Theme*, 19 Ohio St. L.J. 380, 384 (1958) (discussing proposals for specialized administrative courts); Daniel R. Ernst, *Dicey's Disciple on the D.C. Circuit*: *Judge Harold Stephens and Administrative Law Reform, 1933-1940*, 90 Geo. L.J. 787, 796 (2002) (describing how the D.C. Circuit's "varied jurisdiction" in the 1940s and 1950s, including "appeals from the District of Columbia's courts of general jurisdiction, kept Stephens and his colleagues from focusing on administrative cases as much as their predecessors did after 1970").

[151] In 1971, the President's Advisory Council on Executive Organization, often referred to as the Ash Council, recommended an Administrative Court. *See* President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies 54 (1971) (describing the benefits of an administrative court); *see also* Nathaniel L. Nathanson, *The Administrative Court Proposal*, 57 Va. L. Rev. 996, 997–1003 (1971) (evaluating the reasons for the proposed administrative court).

[152] *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Pa. L. Rev. 1111, 1113 (1990) (collecting examples); *see also* Ernst, *supra* note 150, at 811 (discussing Robert Jackson's proposal in 1935 to remove tax controversies from the federal courts to a new "tax equity tribunal" that would take a more "realistic or economic" approach than the "rule of formalism" that characterized the federal bench at the time).

became law, but throughout the mid-twentieth century, Congress repeatedly channeled challenges to agency action to the D.C. Circuit.[153] And the Supreme Court has repeatedly upheld the channeling provisions of those statutes.[154] Meanwhile, scholars, lawyers, and judges have often drawn attention to the D.C. Circuit's distinctive role relative to the other federal courts of appeals.[155] And the D.C. Circuit has been swept up in larger debates about the allocation of administrative law cases in the federal courts.[156] That accretion of statutes and legal practice has led to the D.C. Circuit having a docket that is distinct from the other courts of appeals.

A. The Distinctive Docket of the D.C. Circuit

The D.C. Circuit's docket, as we know it, is merely fifty-two years old. The court was remade on July 29, 1970 when President Nixon signed the District of Columbia Court Reform and Criminal Procedure Act into law.[157] That statute deprived the D.C. Circuit of its jurisdiction over local disputes in Washington D.C., including most criminal proceedings, contract and property disputes, and other cases we associate with state courts.[158] Scholars have consistently identified this statute as the main reason why the D.C. Circuit became "the nation's chief administrative tribunal."[159] There may be other reasons for

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[153] *See, e.g.*, 33 U.S.C. § 1369(b) (Clean Water Act); 42 U.S.C. § 7607(b) (1982) (Clean Air Act); *see also* Fraser et al., *supra* note 23, at App'x, 154–55.

[154] *See, e.g.*, Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978) (upholding the Clean Air Act's channeling provision).

[155] *See, e.g.*, Revesz, *supra* note 152, at 1123 (excluding the D.C. Circuit from the other "generalist" courts of appeals because of the former's "exclusive jurisdiction over the review" of various administrative agencies); Peter Charles Hoffer, Williamjames Hull Hoffer & N. E. H. Hull, The Federal Courts: An Essential History 344 (2016) (describing how the D.C. Circuit became an "intellectual rival" to the Second Circuit "particularly . . . in the area of administrative law").

[156] *See* Henry Friendly, Federal Jurisdiction: A General View 153–96 (1973); Richard Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. Cal. L. Rev. 761, 775–91 (1983); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 65 (1975).

[157] *See* D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 2601, 84 Stat. 473 (1970) ("An Act to reorganize the courts of the District of Columbia . . ."); Prettyman, *supra* note 143, at 140 (showing the Court Reform Act's "dramatic effect on the court" by contrasting the decline in pending criminal cases with the rise in administrative appeals in the 1970s).

[158] *See* Prettyman, *supra* note 143, at 79 (discussing how the Court Reform Act "transferred to the new Superior Court virtually all civil and criminal litigation of a purely local nature" but that "this reduction in workload . . . was matched and indeed exceeded by the transfer to the District of Columbia Circuit of a large number of reviews of federal administrative agency decisions which theretofore had been handled by each of the other judicial circuits").

[159] *See, e.g.*, Morris, *supra* note 142, at 235; Surrency, *supra* note 4, at 443; Christopher P. Banks, Judicial Politics in the D.C. Circuit Court 32 (1999) (recounting how the 1970 Act and "burgeoning social regulation . . . altered the nature and composition of the D.C. Circuit's docket"); *see also* Prettyman, *supra* note 143, at 79–80 (enumerating at least thirty agencies for which petitions of review could be filed in the D.C. Circuit by 1976).

the distinctive docket of the D.C. Circuit: its relatively small geographic area, the ease of venue for government controversies, congressional choice, and practitioner preferences.

The D.C. Circuit covers a much smaller and less populous area than the other geographic circuits. The District of Columbia encompasses not even seventy square miles and has fewer than 700,000 residents.[160] There is also no federal prison in the District.[161] As a result, the D.C. Circuit hears fewer cases of the kind that dominate other circuits: prison litigation, civil rights, Social Security, and diversity cases.[162]

The D.C. Circuit's docket is not just different from other circuits because it lacks many of the types of cases that dominate federal appeals. It is also different because the D.C. Circuit has exclusive jurisdiction over various challenges to agency action.[163] While then-Judge John Roberts was right that "there is nothing inevitable about assigning jurisdiction to review government decisions to the [D.C.] Circuit,"[164] Congress has repeatedly done so.[165] In addition to these exclusive jurisdiction provisions, Congress has also used the D.C. Circuit as an alternative forum with concurrent jurisdiction over certain agencies, such as the National Labor Relations Board ("NLRB") and the

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[160] *See QuickFacts: District of Columbia*, U.S. Census Bureau (July 1, 2022), https://www.census.gov/quickfacts/fact/table/DC/PST045222 [https://perma.cc/D2ZF-ZZ93].

[161] *See Our Locations*, Fed. Bur. of Prisons, https://www.bop.gov/locations/map.jsp [https://perma.cc/Z44H-Hgg4]; *see also* Roberts, *supra* note 1, at 376 (pointing out that the D.C. Circuit "is so small that it does not have a federal prison within its boundaries, so prisoner petitions—which make up a notable portion of the docket nationwide on other courts of appeals—are a less significant part of its work"); Fraser et al., *supra* note 23, at 138 ("Although prisoner petitions against state and local governments are a significant fraction of the caseload of other federal courts of appeal, the D.C. Circuit hears almost none.").

[162] *See* Fraser et al., *supra* note 23, at 140–43. The lack of Social Security disability cases is ironic, since those cases that make it to federal court represent the tip of an iceberg—namely, the largest adjudicative system in the United States. *See* Barnhart v. Thomas, 540 U.S. 20, 28–29 (2003) ("[T]he Social Security hearing system is 'probably the largest adjudicative agency in the western world.'"); David K. Hausman, *Reviewing Administrative Review*, 38 Yale J. on Reg. 1059, 1076 (2021) (pointing out that "Social Security Administrative Law Judges decided an average of over 750,000 cases per year from 2010 to 2014—about twice as many cases as the federal district courts").

[163] *See* Fraser et al., *supra* note 23, App'x at 154–55 (enumerating more than 130 jurisdictional provisions in the United States Code that refer to the D.C. Circuit).

[164] Roberts, *supra* note 1, at 377.

[165] *See id.*; Prettyman, *supra* note 143, at 79 (suggesting that "as early as 1921," Congress was channeling first instance reviews of agency action, but that after the 1970 Court Reform Act, "the number of such reviews greatly increased"); Surrency, *supra* note 4, at 442–43 (discussing how these channeling statutes made the D.C. Circuit "not just another state or federal court but contributed materially to the development of federal administrative law"). Professor Matthew Lawrence and others performed a valuable scholarly service by gathering and analyzing all the channeling statutes that push cases to the D.C. Circuit. *See* Fraser et al., *supra* note 23; *see also, e.g.*, Am. Rd. & Transp. Builders Ass'n v. E.P.A., 865 F. Supp. 2d 72, 80 (D.D.C. 2012), *aff'd*, No. 12-5244, 2013 WL 599474 (D.C. Cir. Jan. 28, 2013) (discussing how Section 307(b)(1) of the Clean Air Act channels challenges to the D.C. Circuit); Env't Def. Fund v. Thomas, 870 F.2d 892, 896 (2d Cir. 1989) (same).

Securities and Exchange Commission ("SEC").[166] Even where the statute does not expressly channel petitions for review to the D.C. Circuit, other federal courts will stay their own cases through primary jurisdiction to allow agency proceedings to continue, which, once final, can be challenged in the D.C. Circuit.[167]

Even when given a choice among circuits, many litigants choose the D.C. Circuit. There is some evidence that lawyers and agencies prefer litigating in the D.C. Circuit.[168] As Roberts put it, "[e]ven when the jurisdiction is concurrent, as it often is . . . lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits."[169] In that way, the perceived administrative law expertise of the D.C. Circuit may be self-fulfilling. If litigants are given a choice of where to bring their legal challenge to federal agency action, and they choose the D.C. Circuit, that court will continue to have opportunities to apply, shape, and reconsider administrative law doctrine. As will be discussed later, though, this reason for the D.C. Circuit's dominance in administrative law may be fading.

As Professor Merritt McAlister recently demonstrated, "[t]he D.C. Circuit's docket composition is the most unusual—and the clearest outlier among the geographic circuits."[170] Due to its size, its lack of more typical federal cases, choices by Congress, and choices by litigants, the D.C. Circuit's docket is distinct from the other federal courts of appeals. And it is not just the

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[166] *See* 29 U.S.C. § 160(f) (permitting a petitioner to seek review of a final order by the NLRB where the petitioner resides, where the matter took place, or in the D.C. Circuit); 15 U.S.C. § 78y(a)(1) (similar provision for final orders from the SEC).

[167] *See, e.g.*, AT&T Corp. v. FCC, 970 F.3d 344, 347–48 (D.C. Cir. 2020) (explaining how the District Court for the District of New Jersey stayed and referred litigation between two telecommunications companies to the FCC through primary jurisdiction, the FCC resolved the liability phase of the proceeding, and then both companies sought review of the FCC's liability determination in the D.C. Circuit). *See generally* Diana R.H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 Ohio State L.J. 541, 547–52 (2017) (defining doctrine as "provid[ing] a mechanism for courts to refer an issue to an administrative agency for determination when the issue is within the agency's purview while the case itself remains with the court's jurisdiction"); Richard J. Pierce, Jr. & Kristin E. Hickman, Administrative Law Treatise §16.1, 1 (6th ed. 2018) (explaining doctrine is "used by courts to allocate initial decisionmaking responsibility between agencies and courts where such overlaps and potential for conflicts exist").

[168] *See* Amy Semet, *Statutory Interpretation and* Chevron *Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. Irvine L. Rev. 621, 663 n.56 (2022) (discussing NLRB nonacquiescence policy); Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. Pa. L. Rev. 302, 307 (1980) (detailing forum shopping in the D.C. Circuit in the context of Occupational Safety and Health Administration appeals regarding standards for toxic chemicals).

[169] Roberts, *supra* note 1, at 389.

[170] Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137, 1183 (2022) (showing that "for administrative appeals," the D.C. Circuit "exceeds two standard deviations" of the five-year mean across all the federal courts of appeals); Prettyman, *supra* note 143, at 139 (analyzing the court's 1975 calendar and finding that "fully 50 percent of its filings came from Petitions for Review of administrative agency decisions and orders").

