

# NOTES

## “INQUIRIES THAT WE ARE ILL-EQUIPPED TO JUDGE”: FACTFINDING IN APPELLATE COURT REVIEW OF AGENCY RULEMAKING

DEBMALLO SHAYON GHOSH\*

*Recognizing the need for a check on agencies' discretion, Congress has assigned the task of reviewing agency rulemaking to the judiciary. Yet, by allocating much of that review directly to appellate courts, Congress has forced them to find facts. For example, when deciding challenges to a rule that an agency has promulgated, these courts must often hear for the first time plaintiffs' evidence about factors that the agency failed to consider. When deciding challenges to an agency's failure to act, they must weigh the plaintiffs' proof about the consequences of the delay against the factual explanation the agency offers for its inaction. And, in any of these challenges, appellate courts may have to rule on facts related to standing. At best, because appellate courts typically lack the tools and institutional experience to conduct factfinding effectively, Congress has unduly burdened these courts and magnified the risk of inaccuracy. At worst, it has created incentives for appellate courts to defer to agencies and thereby weakened the entire institution of judicial review. The solution is simple: Congress should return these factfinding responsibilities to district courts.*

INTRODUCTION .....	1270
I. JUDICIAL REVIEW OF AGENCY DECISIONMAKING .....	1272
A. <i>Article III and Statutory Requirements for Judicial Review</i> .....	1272
B. <i>Which Court Should Review Agency Rulemaking?</i> ..	1274
II. FACTFINDING IN APPELLATE COURTS.....	1278
A. <i>Factfinding in Judicial Review of Agency Rulemaking</i> .....	1279
1. <i>Challenges to Agency Rulemaking</i> .....	1279
2. <i>Challenges to Agency Inaction</i> .....	1282
3. <i>Challenges with Questions of Standing</i> .....	1283

---

\* Copyright © 2015 by Debmallo Shayon Ghosh, J.D., 2015, New York University School of Law. I owe a number of people a great deal for their contributions to this Note. In particular, thanks to Professor Burt Neuborne, whose ideas were instrumental in developing the idea for this piece; to the members of the *New York University Law Review*, especially Nick Reichard, Kevin Benish, Laura Pacifici, and Jess Gardner, whose feedback throughout this process has helped enormously; and to my friends and family, for everything else. Blame me for any mistakes.

B. *Appellate Factfinding and the Effectiveness of Judicial Review* ..... 1285

III. RESERVING FACTFINDING FOR DISTRICT COURTS ..... 1288

    A. *Return to the District Courts* ..... 1288

    B. *Counterarguments* ..... 1291

CONCLUSION ..... 1292

INTRODUCTION

The availability of effective judicial review of agency action is critical to fitting the administrative state into the constitutional system. The explosive growth in the scope of agency power over the past century has complicated that system considerably.<sup>1</sup> Today, agencies create far more binding law than the legislature.<sup>2</sup> However, although Congress and the courts have acquiesced to the development of this unelected “fourth branch,”<sup>3</sup> they have kept it on the leash of judicial review.<sup>4</sup> Scrutiny by courts should counteract the consolidation of power in agencies that take on legislative, executive, and judicial roles. It should prevent them from responding only to factional pressure or from becoming beholden to interest groups, and it should ensure that they act quickly to respond to the needs of the public.<sup>5</sup> Agencies do need some leeway to regulate in order to achieve the

---

<sup>1</sup> See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that the modern administrative state is incompatible with the Constitution); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (proposing a less rigid model of separation of governmental powers than the traditional tripartite scheme in an attempt to accommodate agencies).

<sup>2</sup> See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009) (“In 2007, Congress enacted 138 public laws. . . . [I]n that same year, federal agencies finalized 2926 rules, of which 61 were labeled as major regulations.”).

<sup>3</sup> Strauss, *supra* note 1, at 578; see Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447 (1987) (“[A]gency actors lack electoral accountability and often are not responsive to the public as a whole.”).

<sup>4</sup> See LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320–27 (1965) (exploring the critical role of judicial review in legitimizing agency action); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 526–29 (1989) (considering the costs and benefits of aggressive judicial review of agency action and concluding that the benefits outweigh the costs).