D.C. Circuit's docket that distinguishes it from the rest of the federal judiciary. Its judges are different, too.

B. The Distinctive Composition of the D.C. Circuit

If the definition of a federal judge is a lawyer who knows a senator, a D.C. Circuit judge is a lawyer who works for the President.[171] That quip is backed up by the current composition of the D.C. Circuit, the modern history of the court, and structural features of the nomination process.

Look at the D.C. Circuit today. Of the active judges on the D.C. Circuit, a majority worked as attorneys in the federal government, many for sustained periods and in the upper echelons of the Executive Branch. Chief Judge Srinivasan served as the Principal Deputy Solicitor General immediately before receiving his commission to the D.C. Circuit.[172] Before joining the federal bench, Judge Millet spent nearly her entire career at the Justice Department.[173] During the Clinton Administration, Judge Pillard worked in the Solicitor General's office and in the Justice Department's Office of Legal Counsel.[174] Judge Katsas worked in the Justice Department for nearly all of George W. Bush's presidency and was working in President Trump's White House Counsel's office immediately before his confirmation to the court.[175] Before joining the D.C. Circuit, Judge Rao served as the Administrator of the Office of Information and Regulatory Affairs ("OIRA"), arguably the position in which a lawyer can most influence federal regulations.[176] Judge Pan was elevated from D.C.'s district court but had also served in the Justice and Treasury Departments before spending a decade in the U.S. Attorney's Office in Washington.[177] And Judge Garcia, currently the most junior judge on the court, served as Deputy Assistant Attorney General in the DOJ's Office of Legal Counsel.[178]

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[171] Revesz, *supra* note 152, at 1148.

[172] *See Sri Srinivasan*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+SS [https://perma.cc/LNE7-YUFP].

[173] *See Patricia A. Millett*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+PAM [https://perma.cc/2WXH-22LF].

[174] *See Cornelia T.L. Pillard*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+NP [https://perma.cc/ETM5-2ZGE].

[175] *See Gregory G. Katsas,* U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+GGK [https://perma.cc/2CDU-DNLG].

[176] *See Neomi Rao,* U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+NJR [https://perma.cc/L5LM-SN6P].

[177] *See* Rachel Weiner, *Judge Florence Pan Nominated to Court of Appeals for the D.C. Circuit*, Wash. Post (May 25, 2022), https://www.washingtonpost.com/dc-md-va/2022/05/25/judge-pan-nominated-appeals-court/ [https://perma.cc/4PMK-DFNV].

[178] *Bradley N. Garcia*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BNG [https://perma.cc/M44D-HB3V].

Of the current D.C. Circuit judges who did not work in the Executive Branch, all were federal judges before their elevation to the D.C. Circuit.[179]

This contemporary practice of nominating and confirming judges who have significant government service, and more specifically, service in presidential administrations, is in keeping with the history of the D.C. Circuit. Indeed, since Congress redesignated the D.C. Circuit *as* the D.C. Circuit in 1943, many D.C. Circuit judges have come from extensive government service.[180] As might be expected, several D.C. Circuit judges once worked in the Justice Department. But previous members of the D.C. Circuit have also occupied a mélange of Executive Branch posts. To name more than a few, they include White House staff secretary,[181] another OIRA Administrator,[182] General Counsel of the IRS,[183] Chief Counsel of the Office of Price Administration,[184] Deputy Director of the FBI,[185] Undersecretary of Labor,[186] Undersecretary of State,[187] Chairman of Administrative Conference of the United States

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[179] *See Karen Lecraft Henderson*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+KLH [https://perma.cc/4X35-J4A2] (working for South Carolina Attorney General before serving as a federal district court judge); *Robert L. Wilkins*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+RLW [https://perma.cc/2PK6-N5MM] (spending twelve years in the Public Defender Service for the District of Columbia, then several years in practice that included serving on a presidential commission that advised President George W. Bush on the creation of the Smithsonian Institution's National Museum of African American History and Culture); *Justin R. Walker*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+JRW [https://perma.cc/QF9W-KPYZ] (working as law professor at University of Louisville before being confirmed as a federal district court judge); *J. Michelle Childs*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+JMC [https://perma.cc/2JE6-RQUV] (working in South Carolina state government, including that state's department of labor and serving as Commissioner of Workers' Compensation Commission).

[180] Act of Dec. 29, 1942, ch. 835, 56 Stat. 1094, 1094–95.

[181] *See Current Members*, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/5HYY-W59X] (detailing Justice Brett Kavanaugh's prior government experience).

[182] *See Douglas H. Ginsburg*, U.S. Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judges+-+DHG [https://perma.cc/PK5C-N7M6] (serving also as Deputy Assistant Attorney General and Assistant Attorney General in the Antitrust Division of the Justice Department).

[183] *See E. Barrett Prettyman, Jr., Esq.*, Historical Soc'y of the D.C. Circuit, https://dcchs.org/judges/prettyman-jr-e-barrett/ [https://perma.cc/7DSB-N8DU].

[184] *See Harold Leventhal,* Historical Soc'y of the D.C. Circuit, https://dcchs.org/judges/leventhal-harold/?portfolioCats=5%2C4 [https://perma.cc/9SM6-EZAS] (explaining Judge Leventhal worked in the Office of Price Administration for three different periods: 1940–1943, 1946, and 1951–1952 and before that served in the Solicitor General's Office and as the Chief of Litigation for the Bituminous Coal Division of the Department of the Interior).

[185] *See Edward Allen Tamm*, Historical Soc'y of the D.C. Circuit, https://dcchs.org/judges/tamm-edward-allen/ [https://perma.cc/W7VT-JEFL].

[186] *See Laurence Hirsch Silberman,* Historical Soc'y of the D.C. Circuit, https://dcchs.org/judges/silberman-laurence-hirsch/?portfolioCats=5%2C4 [https://perma.cc/EGL2-MQYJ] (explaining Judge Silberman also served as United States Solicitor of Labor, the United States Deputy Attorney General, and the U.S. Ambassador to Yugoslavia).

[187] *James Lane Buckley,* Historical Soc'y of the D.C. Circuit, https://dcchs.org/judges/buckley-james-lane/?portfolioCats=5%2C4 [https://perma.cc/9YZG-7885] (explaining Judge

("ACUS"),[188] Chairman of the Equal Employment Opportunity Commission ("EEOC"),[189] and Chairman of Amtrak.[190] As then-D.C. Circuit Judge Wald put it thirty-five years ago, "[a] stint in one of the other branches seems almost a prerequisite to service on our court."[191]

Such strong ties to the Executive Branch are a feature, not a bug. Since no senators represent the District of Columbia, the President is not as constrained geographically or politically in his choice of D.C. Circuit nominees.[192] By statute, nominees to the D.C. Circuit, unlike the geographic circuits, do not need to reside in the circuit.[193] Indeed, two of the most influential members of the D.C. Circuit—Judge David Bazelon and Judge J. Skelly Wright—had been considered, but ultimately abandoned, as judicial nominees in the Seventh and Fifth Circuits respectively, because of opposition of their home state senators.[194] Judge Stephen Williams was originally nominated for the Tenth

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Buckley also briefly served as Counselor of the State Department, and before that as a U.S. Senator from New York).

[188] *Antonin Scalia*, Historical Soc'y of the D.C. Circuit, https://dcchs.org/judges/scalia-antonin/?portfolioCats=5%2C4 [https://perma.cc/XWY7-HHJB] (explaining Justice Scalia also served in the Department of Justice's Office of Legal Counsel and in the predecessor office of the National Telecommunication and Information Administration).

[189] *Current Members*, Supreme Court of the U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/D48P-TYKC] (explaining Justice Clarence Thomas also served as Assistant Secretary of Education for the Office for Civil Rights in the U.S. Department of Education).

[190] *Harry T. Edwards*, United States Court of Appeals for the D.C. Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judges+-+HTE [https://perma.cc/6V9Z-GQ82].

[191] Patricia M. Wald, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House*, 72 Minn. L. Rev. 1, 3 (1987).

[192] Roberts, *supra* note 1, at 385 (explaining "presidents could look for appointees nationwide" because D.C. "had no senators to enforce the locality requirements that are applicable as a practical matter in the other circuits"). It would be interesting to study to what extent the elimination of the "blue slip" practice and cloture for court of appeals nominations has altered these norms in recent years. *See* David Lat, *Good Riddance to 'Blue Slips*,*'* N.Y. Times (May 9, 2018), https://www.nytimes.com/2018/05/09/opinion/senate-judicial-nominees-blue-slips.html [https://perma.cc/2WEB-YY8T] (detailing the "blue slip" practice). Interestingly enough, Majority Leader Reid's decision to eliminate the "blue slip" requirement for court of appeals nominees stemmed, in part, from Senate Republicans' refusal to consider President Obama's three nominees to the D.C. Circuit. *See* Burgess Everett & Seung Min Kim, *Senate Goes for 'Nuclear Option*,*'* Politico (Nov. 21, 2013), https://www.politico.com/story/2013/11/harry-reid-nuclear-option-100199 [https://perma.cc/62DA-LYJG] (describing the Senate's rule change to eliminate the filibuster on presidential nominees except those to the U.S. Supreme Court); *see also* 159 Cong. Rec. 17823–26 (2013) (setting precedent for invoking cloture with a simple majority of those voting rather than three-fifths of the Senate); Valerie Heitshusen, Cong. Rsch. Serv., R43331, Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings (2013) (analyzing the implications of the November 21, 2013 reinterpretation of the cloture process).

[193] *See* Fraser et al., *supra* note 23, at 136–37 (quoting 28 U.S.C. § 44(c)).

[194] *See* Harold L. Ickes, *Responsibility for a Strong Bench*, The New Republic (Oct. 31, 1949); Morris, *supra* note 142, at 196 (explaining President Kennedy "intended to elevate Wright to the . . . Fifth Circuit, but opposition by both of Louisiana's U.S. Senators deflected the promotion to the D.C. Circuit"); Anne Emanuel, Elbert Parr Tuttle: Chief Jurist of the Civil Rights Revolution 148 (2011) (discussing controversy over Wright's possible nomination to the Fifth Circuit and relating that Senator Long told President Kennedy that nominating

Circuit, but following opposition from a U.S. senator from Colorado, wound up on the D.C. Circuit instead.[195]

There is another difference between D.C. Circuit judges and all other federal circuit judges: D.C. Circuit judges are not only more likely to come from the Executive Branch; they are also more likely to *leave* the bench for the Executive Branch. Judge Starr sat on the D.C. Circuit for six years, until he resigned to become the Solicitor General of the United States.[196] Judge Mikva sat on the D.C. Circuit for nearly fifteen years, until President Clinton named him White House Counsel.[197] Judge Wald also resigned from the D.C. Circuit for other government service, but not of the strictly presidential sort.[198] Most recently, Judge Garland sat on the D.C. Circuit for nearly fourteen years before becoming President Biden's Attorney General.[199]

In hiring a D.C. Circuit judge into the administration, the President is not just getting a highly qualified and well-respected lawyer. The President is also getting someone who has already been confirmed by the Senate, giving the nominee the aura of confirmability.[200] And of course, by hiring a D.C.

Wright would doom Long's reelection bid); *see also* Morris, *supra* note 142, at 145 (describing a similar dynamic with local, but not necessarily senatorial, opposition to nominating future D.C. Circuit Judge John A. Danaher to the Second Circuit). *See generally* Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. Miami L. Rev. 159, 159 (1993).

[195] *See* Hon. Laurence N. Silberman, U.S. Court of Appeals for the D.C. Circuit, Portrait Presentation Ceremony for Hon. Stephen F. Williams 6 (Oct. 7, 2006), https://dcchs.org/wp-content/uploads/2019/02/Stephen-F-Williams-Portrait-Transcript.pdf [https://perma.cc/64YF-YT7S] (noting Williams "was nominated first for the Tenth Circuit and immediately ran into trouble with one home state Senator, Bill Armstrong"); *see also* Tobias, *supra* note 194, at 159–60.

[196] *See* Peter Baker, *Ken Starr, Independent Counsel in Clinton Investigation, Dies at 76*, N.Y. Times (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/us/politics/ken-starr-dead.html [https://perma.cc/SV39-Y2JY] (noting Kenneth Starr stepped down from D.C. Circuit to become Solicitor General). And of course, after serving as Solicitor General, Kenneth Starr had subsequent government service, but that time, as a prosecutor of President Clinton. *See* Susan Schmidt, *Whitewater Counsel Assembles Team*, Wash. Post (Sept. 13, 1994), https://www.washingtonpost.com/archive/politics/1994/09/13/whitewater-counsel-assembles-team/0e237acc-f657-4e78-9a7a-5a98c70e337b/ [https://perma.cc/FYG4-9YYG].

[197] *See* President Bill Clinton, Remarks Announcing the Appointment of Abner Mikva as White House Counsel and an Exchange With Reporters 1459 (Aug. 11, 1994), https://www.govinfo.gov/content/pkg/PPP-1994-book2/pdf/PPP-1994-book2-doc-pg1459.pdf [https://perma.cc/U72K-824T] (announcing Chief Judge Abner Mikva's transition to White House Counsel).

[198] *See* Press Release, International Criminal Tribunal for the Former Yugoslavia, Appointment of Judge Patricia M. Wald to Succeed Judge Gabrielle Kirk McDonald in November 1999 (July 7, 1999), https://www.icty.org/en/press/appointment-judge-patricia-m-wald-succeed-judge-gabrielle-kirk-mcdonald-november-1999 [https://perma.cc/G6M8-YA9A].

[199] *See* Eric Tucker & Michael Balsamo, *Biden to Name Judge Merrick Garland as Attorney General*, Associated Press (Jan. 7, 2021), https://apnews.com/article/merrick-garland-attorney-general-e7972db4cd96352d028af3167b253481 [https://perma.cc/D4JL-24YF] (referencing Merrick Garland's tenure on the D.C. Circuit); *On the Nomination (Confirmation: Merrick Brian Garland, of Maryland, to be Attorney General): Roll Vote No. 114*, U.S. Senate (Mar. 10, 2021), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00114.htm [https://perma.cc/48FE-5XRH].

[200] This quality is no doubt ironic in then-Judge Garland's case. *See* Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, NBC News (Mar. 16, 2016),

Circuit judge into the administration, the President also frees up a seat on the second-most important court that the President can then try to fill.[201] Indeed, when President Biden named then-Judge Garland as his pick for Attorney General, some speculated that opening up a seat on the D.C. Circuit "may have made [Garland] more attractive" as a cabinet nominee.[202] So to update the quip about the definition of a federal judge once more, perhaps the definition of a D.C. Circuit judge should not just be a lawyer who worked for the President, but a lawyer who may also leave the bench to work for the President.

To be sure, past and future employment as an administrative lawyer is not the only, or necessarily the most important, indicator of judicial expertise.[203] Yet the professional backgrounds of the judges who once sat and now sit on the D.C. Circuit have less in common with the rest of the federal judiciary than a formalist might expect, and perhaps more in common with the members of the Conseil d'État.[204]

C. The D.C. Circuit's Distinctive Role in Doctrinal Development

Any law student who has taken Administrative Law knows that the relevant doctrinal test they seek does not always come from the Supreme Court; often, it comes from the D.C. Circuit. For instance, the Supreme Court has not provided a working definition an "agency" within the meaning of the Administrative Procedure Act ("APA") or the Freedom of Information Act ("FOIA").[205] That fundamental question for administrative law has typically been answered by the courts of appeals, particularly the D.C. Circuit.[206] The D.C. Circuit has also fashioned the leading doctrinal tests for disqualification

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https://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541 [https://perma.cc/6JV4-KDME] (reporting on the record-long wait for a Supreme Court nominee to have a Senate hearing).

[201] *See* Tyler Pager, Josh Gerstein & Kyle Cheney, *Biden to Tap Merrick Garland for Attorney General*, Politico (Jan. 6, 2021), https://www.politico.com/news/2021/01/06/biden-to-tap-merrick-garland-for-attorney-general-455410 [https://perma.cc/WN6U-GTAZ] (describing the importance of the open seat on the D.C. Circuit, the "second-most powerful court in the country").

[202] *Id.*

[203] For instance, the history of the D.C. Circuit is full of judges like Stephen F. Williams, who did not work as a government lawyer but was nonetheless known for his expertise in administrative law. *See* Sam Roberts, *Stephen F. Williams, U.S. Appeals Court Judge, Dies at 83*, N.Y. Times (Aug. 20, 2020), https://www.nytimes.com/2020/08/20/obituaries/stephen-f-williams-dead-coronavirus.html [https://perma.cc/K2ZL-D43V] (describing how "Judge Williams was known to express gusto for legal arcana (as in oil and gas regulatory cases) that might daunt law clerks and some colleagues").

[204] The Federal Circuit, with its specialized docket, may have more in common with the D.C. Circuit than the other circuits, but its role in administrative law pales in comparison and is therefore of less interest here.

[205] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 525 (2009) (concluding the APA "does not apply to Congress and its agencies" but relying on D.C. Circuit precedent for support).

[206] *See* Pierce & Hickman, *supra* note 167, §1.2.2 (concluding that "[t]he fact that the Supreme Court has never developed a definitive test for agency status has left the question of interpreting the statutory definitions to the circuit courts").

of agency adjudicators,[207] as well as the leading defense of why ex parte contacts in the rulemaking process are lawful, and even desirable.[208]

This is not to say that the D.C. Circuit is always or predominantly the key court for most doctrinal questions. Rather, three major cases from the Rulemaking Revolution—*Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*,[209] *Motor Vehicles Association v. State Farm Mutual Automobile Insurance Co.*,[210] and *Chevron USA Inc. v. Natural Resources Defense Council*[211]—clarify the D.C. Circuit's role in developing legal doctrine in the administrative state. Specifically, the D.C. Circuit has not always been successful as an originator of doctrine. For instance, the D.C. Circuit's efforts to mandate additional procedures failed once the Supreme Court decided *Vermont Yankee*.[212] However, the D.C. Circuit's development of "hard look review" of agency's policy decisions, blessed by the Supreme Court in *State Farm*, suggests it has and can create major doctrine that the Supreme Court will adopt and follow.[213] And the D.C. Circuit has been instrumental

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[207] *See* Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970) (reiterating test for disqualification and remanding case for consideration without Chairman Dixon's participation); FTC v. Cinderella Career & Finishing Sch., Inc., 404 F.2d 1308 (D.C. Cir. 1968)*; see also* Louis J. Virelli iii, Recusal Rules for Administrative Adjudicators, Admin. Conf. of the U.S. 8 n.8 (Nov. 30, 2018). While the Supreme Court has articulated general principles of why the due process clause demands a neutral decisionmaker, it has been the D.C. Circuit that has articulated a test to make that due process value real for an agency proceeding. *Compare* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) ("It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process.") (internal quotation omitted), *with Cinderella*, 425 F.2d at 591 (articulating the test as "whether a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it") (internal quotation omitted).

[208] *See* Sierra Club v. Costle, 657 F.2d 298, 403 (D.C. Cir. 1981) (finding that a "judicially imposed blanket requirement that all post-comment period oral communications be docketed would . . . stifle desirable experimentation in the area by Congress and the agencies"); *see also* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 883 (2007) (criticizing how "for nearly half a century, the D.C. Circuit has sought to limit ex parte contacts in at least some informal rulemakings").

[209] 435 U.S. 519 (1978).

[210] 463 U.S. 29 (1983).

[211] 467 U.S. 837 (1984).

[212] *Vt. Yankee Nuclear Power Corp.*, 435 U.S. 519; *see also* Beermann & Lawson, *supra* note 208, at 866 (characterizing *Vermont Yankee* as "the legal equivalent of a meltdown for the D.C. Circuit"); Peter 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, 1107 n.62 (1987) (discussing how the Supreme Court in *Vermont Yankee* "reversed unanimously in one of the sterner rebukes it has delivered to the D.C. Circuit in recent years").

[213] *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 50; *see also* Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 Notre Dame L. Rev. 331, 332 (2016) (recounting the "well-known fact" that "the courts, led by the D.C. Circuit in the late 1960s and 1970s, essentially rewrote the statutory procedures for notice-and-comment rulemaking"); Strauss, *supra* note 212, at 1130 (describing *State Farm* as the Supreme Court's "imprimatur . . . on the so-called "hard-look" doctrine, by which the courts of appeals (notably but not exclusively the D.C. Circuit) have placed strong obligations upon the administrative agencies to explain their actions"). The moniker of "hard look" review stems from D.C. Circuit Judge Leventhal's description of the court's role as ensuring the agency gave "reasoned consideration to all the material

as the implementer and elaborator of doctrines like the *Chevron* doctrine.[214] The question is which version the D.C. Circuit will be in relation to the Supreme Court going forward: a failed innovator (as it was in *Vermont Yankee*), a successful one (as it was in *State Farm*), or an indispensable implementer (as it was in *Chevron*). The Supreme Court may head off the D.C. Circuit's doctrinal innovations in administrative law. Pressures to do so could intensify in the coming years.

The D.C. Circuit is subordinate to the Supreme Court under Article III of the U.S. Constitution. For many, that is the end of the matter. But if one digs into the two courts' dockets, one sees that that formal hierarchy masks an institutional imbalance. As a functional matter, the Supreme Court rarely hears more than a handful of administrative law cases each year.[215] Of course, the Supreme Court can rely on emergency procedures to influence administrative law doctrine beyond the fully briefed cases.[216] Even with that kind of docket control, there are various other controversies vying for the Supreme Court's attention.[217] Those controversies could dilute the Supreme Court's administrative law docket for the foreseeable future.

However, when the Supreme Court does decide to take administrative law cases, the D.C. Circuit's current composition makes the potential for conflict

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facts and issues" and vacating a rule when "the agency has not really taken a 'hard look' at the salient problems" or engaged in "reasoned decision-making." Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970); *see also* Wald, *supra* note 149, at 227 (describing how the Court "explicitly adopted Judge Leventhal's hard look doctrine as the means by which a reviewing court should determine if agency reasoning is 'arbitrary and capricious'").

[214] Thomas W. Merrill, The Chevron Doctrine 83, 85 n.33 (2022) (noting that "[t]he role of the D.C. Circuit in creating 'the *Chevron* doctrine' has been advanced by others, and is broadly consistent with much of the data about *Chevron*'s rise from obscurity") (citing Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1, 39 (2013)); *see also id.* (noting that the D.C. Circuit made up the bulk of citations to *Chevron* both shortly after it was decided and still today); Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 45 (2017) (finding the D.C. Circuit "led the way by applying the *Chevron* standard" more frequently than other appellate courts).