<sup>5</sup> See Sunstein, *supra* note 3, at 446–52, 463 (describing these risks inherent in the modern administrative state and arguing that judicial review helps to counteract them); see also James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 405–11 (1986) (detailing six goals of exercising control over agencies: ensuring fairness, achieving competent performance, maintaining jurisdictional boundaries, overseeing error tolerance, coordinating between agencies, and safeguarding public resources). *But see* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1247–326 (1999) (attacking these and other justifications for judicial review of rulemaking).

socially desirable objectives that Congress has set for them, but they must explain their actions to the public. Judicial scrutiny ensures that these explanations are adequate.

Congress’s decision to allocate much of this review to appellate courts threatens to undermine the effectiveness of judicial review. Thousands of often conflicting statutes govern which court initially reviews an agency decision, and in many cases they mandate direct review by a court of appeals.<sup>6</sup> Although these courts are fundamentally ill suited to conduct factfinding,<sup>7</sup> reviewing agency rulemaking often requires them to do so.<sup>8</sup> Not only does the need for appellate factfinding carry implications for efficiency and accuracy, but it also may engender more deference towards agencies and thus undermine the entire purpose of judicial review.<sup>9</sup>

Therefore, I propose leaving this factfinding responsibility to district courts in the first instance.<sup>10</sup> Such a rule maintains the crucial role of appellate courts in deciding the law while eliminating the need for them to wade into factfinding. Although this proposal would curtail certain benefits of direct appellate court review, those benefits may be more limited than they appear, and the advantages of district court factfinding may outweigh them.<sup>11</sup>

---

<sup>6</sup> See *infra* Part I.A (describing this statutory framework).

<sup>7</sup> See *infra* Part I.B (discussing appellate courts’ institutional incapacity for finding facts and how that characteristic should affect the decision of which court initially reviews agency decisions).

<sup>8</sup> See *infra* Part II.A (showing when judicial review of agency rulemaking requires factfinding). The problem extends to judicial review of other agency action, but this Note focuses only on appellate court factfinding in the rulemaking context.

<sup>9</sup> See *infra* Part II.B (discussing these problems created by appellate court factfinding in review of agency action).

<sup>10</sup> See *infra* Part III.A (detailing this proposal, as well as practical alternatives).

Two relatively recent articles have similarly advocated for changes to the statutory framework that sends many challenges against agency action directly to appellate courts. Professors Wildermuth and Davies write about problems with appellate court factfinding, but only in the context of resolving standing disputes. Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 959–61. They consider and reject my proposal, among others, and eventually suggest appointing special masters to find facts on behalf of appellate courts. *Id.* at 999–1005. I discuss that approach below and encourage it, with some caveats. *Infra* notes 125–28 and accompanying text. Professors Mead and Fromherz have also recently studied the question of which court should review agency decisions. Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. (forthcoming 2015) (manuscript at 2), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2409944](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409944). In response to the confusion that the arbitrary statutory scheme creates, they put forth a framework for deciding jurisdiction more systematically. *Id.* at 2–4. They conclude that “district courts are generally as capable—and usually more efficient—than their counterparts at the circuit level” at handling agency appeals. *Id.* at 4. Mead and Fromherz mention in passing that appellate courts may have to find facts under the current congressional scheme. *Id.* at 27–28.

<sup>11</sup> See *infra* Part III.B (addressing counterarguments).

This Note contains three Parts. In Part I, I present the general background of judicial review of agency action, relying heavily on a seminal 1975 article by Professors Currie and Goodman.<sup>12</sup> I then introduce the statutory landscape. In Part II, I describe a number of instances in which Congress has forced appellate courts to find facts when reviewing agency rulemaking and describe the issues this creates. Finally, in Part III, I propose several ways to mitigate this problem and discuss some potential counterarguments.

## I

### JUDICIAL REVIEW OF AGENCY DECISIONMAKING

#### A. Article III and Statutory Requirements for Judicial Review

Judicial review of agency action helps fit the administrative state into the tripartite constitutional system.<sup>13</sup> The three primary branches of government are each subject to checks and balances from the other two to maintain the separation of powers and to keep any one branch from aggrandizing itself at the others' expense.<sup>14</sup> By contrast, agencies combine all of these functions, stoking fears that they will grow too powerful, too arbitrary, or too closely tied to factions.<sup>15</sup> Their lack of direct electoral accountability only aggravates these risks.<sup>16</sup> Judicial

---

<sup>12</sup> David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).