[215] *See* Daniel Halberstam, *The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies*, *in* Comparative Administrative Law 142 (Susan Rose-Ackerman & Peter L. Lindseth, eds. 2010) (concluding that "in light of the US Supreme Court's miniscule docket, the Court of Appeals for the DC Circuit is often the final court for administrative complaints"); Fraser et al., *supra* note 23, at 133 (arguing that Congress's jurisdictional grants to the D.C. Circuit, along with the "infrequency with which the Supreme Court considers, let alone reverses, the Circuit's decisions combine to give the court the final say—and the only appellate say—over numerous laws and rules affecting the entire nation"); Richard J. Pierce, *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 Geo. L.J. 779, 781 (2002) (arguing that "the D.C. Circuit does much more than set the table for the Supreme Court").

[216] *See infra* Part IV.A.3.

[217] *Cf.* David Fontana, *Docket Control and the Success of Constitutional Courts*, *in* Comparative Constitutional Law 627–33 (Tom Ginsburg & Rosalind Dixon, eds. 2011) (explaining how docket control affects the timing of when the court enters a politically controversial debate and limits the number of cases heard to enhance legitimacy of constitutional review).

between it and the Supreme Court even more apparent. Much has been written about the Republican-appointed supermajority of the latter, but few scholars have explored the implications of a Democratic-appointed supermajority of the former.[218] As of this writing, seven of the eleven D.C. Circuit judges were nominated by either President Obama or President Biden.[219] The most recent addition to the D.C. Circuit, Judge Bradley N. Garcia, is the youngest circuit court nominee confirmed by the Senate during the Biden Administration.[220] The composition of the D.C. Circuit could be quite stable in the coming years: ten of the eleven active judges are sixty-one years old or younger.[221]

In 1987, Professor Peter Strauss pointed out that the Supreme Court is the one institution whose capacity has not expanded with the rise of the modern administrative state.[222] When Strauss wrote his article, the lower federal courts, Congressional staff, and the federal bureaucracy had grown immensely.[223] Strauss's insight remains true today: "[a]s the pool of cases from which to choose increases, and the number selected remains constant, the Court's freedom of choice and the stakes in making a given selection are also enhanced."[224] Put another way, each Supreme Court case "represents an increasingly precious opportunity for the Court to perform its supervisory task."[225] Today, more cases are filed in the Supreme Court, but the Supreme Court agrees to hear far fewer. Contrast the 1985 term—when 4,413 cases were filed and the Supreme Court set 171 of them for argument—with the 2020 term, when 5,307 cases were filed, and the Supreme Court only heard 72 of them.[226]

The size of its docket is one of the few remaining constraints on the Supreme Court's reach. Its shrinking docket hampers the Supreme Court's

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[218] *Compare Supreme Court of the United States, Active Justices*, Ballotpedia, https://ballotpedia.org/Supreme_Court_of_the_United_States [https://perma.cc/H8EN-HTED], *with U.S. Court of Appeals for the D.C. Circuit: Active Judges*, Ballotpedia, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_District_of_Columbia_Circuit [https://perma.cc/U8TD-4XSE].

[219] President Biden has actually made four nominations to the D.C. Circuit, but one of his nominees, then-Judge Ketanji Brown Jackson, was subsequently elevated to the Supreme Court. *See* 167 Cong. Rec. S4511 (June 14, 2021).

[220] Ryan Tarinelli, *Senate Confirms Bradley N. Garcia to Appeals Court in DC*, Roll Call (May 15, 2023), https://rollcall.com/2023/05/15/senate-confirms-bradley-n-garcia-to-appeals-court-in-dc/ [https://perma.cc/RZ5S-TGYQ] (reporting that "Garcia, 36, is the youngest circuit court nominee confirmed under President Joe Biden").

[221] *See U.S. Court of Appeals for the D.C. Circuit: Active Judges*, *supra* note 218.

[222] Strauss, *supra* note 212, at 1098 (describing how "the business of the federal appellate and district courts has expanded dramatically, while the Supreme Court's capacity for work has increased hardly at all"); *see also id.* at 1123 n.124 (arguing that "the legislative process, like the judicial, has become bureaucratized, perhaps even more so").

[223] *Id.*

[224] *Id.* at 1102.

[225] *Id.* at 1100.

[226] Sup. Ct. of the U.S., 2021-Year End Report on the Federal Judiciary 7 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/9RP6-ZTAE].

capacity to change any area of law quickly, especially one as complex as administrative law. To affect a judicial revolution in any area of law, the Supreme Court needs lower courts to participate and obey. The D.C. Circuit has been the most influential lower court in the development of administrative law. Unless the Supreme Court dramatically increases the number of administrative law cases it hears (highly unlikely) or relies more heavily on emergency procedures to short-circuit appeals in the circuits (more likely), it will encounter institutional resistance in reshaping the doctrine. The contours and consequences of that intra-judicial conflict are the focus of the remainder of the Article.

IV. The D.C. Circuit, the Supreme Court, and the Future of Administrative Law

So far, this Article has pressed two interlocking claims. First, jurisprudential and scholarly trends in administrative law risk blinding American public law to lessons from foreign jurisdictions. Second, that intellectual predisposition obscures ways in which federal administrative law relies on a non-apex court, the D.C. Circuit, for judicial review of agency action, much like France does with its Conseil d'État. This Part explores the doctrinal implications of the earlier institutional analysis. The first section of this Part applies that earlier analysis to three current controversies in administrative law: challenges to agency independence, deference to agency statutory and regulatory interpretation, and the Supreme Court's emergency docket. Then, in the second section, the Part steps back from the din and disorder of current administrative law doctrine to evaluate some mechanisms by which Congress could solidify the D.C. Circuit's role as the leading federal administrative law court.

A. Current Controversies

One would be forgiven for thinking the role of the D.C. Circuit in administrative law is assured. After all, administrative law doctrine has been remarkably stable over the last forty years.[227] But the Supreme Court's activity in administrative law in the last five years has shaken up this institutional arrangement. This Part tries to make sense of what the Supreme Court's recent decisions mean for the D.C. Circuit—and judicial review of federal agency action more generally.

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[227] *See* Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 Ga. L. Rev. 757, 759 (2015) (predicting that "[t]oday's stability, however, almost certainly will not be permanent").

1. Reviewing Agency Independence

One area of administrative law in which the Supreme Court has been most active is in its consideration of constitutional challenges to agency structure. Specifically, the Supreme Court has handed down several decisions striking down statutory provisions that promote agency independence as violations of the Appointments Clause. Indeed, in four decisions over the last five years, the Court has invalidated protections for agency adjudicators in the Securities and Exchange Commission ("SEC") and the U.S. Patent and Trademark Office ("USPTO") and for the heads of the Consumer Financial Protection Bureau ("CFPB") and the Federal Housing Finance Agency ("FHFA").[228] In *Lucia v. SEC* and *United States v. Arthrex, Inc.*, the challenges to agency adjudicators, the petitioners argued that the legal protections of the respective adjudicators from direction by the agency heads was unconstitutional.[229] Meanwhile, in *Seila Law LLC v. CFPB* and *Collins v. Yellen*, the petitioners argued the legal protections against at-will removal of the agency head by the President were unconstitutional.[230] But all four of these recent Supreme Court cases share the same legal basis—the Appointments Clause—and the same animating skepticism of Congress's insulating agency officials from the President.[231]

For our purposes, this series of Appointment and Removal decisions is most interesting as an illustration of a corner of administrative law doctrine that the Supreme Court can rework without the assistance of lower courts. Whether the Supreme Court can effectively reshape this area of law depends, in part, on how many agencies are vulnerable to this kind of litigation. And looking at these cases suggests there is a relatively small universe of agencies and therefore a finite amount of judicial capacity required.

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[228] *See* Lucia v. SEC, 138 S. Ct. 2044 (2018) (SEC); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (USPTO); Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (CFPB); Collins v. Yellen, 141 S. Ct. 1761 (2021) (FHFA). Congress created the agencies at issue in *Seila Law* and *Collins* to respond to some of the business practices that led to the financial crisis of 2008. *See* United States Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654 (2008) (creating FHFA to regulate the government mortgage giants, Fannie Mae and Freddie Mac); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (creating CFPB to curb certain egregious financial services practices that brought on the worst recession since the Great Depression).

[229] *See Lucia*, 138 S. Ct. at 2055; *Arthrex*, 141 S. Ct. at 1976.

[230] *See Seila Law*, 140 S. Ct. at 2189–90 (striking down removal protection for CFPB director); *Collins*, 141 S. Ct. at 1783–87 (extending *Seila Law* to FHFA and holding that any statutory restriction on presidential removal of a single agency head is unconstitutional).

[231] U.S. Const. art. II, § 2, cl. 2*; see also* Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 Vand. L. Rev. 1, 5 (2023) (suggesting that "the statutory restrictions on presidential removal may not be long for this world"); *id.* at 9 (concluding that "there is no dispute that a supermajority of the Court has decisively turned against statutory restrictions on removal"). Other scholars have usefully dissected each of these four decisions, so this Article need not do so here. *See* Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 Geo. Mason L. Rev. 643 (2021); Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 Minn. L. Rev. 39 (2020).

Start with the agency heads. As Justice Kagan noted in her lengthy dissent in *Seila Law*, four agencies prior to the CFPB had a "single-director structure" with removal protections: the Federal Housing Finance Agency, the Social Security Administration, the Comptroller of the Currency, and the Office of the Special Counsel.[232] *Seila Law* invalidated that structure in the CFPB by eliminating removal protections for its director.[233] The following term in *Collins*, the Supreme Court did the same for the FHFA.[234] And just as Justice Kagan predicted, the Biden Administration relied on *Collins* to fire the head of the Social Security Administration.[235] That leaves the Office of Special Counsel and the Comptroller of the Currency.[236] In other words, the Supreme Court has effectively reworked the constitutional baseline for appointing the heads of federal agencies. The only question that remains is whether the Supreme Court will sweep in agencies led by multiple officials, like the FTC or SEC, whose tenure protections have gone uncontested since the Supreme Court upheld them in 1935. Indeed, the Court itself in *Seila Law* recognized these multi-member agencies as one of two exceptions to the default rule of presidential removal at will.[237]

But for agency adjudicators, the Supreme Court faces more than five agencies. There are hundreds of federal agencies, dozens of which engage in adjudication.[238] Of those agencies, nearly fifty rely on adjudicators who have some independence from the agency itself.[239] While all of those agencies that

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[232] *Seila Law*, 140 S. Ct. at 2241 (Kagan, J., dissenting).

[233] *Id.* at 2192.

[234] *Collins*, 141 S. Ct. at 1768–69.

[235] *Id.* at 1802 (Kagan, J., concurring in part and concurring in the judgment) (musing that "a betting person might wager that the [SSA's] removal provision is next on the chopping block"); *see also supra* note 16 and accompanying text (describing Biden's removal); *cf.* Kaufmann v. Kijakazi, 32 F.4th 843, 849 (9th Cir. 2022) (concluding that "[t]he removal provision violates separation of powers principles" on the grounds that "the Commissioner of Social Security is indistinguishable from the Director of the FHFA discussed in *Collins* and the Director of the CFPB discussed in *Seila Law*").

[236] *Seila Law*, 140 S. Ct. at 2241 (Kagan, J., dissenting). The Comptroller is a bit of an outlier for a few reasons. The office's removal protection is weaker than the ones struck down in *Seila Law* and *Collins*, permitting the President to fire the Comptroller provided the President gives the Senate reasons for the officer's dismissal. *See* Nielson & Walker, *supra* note 231, at 6–7 (pointing out that "[f]or over 150 years, it appears that no president has removed a Comptroller of the Currency, even in the face of policy disagreement").

[237] *Seila Law*, 140 S. Ct. at 2192.

[238] *See* Jennifer L. Selin & David E. Lewis, Admin. Conf. of the U.S., Sourcebook of United States Executive Agencies 12 (2d ed. 2018) https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition [https://perma.cc/SX2G-BA5R] (pointing out that "[s]ince what constitutes an agency under the APA is governed on a case-by-case basis through litigation, there is no authoritative list of government agencies" and noting that the *United States Government Manual* lists 305 agencies whereas USA.gov lists "over 600").

[239] *Administrative Law Judges: ALJs by Agency*, U.S. Office of Personnel Mgmt., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency [https://perma.cc/AVC5-SGXV] (listing thirty-one federal agencies that currently employ ALJs); *see also* Kent Barnett, Malia Reddick, Logan Cornett & Russell Wheeler, Admin. Conf. of the U.S., Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight,

rely on semi-independent adjudicators are vulnerable to constitutional challenges, the Supreme Court can handle hearing these challenges without the D.C. Circuit's cooperation for two reasons.

First, while *Lucia* originated in the D.C. Circuit, lawsuits challenging administrative adjudication are scattered across the federal courts of appeals.[240] Lawsuits involving the SEC may come from the Second Circuit.[241] Lawsuits challenging immigration judges may be more likely to crop up in the Fifth, Ninth, or Eleventh Circuits.[242] But none of these caseload trends are mandated by statute. Indeed, the venue of these challenges is typically dictated by the location of the petitioner. The exception are those agencies whose adjudication challenges are channeled to the Federal Circuit, like claims for veterans' benefits in *Kisor* and patent determinations in *Arthrex*.

Second, while agency adjudications number in the hundreds of thousands, the constitutional challenges to those adjudications are limited. The Supreme Court can hear the limited challenges to agency structure without overwhelming the Court's docket. And indeed, that is what the Supreme Court has done in *Lucia*, *Seila Law*, *Arthrex*, and *Collins*.

Of course, if the Supreme Court invalidates some aspect of the agency structure, the nature of the remedy on remand could give rise to subsequent litigation. And that subsequent litigation could return to the Supreme Court. Thus, one could imagine a *Lucia II* or *Arthrex II* in which a litigant challenges the new structure of agency adjudication in the SEC or the Patent Trial and Appeal Board ("PTAB"). That kind of redux litigation is not unknown in administrative law, and there is preliminary evidence to suggest that litigants are continuing to mount Appointments Clause challenges against the same agencies.[243] Indeed, Appointments Clause challenges to administrative adjudication should only increase after the Supreme Court's recent decision in *Carr v. Saul*.[244] In *Carr*, the Supreme Court reversed the Tenth Circuit's ruling that Social Security claimants "forfeited their Appointments Clause challenges by failing to make them first to their respective ALJs."[245] Interestingly enough, earlier that year, the D.C. Circuit had maintained that exhaustion requirement

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AND REMOVAL, 18–19 fig.1, 40–59 (2018) (listing twenty-seven agencies reporting the use of non-ALJs, but later describing how many of those agencies do not afford the same protections to their adjudicators enjoyed by ALJs). *But see* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153 (2019) (describing how "most agency actions are adjudicated by non-ALJ agency personnel").

[240] *See* Lucia v. SEC, 138 S. Ct. 2044, 2050 (2018).

[241] *See, e.g.*, Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016) (holding challenges to SEC ALJ appointments cannot be adjudicated in separate federal district court suit).

[242] *Cf. Table B-7—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2022)*, U.S. CTS., https://www.uscourts.gov/statistics/table/b-7/federal-judicial-caseload-statistics/2022/03/31 [https://perma.cc/5JZ9-MJC6] (noting only criminal immigration offenses).

[243] *See, e.g.*, Rop v. Fed. Hous. Fin. Agency, 50 F.4th 562 (6th Cir. 2022) (considering a challenge to the FHFA's structure after *Collins*).

[244] 141 S. Ct. 1352 (2021).

[245] *Id.* at 1356.

in a similar challenge.[246] After *Carr*, though, individuals will not forfeit an Appointments Clause challenge to agency adjudicators by waiting until federal court to raise that argument.[247]

This focus on judicial behavior also should not blind us to how litigants will respond. Lawyers in federal court might raise and brief more constitutional challenges to agency structure because they want to preserve those arguments for appeal. But the point here is that the permutations of this kind of legal challenge are finite. There are only so many agency heads who enjoy some independence from the President and only so many agencies that rely on administrative law judges with tenure protections. If the Supreme Court chooses to hear such a controversy each term, it will not need the lower courts to reshape this area of administrative law.

2. Reviewing Agency Legal Interpretation

Unlike questions of agency independence, reworking judicial review of agency statutory and regulatory interpretation might depend on lower courts assisting the Supreme Court. As discussed in Part III, the Supreme Court may have decided *Chevron*, but the D.C. Circuit is largely responsible for the dominance of the *Chevron* doctrine over the last forty years.[248] However, a majority of the Supreme Court is on record as either skeptical of or outright hostile to judicial deference to agency statutory or regulatory interpretation.[249] It is not clear whether there is a Supreme Court majority to overturn *Chevron*, although the Court will have an opportunity to do so in *Loper Bright Enterprises*.[250] In *Kisor v. Wilkie*, the Court recently declined to abandon *Auer* deference, the parallel doctrine in which courts defer to an agency's reasonable interpretation of an ambiguous regulation.[251] However, since that case was decided, Justices Barrett and Jackson have joined the Court.[252] And even

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[246] Fleming v. U.S. Dep't of Agric., 987 F.3d 1093, 1097–103 (D.C. Cir. 2021) (holding that petitioners' failure to exhaust their administrative remedies barred review of their argument that dual layers of for-cause-removal protections unconstitutionally limited President's removal power).

[247] *Carr*, 141 S. Ct. at 1362. *Compare* Morris v. McDonough, 40 F.4th 1359, 1364 (Fed. Cir. 2022) (declining to extend *Carr*'s issue exhaustion requirement outside the Appointments Clause context), *with Rop*, 50 F.4th at 587 (Thapar, J., concurring in part, dissenting in part) (suggesting that the Supreme Court's rejection of issue exhaustion for Appointments Clause challenges is to, in part, "incentivize" those challenges).

[248] *See supra* notes 212–214 and accompanying text.

[249] *See Chevron Deference on the Chopping Block? Supreme Court to Hear Case That Could Change Landmark Precedent*, BROWNSTEIN (May 24, 2023), https://www.bhfs.com/insights/alerts-articles/2023/chevron-deference-on-the-chopping-block- [https://perma.cc/3PLQ-HZB5] (citing criticisms from Justices Roberts, Thomas, Alito, Gorsuch, and Kavanaugh).

[250] *See supra* note 20 and accompanying text.

[251] 139 S. Ct. 2400, 2414 (2019); *see also* Andrew Hammond & Christopher J. Walker, *Judicial Hierarchy and Change in Administrative Law* 1, 45–46 (2023) (on file with authors) (exploring what lower court application of *Kisor v. Wilkie* suggests for *Loper Bright*).

[252] *See Current Members*, *supra* note 2.

though the Court has yet to overrule *Chevron* and *Auer*, the Court does seem to be ignoring *Chevron* by abandoning its framework in recent cases.[253]

While *Chevron* remains good law for now, its reach in all questions of agency statutory interpretation is more limited. In *Alabama Association of Realtors v. Department of Health and Human Services*,[254] *National Federation of Independent Business ("NFIB") v. Occupational Safety and Health Administration ("OSHA")*,[255] *West Virginia v. EPA*,[256] and *Biden v. Nebraska*,[257] the Supreme Court revealed that it is unconstrained by judicial deference to agency legal interpretation. In *Alabama Association of Realtors* and *NFIB v. OSHA*, two cases involving the federal government's response to the COVID-19 pandemic, the Supreme Court vacated agency action on the grounds that the Centers for Disease Control and Prevention ("CDC") and OSHA respectively lacked clear Congressional authorization.[258]

First, in *Alabama Association of Realtors*, the Court reviewed the CDC's nationwide eviction moratorium for residential rental properties.[259] Associations of real estate agents and rental property managers sued the Department of Health and Human Services ("HHS") and others to challenge the CDC's action.[260] The district court granted the associations' expedited motion for summary judgment as well as HHS's emergency motion for stay of judgment pending appeal.[261] HHS appealed the district court order to the D.C. Circuit, which denied the associations' emergency motion to vacate the stay.[262] The Supreme Court also denied the associations' first application to vacate the stay.[263] After the CDC renewed the moratorium, the district court and the D.C. Circuit denied the associations' subsequent emergency motion to vacate the stay.[264] The associations then again applied to the Supreme Court, which vacated the stay after holding that the CDC lacked the statutory authority to impose the moratorium.[265]

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[253] *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (referring to *Chevron* as an "increasingly maligned precedent" that the Court is now "simply ignoring"); *see also* Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 281 (2022) (collecting cases); Hickman, *The Roberts Court's Structural Incrementalism*, *supra* note 11, at 87 (noting that the Supreme Court "has not applied *Chevron* to defer to an agency interpretation of a statute since 2016, notwithstanding several opportunities to do so") (citations omitted); Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 Duke L.J. 931, 996–98 (2021) (suggesting that the Supreme Court may curtail *Chevron* but not overrule it).

[254] 141 S. Ct. 2485 (2021).

[255] 595 U.S. 109 (2022).

[256] 142 S. Ct. 2587 (2022).

[257] 143 S. Ct. 2355 (2023).

[258] *See Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117–20; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489–90 (per curiam).

[259] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486 (per curiam).

[260] *Id.* at 2487 (per curiam).

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.* at 2488 (per curiam).

[265] *Id.*

Second, in *NFIB v. OSHA*, the Court responded to OSHA's emergency temporary standard mandating that employers with more than 100 employees require those employees to obtain a COVID-19 vaccination or take weekly COVID-19 tests and wear a mask at the workplace.[266] States, businesses, and other groups filed separate petitions for review of OSHA's emergency temporary standard in various federal courts, including the Fifth and Sixth Circuits.[267] Eventually, states and the NFIB requested that the Supreme Court stay OSHA's mandate pending judicial review.[268] On January 13, 2022, the Supreme Court granted the applications and stayed the OSHA rule.[269] In doing so, the Supreme Court built on its recent decision in *Alabama Association of Realtors*, concluding that "there can be little doubt that OSHA's mandate qualifies as an exercise of [statutory] authority."[270]

In *West Virginia v. EPA*, the Supreme Court cited those two COVID-related decisions when it vacated a soon-to-be replaced and already irrelevant environmental regulation from the Obama Administration.[271] The Supreme Court did so by explicitly invoking the major questions doctrine.[272] In addition to *Alabama Association of Realtors* and *NFIB*, the Supreme Court relied on a handful of earlier cases like *King v. Burwell* and *FDA v. Brown & Williamson Tobacco Corp*.[273] The following year, the Supreme Court in *Biden v. Nebraska* built on the earlier major question cases to invalidate the Biden Administration's student loan forgiveness policy.[274]

There are still a lot of questions about what the major questions doctrine is and when and how lower courts should apply it. The basic rule is that the major questions cases "address[] a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could

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[266] *See* COVID-19 Vaccination and Testing: Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, and 1928). OSHA's enabling statute, the Occupational Safety and Health Act, exempts these emergency temporary standards from the typical notice-and-comment procedures. *See* 29 U.S.C. § 655(c)(1).