<sup>13</sup> Many scholars have written about the importance of judicial review of agency action. See, e.g., *supra* notes 4–5 (discussing some of these arguments). But see Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1051–52 (1995) (arguing that indeterminacy in the legal standards of review has led judges to pursue outcomes instead of accuracy); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1721–23 (2012) (arguing that judicial review may actually be counterproductive by giving more engaged interest groups, such as industry, leverage over agencies).

<sup>14</sup> See THE FEDERALIST NO. 51, at 1 (James Madison) (Michael A. Genovese ed., 2009) (“To what . . . shall we finally resort, for maintaining . . . the necessary partition of power . . . ? [T]he defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”).

<sup>15</sup> See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21–24 (2010) (discussing the dangers of “undue industry influence, or ‘capture’”); Sunstein, *supra* note 3, at 446–50 (presenting this critique of the unchecked administrative state).

<sup>16</sup> See Catherine Y. Kim, *Immigration Separation of Powers and the President’s Power to Preempt*, 90 NOTRE DAME L. REV. 691, 721–22 (2014) (“Agency officials, unlike members of Congress, are not popularly elected and remain notoriously vulnerable to capture by regulated interests and self-aggrandizing bias.”); Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1179–80 (1981) (pointing out “the tension between agency government and democratic values”).

review can mitigate these problems.<sup>17</sup> As Justice Brennan once wrote: "Judicial review is available . . . so that agencies, whether in rulemaking, adjudicating, acting or failing to act, do not become stagnant backwaters of caprice and lawlessness."<sup>18</sup>

Congress and the Supreme Court have recognized this need. In the early twentieth century, the Court held that agencies could make initial recommendations, but courts would review *de novo* agencies' findings of constitutional facts and of law.<sup>19</sup> This strict standard of judicial supervision deteriorated over time,<sup>20</sup> but in 1946 Congress passed the Administrative Procedure Act (APA) to maintain some judicial control over agencies.<sup>21</sup>

---

<sup>17</sup> See JAFFE, *supra* note 4, at 322–24 (highlighting the potential problems with unchecked agency discretion and observing that "[t]he guarantee of legality by an organ independent of the executive . . . is the very condition which makes possible, which makes so acceptable, the wide freedom of our administrative system"); Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 324–25 (2013) ("First, hard-look review . . . act[s] as a check on discretion. Second, . . . even if agencies have close relationships with regulated entities (or other stakeholders), a careful look by a court helps ensure that the agency's action is at least within the range of possible options that the applicable statute permits."); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2004) ("The dominant narrative of modern administrative law casts judges as key players who help tame, and thereby legitimate, the exercise of administrative power. . . . Judges closely evaluate administrative action in order to guard against arbitrary or corrupt uses of state power."); Sunstein, *supra* note 3, at 469–74 (describing this function of arbitrariness review); see also Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 863–66 (arguing for more intense judicial review of agency decisions and responding to the critique that judicial involvement is undemocratic). Congress and the executive branch also share some of this responsibility. See Pierce & Shapiro, *supra* note 16, at 1195–219 (discussing legislative and presidential control over agencies); Sunstein, *supra* note 3, at 452–63, 478–83 (same).

This take on judicial review is the dominant one among courts and scholars, Hammond & Markell, *supra*, at 314, but it is not quite universal. See, e.g., Cross, *supra* note 5, at 1247–326 (vigorously challenging the conventional justifications for judicial review of rulemaking).

<sup>18</sup> Heckler v. Chaney, 470 U.S. 821, 848 (1985) (Brennan, J., concurring in the judgment).

<sup>19</sup> Crowell v. Benson, 285 U.S. 22, 60–65 (1932).

<sup>20</sup> See Sunstein, *supra* note 3, at 447 (noting that the Court's "constitutional assault" on the growth of the administrative state, as represented in cases like *Crowell*, "eventually disintegrated in the face of prolonged and persistent support of regulatory administration").