[267] Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 113 (2022).

[268] *Id.*

[269] *Id.*

[270] *Id.* at 117.

[271] West Virginia v. EPA, 142 S. Ct. 2587, 2608–10; *see also id.* at 2627 (Kagan, J., dissenting) (describing history of regulation).

[272] *Id.* at 2609.

[273] *Id.* But the Supreme Court had taken a different approach to *Massachusetts v. EPA,* which involved a similar issue and the same statute, on major questions grounds. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 73–74 (pointing out that the Solicitor General briefed the major questions doctrine but that doctrine did not get traction in oral argument or Court's decision); *see also* Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 Admin. L. Rev. 445, 465–69 (2016) (discussing the case in conjunction with other EPA litigation); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got it Wrong*), 60 Admin. L. Rev. 593, 603 (2008) (critiquing the omission).

[274] Biden v. Nebraska, 143 S. Ct. 2355, 2372–77 (2023).

reasonably be understood to have granted."[275] It's unclear, though, what purpose this doctrine serves. There have been suggestions in judicial opinions and academic commentary that the major questions doctrine reserves the most important questions of policy for the democratically elected legislature. Others have suggested that it forces the legislative branch to provide agencies with some direction to exercise their discretion, and thus, also provide courts a way to review agency action using ascertainable standards. However, these purposes are often discussed in the context of the nondelegation doctrine, which has laid dormant despite recent efforts to revive it at the Supreme Court.

In addition to the controversy over the basis for the major questions doctrine, there are also some basic questions left unanswered by the Court's decisions. First, it is not clear if the major questions doctrine operates as a clear statement rule of statutory interpretation to be used in conjunction with the *Chevron*'s traditional analysis of a statute's ambiguity and the agency action's reasonableness.[276] Alternatively, the major questions doctrine could be a get-out-of-*Chevron*-free card.[277] At an even more basic level, the Court has not explained what a major question is.[278] Of course, there is some language in prior decisions that suggests a combination of "lack of historical precedent" and "breadth of authority" asserted is a "telling indication" that an agency's "mandate extends beyond the agency's legitimate reach."[279] While Justice Gorsuch attempted to provide a list of "suggestive" but not "exclusive" factors, one can

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[275] *West Virginia*, 142 S. Ct. at 2609.

[276] Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.") (citation and quotation marks omitted); David M. Driesen, *The Political Economy of the Major Questions Doctrine*, at *2 (2022) (describing *West Virginia* as "announc[ing]" a "clear statement rule") https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181917 [https://perma.cc/F6YJ-9MJV].

[277] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (holding that *Chevron* generally applies, but "in extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation"); *see also* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Major Questions*, 102 Minn. L. Rev. 2019, 2021 (2018) (suggesting the doctrine is an exception to *Chevron* deference); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent Major Questions Doctrine*, 49 Conn. L. Rev. 355, 358 (2016) (same).

[278] *See* Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J.L. & Pub. Pol'y 463, 465 (2021); *see also* Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174, 175 (2022) (suggesting that in *Alabama Association of Realtors* and *NFIB v. OSHA*, the Court claimed "broad discretionary power to reject delegations of authority to administrative agencies"); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 459 (2008) (pointing out that in *Brown & Williamson*, the Court effectively "decided the major questions itself" (emphasis omitted)).

[279] Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 119–20 (2022) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010)).

only read those factors as what would qualify in his mind and Justice Alito's, the only other member of the Court to join the opinion.[280]

Even if the Court in *West Virginia v. EPA* or *Biden v. Nebraska* had provided guidelines to the lower courts on how to apply the major questions doctrine, there are still reasons to think the Supreme Court will need the lower courts to participate in shaping that doctrine.[281] In a typical year, federal agencies promulgate more than 3,000 final rules.[282] Not all of these rules qualify as "major"—whatever that test might be. Some rescind earlier rules, others only apply to agencies' internal procedures, and still others apply to only a few people or corporations. However, some rules are considered "major rules" under the Congressional Review Act or "significant regulatory actions" under the closely linked Executive Order 12,866.[283] As explained in Part III, some of these major-ish rules can only be challenged in the D.C. Circuit.[284] It is hard to know how many regulations could give rise to a legal challenge under the major questions doctrine.[285] But unlike agency structure, discussed above, the universe of regulations vulnerable to challenges based on the major questions doctrine numbers in the hundreds—each year.[286]

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[280] *West Virginia*, 142 S. Ct. at 2620–22 (Gorsuch, J., concurring) (identifying "suggestive factors" including "when an agency claims the power to resolve a matter of great 'political significance,'" when an agency "seeks to regulate 'a significant portion of the American economy'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) or requires "'billions of dollars in spending' by private persons or entities" (quoting King v. Burwell, 567 U.S. 473, 485 (2015)), and when an agency "seeks to intrud[e] into an area that is the particular domain of state law" (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (alteration in original))).

[281] *See, e.g.*, Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. Pa. L. Rev. 1129, 1133 (2022) (explaining how the cases presented and the manner in which they are presented limits the Supreme Court's influence); Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 Law & Soc'y Rev. 325, 325–26 (1987) (emphasizing the importance of lower courts in interpreting Supreme Court decisions). Others have explored how the federal judiciary, especially the Supreme Court in its supervisory role, can be analyzed using a principal-agent framework. *Compare* Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 Am. J. Pol. Sci. 673, 674–75 (1994) (endorsing the use of a principal-agent framework to analyze the judicial hierarchy), *with* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. Rev. 383, 442 (2007) (criticizing that framework's application).

[282] *See* Maeve P. Carey, Cong. Rsch. Serv., R43056, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register (2019) [hereinafter Counting Regulations].

[283] *See* 5 U.S.C. § 804(2); Off. of Mgmt. & Budget, Exec. Off. of the President, M-19-14, Memorandum for the Heads of Executive Departments and Agencies: Guidance on Compliance with the Congressional Review Act (2019) (seeking to clarify what is considered a "major rule"); *see also* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Major Questions*, 102 Minn. L. Rev. 2019, 2077 (2018) (discussing E.O. 12,866 in light of the major questions doctrine).

[284] *See supra* Part III.

[285] *See* Counting Regulations, *supra* note 282.

[286] Professor Kristin Hickman has made a similar argument in the context of the impracticability of a revived nondelegation doctrine due to "the sheer number and varying types of delegations contained in the U.S. Code" and "the incremental, case-by-case, provision-by-provision, statute-by-statute alternatives" that some members of the Court favor. *See* Hickman, *The Roberts*

Assuming agencies continue to promulgate rules at this rate, the Supreme Court will need lower courts to apply the major questions doctrine with vigor for it to have widespread impact.[287]

Two recent cases suggest the D.C. Circuit is not taking the bait. First, in *Loper Bright Enterprises v. Raimondo*, commercial fishermen challenged the National Marine Fisheries Service's ("NMFS's") policy of requiring that fishing vessels contribute to the salaries of monitors who help implement fishery management plans.[288] Among its challenges, the fishermen argued the NMFS's policy exceeded its authority under the substantive statute.[289] Reviewing the district court's rejection of that and other claims, the D.C. Circuit analyzed the statute using the traditional *Chevron* framework and ruled in the agency's favor.[290] Importantly, Judge Rogers, writing for the majority, used the occasion to address the recent major questions cases: "This court is aware of the Supreme Court precedent that Congress must clearly indicate its intention to delegate authority to take action that will have major and far-reaching economic consequences."[291] For the majority, though, "that 'major questions doctrine' applies only in those 'extraordinary cases' in which the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[292] The dispute over the fishery management monitors was not sufficiently major. Instead, Judge Rogers reasoned, "Congress has delegated broad authority to an agency with expertise and experience within a specific industry, and the agency action is so confined, claiming no broader power to regulate the national economy."[293] She then concluded that since the major questions doctrine did not apply, the court's review was "limited to the familiar questions of whether Congress has spoken clearly, and if not, whether the implementing agency's interpretation is reasonable"—or, in other words, the traditional *Chevron* analysis.[294]

Court's Structural Incrementalism, *supra* note 11, at 85 (citing Kristin E. Hickman, Foreword, *Nondelegation as Constitutional Symbolism*, 89 Geo. Wash. L. Rev. 1079, 1125–30 (2021)).

[287] While Professor Mila Sohoni suggests that "[m]ajor questions challenges will load the [Supreme] Court's docket for years to come," she also concludes that the impact of these cases seems to turn more on lower court decisions. *See* Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 266, 315 (2022). Professor Hickman's response to Sohoni appears to admit the crucial role of lower courts, too. *See* Hickman, *The Roberts Court's Structural Incrementalism*, *supra* note 11, at 76 (noting that "[t]he Court's failure to address at least some of Sohoni's questions and concerns likely will lead to some amount of confusion and inconsistency among future lower court decisions").

[288] 45 F.4th 359, 364–65 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023).

[289] *Id.* at 364.

[290] *Id.* at 372.

[291] *Id.* at 364.

[292] *Id.* at 364–65 (alteration in original) (quoting *West Virginia*, 142 S. Ct. at 2595).

[293] *Id.* at 365.

[294] *Id.* at 365 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984)).

Dissenting from the panel, Judge Walker relied, in part, on *Alabama Association of Realtors*.[295]

Second, in *Washington Alliance of Technology Workers v. Department of Homeland Security*, the D.C. Circuit considered a challenge to the Department of Homeland Security's regulation authorizing student visa holders to remain in the United States for a limited period of time to engage in post-graduation practical training.[296] There, too, the D.C. Circuit applied *Chevron* and upheld the agency's statutory authority to issue the regulation.[297] Judge Henderson dissented in part on the grounds that, after *West Virginia v. EPA*, "the major questions inquiry appears to be a threshold question to Chevron analysis."[298] And "[b]ecause . . . this dispute may be a major question," she would have "either ask[ed] for supplemental briefing to [the court] or direct[ed] the district court on remand to treat the applicability of *West Virginia* to the 2016 OPT Rule."[299]

Other circuits may be more willing than the D.C. Circuit to conclude that agency actions implicate the major questions doctrine.[300] And, of course, two cases do not make a pattern. But *Loper Bright Enterprises* and *Washington Alliance of Technology Workers* preview how the D.C. Circuit might apply the major questions doctrine for the foreseeable future.

Meanwhile, the Supreme Court recently granted the *Loper Bright Enterprises* fishermen's petition for certiorari.[301] The fishermen argued that Congress rejected proposals to give the agency the authority that the agency now claims and quote the three most recent major questions cases.[302] The Court granted certiorari on the question "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning

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[295] *Id.* at 376–77 (Walker, J., dissenting) (citing *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488).

[296] 50 F.4th 164, 192 (D.C. Cir. 2022).

[297] *Id.* at 193 ("As neither 'experts in the field' nor 'part of either political branch of the Government,' we have a 'duty to respect legitimate policy choices made by those who [are].'") (quoting *Chevron*, 467 U.S. at 865–66); *id.* at 194 (upholding agency's statutory authority to issue regulation under *Chevron*).

[298] *Id.* at 204 n.11 (Henderson, J., concurring in part and dissenting in part) (reasoning that, after *West Virginia*, "the major questions inquiry appears to be a threshold question to *Chevron* analysis" and "[b]ecause . . . this dispute may be a major question, [she] would either ask for supplemental briefing to [the court] or direct the district court on remand to treat the applicability of *West Virginia* to the 2016 OPT Rule").

[299] *Id.*

[300] *See, e.g.*, Georgia v. President of the United States, 46 F.4th 1283, 1295 (11th Cir. 2022) (using the major questions doctrine to hold that the President exceeded his authority in issuing E.O. 14042). *See generally* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. 1743, 1745 (2019) (referring to lawsuits brought against a "president's written orders" under the major questions doctrine as a "new and particularly forceful form of litigation"); Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 Vand. L. Rev. 1169, 1209 (2009) (arguing that the actions of neither Congress nor Congress's chosen delegate are exempt from judicial review).

[301] *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023).

[302] Petition for Writ of Certiorari at 21, Loper Bright Enters. v. Raimondo, No. 22-451 (Nov. 10, 2022) (quoting *NFIB*, *West Virginia*, and *Ala. Ass'n of Realtors*).

controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[303] If the Supreme Court does overrule *Chevron* in *Loper Bright Enterprises*, the question will remain how the D.C. Circuit and other lower courts will implement the Supreme Court's new rules for judicial review of agency statutory interpretation.[304]

3. Reviewing Judicial Review

Another recent controversy has been the way in which the Supreme Court has moved away from the writ of certiorari—the typical procedure for exercising its appellate jurisdiction—in favor of quicker, less visible mechanisms, like the Court's emergency or shadow docket.[305] Recently, scholars have devoted significant attention to the features and consequences of this shift.[306] In the words of Professor Richard Pierce, an author of a leading administrative law treatise, "[t]he Supreme Court is now making many decisions that have massive, permanent effects without ever issuing an opinion explaining why."[307] The increased use of the emergency docket in the Supreme Court reflects an increase in nationwide injunctions granted by district

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[303] *Id.* at i–ii. *But see* Hickman, *The Roberts Court's Structural Incrementalism*, *supra* note 11, at 86–91 (discussing cases including *Chevron* questions for which the Court granted certiorari but decided without citing *Chevron*).

[304] *See* Hammond & Walker, *supra* note 251, at 45–46 (exploring what the lower court application of *Kisor v. Wilkie* suggests for *Loper Bright*).

[305] The term "shadow docket" has become rather loaded. Indeed, some, including Supreme Court justices, regard it as a slanderous term meant to undermine the Court's legitimacy. *See, e.g.*, Ashley Rowland, *Justice Samuel Alito Defends Supreme Court's Use of Emergency Docket*, Notre Dame News (Oct. 1, 2021), https://news.nd.edu/news/justice-samuel-alito-defends-supreme-courts-use-of-emergency-docket/ [https://perma.cc/5YWF-PXPL] (quoting Justice Alito as referring to the term as "catchy and sinister" and as used to "portray the court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its way"). Recognizing that the shadow docket refers to other non-merits orders by the Supreme Court, I use shadow docket interchangeably with emergency docket. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 4 (2015) (coining the term shadow docket and arguing that "the Court's non-merits orders do not always live up to the high standards of procedural regularity set by its merits cases"); *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 125 (2019) (citing Baude and defining the shadow docket as "the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument").

[306] *See, e.g.*, Z. Payvand Ahdout, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 163 (2021) (arguing that the emergency docket "can reflect changes in Court behavior and viewpoint much more rapidly than the merits docket" and that "in some areas of the law, the shadow docket is even more influential than the merits docket"); *see also* Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 Admin. L. Rev. 1, 9 (2022) (arguing that the Supreme Court's use of the shadow docket permits the Court to take actions that "have a wide variety of permanent, major effects without ever providing any explanation"); Vladeck, *supra* note 305, at 125 (same); Baude, *supra* note 305, at 4 (same).

[307] Pierce, *supra* note 306, at 15.

courts.[308] For example, the Trump Administration relied heavily on emergency petitions to the Supreme Court to challenge the unprecedented number of nationwide injunctions blocking its agenda.[309] Some have questioned whether the Supreme Court can continue to keep up this frantic pace.[310]

Moving from the shadow docket generally to its implications for administrative law specifically, these emergency procedures create possibilities for the Supreme Court to make an end run around the D.C. Circuit.[311] Indeed, we can look at some of the aforementioned cases to highlight the consequences of these emergency procedures. Let us return to the major question cases. Importantly, the Supreme Court's use of emergency procedures in those cases repeatedly deprived the D.C. Circuit of the opportunity to hear them first, as Congress intended. As Justice Kagan pointed out in her dissent in *West Virginia v. EPA*, the Supreme Court had "obstructed [the] EPA's effort from the beginning."[312] As the Chief Justice admitted in his opinion for the Court, "the same day that EPA promulgated the [Clean Power Plan] dozens of parties (including 27 States) petitioned for review in the D. C. Circuit."[313] When the D.C. Circuit "declined to enter a stay of the rule," the Supreme Court was happy to oblige.[314] As Justice Kagan rightly pointed out, "[t]hat action was unprecedented: Never before had the Court stayed a regulation then under review in the lower courts."[315] While the D.C. Circuit later vacated the Trump

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[308] *See* Pierce, *supra* note 306, at 3 n.15 (citing Jeffrey A. Rosen, Deputy Attorney General, Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide [https://perma.cc/ZJ74-WAFJ]) (counting twelve nationwide injunctions against the Bush Administration, nineteen against the Obama Administration, and roughly eighteen per year against the Trump Administration); *see also id.* at 10 (identifying political polarization as a partial explanation); *cf.* Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. Colo. L. Rev. 789, 804 (2020) (arguing that the nationwide injunction is "a rational institutional response to increasing assertions of unilateral presidential authority, which are incentivized and immunized by increased legislative gridlock").

[309] *See* Vladeck, *supra* note 305, at 132–34 (analyzing the Solicitor General's emergency docket strategy during the Trump Administration); Pierce, *supra* note 306, at 9 (noting that between 2000–2016, the Supreme Court granted four of eight requests for emergency injunctive relief, but the Court granted twenty-eight of the Trump Administration's forty-one requests either in full or in part).

[310] *See* Mark Joseph Stern, *Roberts and Kavanaugh Issue a Surprise Warning Shot to Conservative Lawyers*, Slate (Sept. 15, 2022), https://slate.com/news-and-politics/2022/09/roberts-kavanaugh-lgbtq-yeshiva-shadow-docket.html [https://perma.cc/D2H7-U9TF] ("The surge in shadow docket orders since 2018 is unsustainable. There's no way nine justices can handle a nonstop glut of so-called emergencies that demand instant action."); *see also* Pierce, *supra* note 306, at 19–21 (suggesting reasons why the Court might be backing away from such heavy reliance on the shadow docket).

[311] *See, e.g.*, Vladeck, *supra* note 305, at 140–41, 146–47 (discussing the use of the emergency docket in the Census and DACA controversies).

[312] 142 S. Ct. 2587, 2627 (2022) (Kagan, J., dissenting).

[313] *Id.* at 2604.

[314] *Id.* ("After that court declined to enter a stay of the rule, the challengers sought the same relief from this Court. We granted a stay, preventing the rule from taking effect.").

[315] *Id.* at 2627 (Kagan, J., dissenting).

Administration's decision to rescind the rule, the D.C. Circuit had decided to rehear those cases en banc, only to grant the Biden Administration's motion to dismiss them as moot.[316] Similarly, in *Alabama Association of Realtors*, the D.C. Circuit rejected the requests for emergency stays twice, only to have the Supreme Court on the second go-around consider the case.[317] These cases illustrate how the emergency docket gives the Supreme Court a way to rule on various administrative law controversies quickly, but without the benefit of the D.C. Circuit's rulings.

As Justice Sotomayor put it in a dissent from the Court's grant of a different emergency order, these kinds of orders "follow[] a now-familiar pattern" in which "[t]he Government seeks emergency relief from this Court, asking it to grant a stay where two lower courts have not . . . even though review in a court of appeals is imminent."[318] As Justice Sotomayor noted, the Court "often permits executions—where the risk of irreparable harm is the loss of life—to proceed."[319] Contrast that with the requested stay in the case involving the Trump Administration's public charge rule, in which the federal "[g]overnment itself chose to wait to seek relief, and where its claimed harm is [the] continuation of a 20-year status quo in one State."[320] Justice Sotomayor concluded, "I fear that this disparity in treatment erodes the fair and balanced decisionmaking process that this Court must strive to protect."[321] People can disagree whether that fear has or will prove well-founded. But it seems clear that this frequent use of emergency procedures by the Court offers a powerful tool in the administrative law context. As Justice Kagan put it recently, the emergency docket has become "only another place for merits determinations—except made without full briefing and argument."[322]

The quality of reasoning in these emergency orders pales in comparison to that in the Court's merits decisions. And in some instances, the decision granting a stay is the last time the Court renders any judgment in a particular case.[323] Looking at the emergency docket from this Article's perspective, we see that the difference is not between a decision by the D.C. Circuit and one by the Supreme Court. Instead, the difference will often be between a reasoned decision on the merits by the D.C. Circuit and a truncated, opaque order by the Supreme Court.[324] This difference in the quality of judicial reasoning

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[316] *Id.* at 2604.

[317] *See* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021); Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 3721431, at *1 (D.C. Cir. Aug. 20, 2021), *vacated stay*, 141 S. Ct. 2485 (2021).

[318] Wolf v. Cook Cnty., 140 S. Ct. 681, 681 (2020) (Sotomayor, J., dissenting).

[319] *Id.* at 684 (Sotomayor, J., dissenting).

[320] *Id.*

[321] *Id.*

[322] Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting).

[323] *See* Pierce, *supra* note 306, at 4.

[324] *See id.* at 8–9 (contrasting the "lengthy opinions in which [the members of the D.C. Circuit] debated the merits of each of the six arguments that the EPA and its allies made" with the

means not just that the parties before the Court lack reliable information but also that other agencies and industries cannot rely on the Court's orders to guide their future conduct.[325]

With no mandatory appellate jurisdiction, the Supreme Court picks its cases.[326] And by picking cases, the Supreme Court also picks its lower courts. Recently, the Supreme Court has tended to use its discretion to pick cases from the Fifth Circuit. As a result, the Fifth Circuit has begun to rival the D.C. Circuit in generating administrative law cases for the Supreme Court to hear. Many of the cases discussed above originated in the D.C. Circuit, including *Lucia, Seila Law*, *Alabama Association of Realtors*, and *West Virginia v. EPA*. But *Collins* came to the Supreme Court by way of the Fifth Circuit, which has also teed up two new agency independence cases that the Supreme Court will consider. In *Jarkesy v. SEC*, the Fifth Circuit held that the agency's enforcement proceeding violated the Seventh Amendment and separation of powers.[327] And last October, in *Community Financial Services Association v. CFPB*, the Fifth Circuit held that the CFPB's funding provision violates the Appropriations Clause.[328] The Supreme Court has granted certiorari to review both of these blockbuster administrative law cases.[329] While both decisions could have come from any circuit, it's worth remembering that Mr. Jarkesy wound up in the Fifth Circuit only after the D.C. Circuit denied him relief in a related case.[330] The Fifth Circuit's recent decisions suggest it will play a vigorous supporting role in the Supreme Court's administrative law caseload—one that could diminish the D.C. Circuit's influence considerably.

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then-unknowable positions of the Justices of the Supreme Court).

[325] *See id.* at 3–6 (identifying the information defects for parties and third parties in these kinds of orders).

[326] For recent accounts of the shape and size of the Supreme Court's docket, see Michael Heise, Martin T. Wells & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 Notre Dame L. Rev. 1565, 1567 (2020); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 Wm. & Mary L. Rev. 1219, 1235 (2012); *see also* Nielson & Stancil, *supra* note 281, at 1132–33, 1139 (noting that Supreme Court "[J]ustices have almost unbounded discretion in deciding *which* sixty to eighty cases to hear annually out of the thousands of petitions they receive" but suggesting "the Supreme Court's power to exercise that jurisdiction—at least in the real world—is not entirely within the Justices' control" because lower courts can make their opinions either more or less "certworthy," if not "cert proof").

[327] 34 F.4th 446, 449 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

[328] Cmty. Fin. Servs. Ass'n v. CFPB, 51 F.4th 616, 635 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023).

[329] *See Jarkesy*, 143 S. Ct. 2688; *Cmty. Fin. Servs. Ass'n*, 143 S. Ct. 978.

[330] *See Jarkesy*, 34 F.4th at 450 (citing Jarkesy v. SEC, 48 F. Supp. 3d 32, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9, 12 (D.C. Cir. 2015)) (noting Jarkesy first sued in the D.C. district court to enjoin the agency proceedings but the district court and later the D.C. Circuit refused to issue an injunction on the grounds that the district court lacked jurisdiction and that Jarkesy had to continue with the agency proceedings and, only then, petition the court of appeals to review any adverse final order).

An institutional analysis of these three recent controversies helps make sense of the probable shape and direction of administrative law in the coming years. Where the permutations of a particular issue are finite, like agency independence, the Supreme Court can reshape fundamental tenets of administrative law. Where the permutations are indeterminate, like which agency actions raise a "major question," the Supreme Court will need other federal courts to effectuate a doctrinal revolution as complete as, say, *Chevron* or *State Farm*. And of course, those earlier doctrinal developments depended on their use by the D.C. Circuit. It remains an open question whether the D.C. Circuit will be a willing participant in, say, the major questions doctrine. The Supreme Court's unprecedented use of the emergency docket in recent years underscores this insight. The emergency docket allows the Supreme Court to short-circuit lower court consideration of administrative law issues—as it did in two of the most recent major question cases.[331] But it has drawbacks, diminishing both the quality of the reasoning and the sociological legitimacy of the Court.

One way to evaluate this Article going forward will be to assess whether and how the Supreme Court relies on lower courts other than the D.C. Circuit to tee up administrative law controversies.[332] The Fifth Circuit may play a critical role as the key court to set the table for the Supreme Court's administrative law jurisprudence. There will be some limits on the extent to which the Fifth Circuit or another court that is more ideologically aligned with the Supreme Court could help effectuate an end-run around the D.C. Circuit in administrative law matters. After all, West Virginia and its sister states could not have challenged the EPA's Clean Power Plan in the Fifth Circuit. As a technical matter, the challengers had to file their petition for review in the D.C. Circuit.[333] The question becomes, then, how Congress could enact other jurisdictional provisions to entrench the D.C. Circuit's role in these cases. The next section tries to answer that question.

B. Entrenching the D.C. Circuit's Role in Administrative Law

As then-Judge John Roberts put it some years ago, "there is nothing inevitable about assigning jurisdiction to review government decisions to the District of Columbia Circuit."[334] His tenure as Chief Justice of the Supreme Court is beginning to bear that out. If trends continue, it seems likely that the Supreme Court will either repeatedly overrule or evade the D.C. Circuit. But that does not mean that Congress could not entrench or expand the D.C.

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[331] *See supra* notes 259–270 and accompanying text.

[332] *Cf.* Nielson & Stancil, *supra* note 281, at 1133 (explaining how "the power of lower courts to game certiorari complicates the reality of [the] Supreme Court's supremacy").

[333] *See* 42 U.S.C. § 7607(b)(1) (requiring filing of petitions for review of EPA standards and requirements promulgated under Section 111 of the Clean Air Act in the D.C. Circuit); *see also* Am. Lung Ass'n v. EPA, 985 F.3d 914, 941 (D.C. Cir. 2021) (finding jurisdiction under 42 U.S.C. § 7607(b)(1)), *rev'd on other grounds sub nom.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[334] Roberts, *supra* note 1, at 377.

Circuit's role in reviewing agency action. The following procedural mechanisms differ in important ways, but each would conceivably increase the share of administrative law litigation handled by the D.C. Circuit. These suggestions are imperfect, but they are meant as options that could be considered by those interested in securing the D.C. Circuit's role in the development of federal administrative law.

1. Expanding the D.C. Circuit's Exclusive and Concurrent Jurisdiction

As discussed in Part III, Congress has already shown a willingness to channel some administrative law cases to the D.C. Circuit to the exclusion of other federal courts.[335] Yet, the relatively relaxed jurisdiction and venue provisions of substantive statutes offer litigants the chance to choose among district courts and circuits.[336] Congress could consider amending agencies' substantive statutes to reduce this kind of forum shopping by channeling more petitions for review, in particular review of final rules, to the D.C. Circuit.[337] As discussed, Congress has already done so with the Clean Air Act.[338]

However, these channeling statutes would be less effective in driving administrative law issues to the D.C. Circuit when the underlying agency action is an adjudication and not a rulemaking. To push more cases to the D.C. Circuit involving agency adjudication, one could imagine broadening concurrent appellate jurisdiction. Under this type of provision, appellants could file their appeals either in the geographic circuit or in the D.C. Circuit.[339] As noted in Part III, Congress has already provided the D.C. Circuit as an alternative appellate forum for final orders of the NLRB and the SEC, among other agencies.[340]

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[335] *See supra* Part III.

[336] *See* Pierce, *supra* note 306, at 12.

[337] *See, e.g.*, Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 78 (D.C. Cir. 1984) (identifying "compelling policy reasons for holding that the jurisdiction of the Court of Appeals is exclusive," including that "[a]ppellate courts develop an expertise concerning the agencies assigned them for review," it "promotes judicial economy and fairness to the litigants by taking advantage of that expertise," and it "eliminates duplicative and potentially conflicting review and the delay and expense incidental thereto" (citation omitted)); *see also* Pierce, *supra* note 306, at 17 (suggesting "Congress could eliminate the opportunity to engage in forum shopping by specifying that all petitions for review can only be filed in the D.C. Circuit or only in a special three-judge district court," but noting that such a reform would "concentrat[e] power in a few judges" and that it is "totally unrealistic to expect Congress to take any action to address the problem in today's conditions of extreme political polarity").

[338] *See supra* notes 153–154 and accompanying text.

[339] *See* Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425, 473 (2019) (arguing "inconsistences in regulation" are moderated in part by "the concentration of administrative review in the Court of Appeals for the D.C. Circuit").

[340] *See supra* note 166 and accompanying text.

2. Channeling Questions of Law to the D.C. Circuit

There are two ways in which Congress could continue to permit federal courts outside of the D.C. Circuit to hear some administrative law matters but still increase the federal judiciary's use of the D.C. Circuit's expertise. First, Congress could permit interlocutory appeals on controlling questions of administrative law to the D.C. Circuit by amending Title 28. That statute already channels interlocutory appeals on controlling questions of patent law to the Federal Circuit.[341] Congress could do the same with controlling questions of administrative law by allowing interlocutory appeals from various district courts to the D.C. Circuit.

Perhaps more audacious would be a statute that would allow other circuits to certify questions of law to the D.C. Circuit, just as those courts can certify questions of state law to state supreme courts.[342] This certification mechanism is used often by federal courts of appeals, and the Supreme Court and the Judicial Conference have promoted its use.[343] This would perform a similar function to an interlocutory appeal on a controlling legal question, but the sending court would be a sister circuit, not a district court. One challenge with this certification mechanism would be the extent to which the D.C.

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[341] *See* 28 U.S.C. § 1295(a) (giving the Federal Circuit exclusive jurisdiction over more than a dozen types of appeals); 28 U.S.C. § 1292(c) (laying out the Federal Circuit's exclusive jurisdiction for interlocutory appeals). For an extended criticism of this practice by the then-Chief Judge of the Seventh Circuit, see Hon. Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1 (2013); *see also* Paul R. Gugliuzza, *Rising Confusion About 'Arising Under' Jurisdiction in Patent Cases*, 69 EMORY L.J. 459 (2019) (discussing recent cases involving subject matter jurisdiction disputes among the circuits); John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 553 n.2 (2010) (arguing that the D.C. and Federal Circuits are best thought of as "semi-specialized" because "substantial portions of their dockets encompass issues outside administrative law and patent law, respectively").

[342] *See* Unif. Certification of Questions of Law Act (1967), 12 U.L.A. 86 (1996) (revised 12 U.L.A. 71 (1996); *see also* Verity Winship, *Certification of State-Law Questions by Bankruptcy Courts*, 87 AM. BANKR. L.J. 483, 488 (2013) ("In general, certification from federal courts of appeal has become a well-established piece of the federal jurisdictional landscape."); *see also* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1230 (2004); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672 (2003).

[343] *See* Lehman Bros. v. Schein, 416 U.S. 386, 390–91 (1974) (describing how certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism"); *see also* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1895 (2018) (Sotomayor, J., dissenting) (noting that the Court has previously certified questions to state supreme courts sua sponte); City of Houston v. Hill, 482 U.S. 451, 475 (1987) (Powell, J., concurring in part and dissenting in part) (pointing out that "[t]he Court repeatedly has emphasized the appropriateness of certification in cases presenting uncertain questions of state law"); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring) ("Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court."); JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 32 (1995) (recommending that states adopt certification procedures).

Circuit would effectively be issuing an advisory opinion, a question that bedevils the state court context, but might be particularly acute given Article III's case-or-controversy requirement. Nonetheless, both of these possibilities of channeling more legal questions to the D.C. Circuit should be "on the menu" of possible ways to protect and promote the D.C. Circuit's role in administrative law.

To be sure, there are other changes that could indirectly entrench or promote the D.C. Circuit's leading role in federal administrative law, especially reform of the Supreme Court's emergency docket. But the possibilities sketched above do not depend on any action by the Supreme Court, and unlike other proposals involving the Supreme Court or the nomination process, they are specific to the domain of administrative law.

V. Conclusion

Administrative law in the twenty-first century bursts with variety and volume. A legal system that relies on courts to function as a meaningful mechanism of ex post review of agency action will, in turn, need judges whose experience and current docket make them familiar with the administrative state. In short, judicial review of administrative agencies tends to demand courts that resemble the Conseil d'État and the D.C. Circuit.

This Article suggests a showdown of sorts between the D.C. Circuit and the Supreme Court in the years to come. So long as the Supreme Court lacks and the D.C. Circuit maintains mandatory appellate jurisdiction, it seems likely that the supremacy of the former's decisions will clash with the frequency of the latter's decisions for the foreseeable future. But if American administrative law follows formalism's focus on origins, it will ignore useful analogs. A look at France should temper the renewed fever in the United States for drastic changes to administrative law. The Conseil d'État has become less supreme, now sharing oversight of administrative law with France's constitutional court and the judicial bodies of the European Union. Those other courts, along with recent codification efforts, have restricted the Conseil d'État's freedom to shape administrative law. These changes show that changes in administrative law need not come from conflict. Change also can be the result of cooperation. Administrative law in the United States increasingly feels like yet another fora for political blood sport. This Article's comparative perspective provides insights into the likely institutional consequences of this era of destabilized administrative law doctrine, but also shows us that intra-branch clashes are not inevitable in judicial review of agency action.