<sup>21</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–706 (2012)); see Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 276–78 (1978) (putting the APA in historical context). Professor Sunstein aptly describes the APA as "a working compromise in which broad delegations of power were tolerated as long as they were accompanied by extensive procedural safeguards." Sunstein, *supra* note 3, at 448.

The text of the APA provides only blurry outlines of its requirements, but the Court has sharpened them. The APA permits a “reviewing court” to either “compel agency action unlawfully withheld or unreasonably delayed” or “set aside agency action” that it finds “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>22</sup> The Court has read this to mean that courts reviewing agency action must determine whether the agency considered all “the relevant factors,”<sup>23</sup> meaning that the court must inquire into the reasoning behind the decision.<sup>24</sup> In light of the agency’s technical expertise and statutory discretion, the reviewing court cannot second-guess the agency.<sup>25</sup> However, the court’s “inquiry into the facts is to be searching and careful.”<sup>26</sup> All told, the APA ensures that an individual whom an agency action harms can challenge the action in court.<sup>27</sup>

### B. Which Court Should Review Agency Rulemaking?

The APA created a presumption of judicial review of agency rulemaking, but it did not specify *which* court would conduct that review. In the mid-1970s, the Administrative Conference of the United States and the Commission on Revision of the Federal Court Appellate System commissioned Professors Currie and Goodman to

---

<sup>22</sup> 5 U.S.C. § 706 (2012).

<sup>23</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *superseded by statute on other grounds*, Pub. L. No. 94-574, 90 Stat. 2721, *as recognized in Califano v. Sanders*, 430 U.S. 99, 104–05 (1977).

<sup>24</sup> *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983); *see also* Sunstein, *supra* note 3, at 469–74 (describing *State Farm* and the benefits of arbitrariness review on the merits). Specifically, the Court in *State Farm* said:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. at 43.

<sup>25</sup> *See State Farm*, 436 U.S. at 43 (“[A] court is not to substitute its judgment for that of the agency.”).

<sup>26</sup> *Overton Park*, 401 U.S. at 416.

<sup>27</sup> *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1966) (quoting 5 U.S.C. § 702 (2012)) (holding that the APA “embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute’” (citation omitted)), *superseded by statute on other grounds*, Pub. L. No. 94-574, 90 Stat. 2721, *as recognized in Califano v. Sanders*, 430 U.S. 99, 104–05 (1977).

answer this question.<sup>28</sup> They responded with an influential article that laid out a comprehensive analysis of the decision.<sup>29</sup>

Currie and Goodman implicitly assumed that appellate courts should not have to inquire into facts.<sup>30</sup> Most scholars agree that appellate courts are ill-suited to find facts,<sup>31</sup> and courts have tended to follow suit. The Supreme Court has observed that "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."<sup>32</sup> Courts of appeals have little opportunity to develop that factfinding expertise, and they do not hesitate to admit it. Accepting that "district courts are better equipped to find facts than courts of appeals," Judge Posner has argued for leaving agency challenges to district courts if they will require factfinding.<sup>33</sup>

<sup>28</sup> Currie & Goodman, *supra* note 12, at 3.

<sup>29</sup> *Id.* More recently, Professors Mead and Fromherz have also undertaken an analysis of the same question. Mead & Fromherz, *supra* note 10.

<sup>30</sup> Currie & Goodman, *supra* note 12, at 52 (referring to the "awkwardness" that could result from an appellate court "allowing new factual evidence on the issue of facial validity" of a regulation).

<sup>31</sup> See, e.g., 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3943 (3d ed. 1996) ("The arguments in favor of district court action rest on the factfinding capacities of a trial court and the ability of a single trial judge to act faster than a panel of three appellate judges."); Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 407 (2009) ("[A]s our federal courts are currently structured, federal district courts are designed to serve as the trial courts; the courts that are institutionally designed to find facts."); Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1523–24 (2012) ("[A]s a society we generally believe and historically we generally have believed that trial courts—judges and juries—have advantages in making fact findings, so we allow appellate courts to review fact-findings but only to avoid severe aberrations, violations of duty, and clear errors . . ."); Wildermuth & Davies, *supra* note 10, at 980 ("Courts of appeals do not do factfinding; they simply are not built for it."); Daniel Egger, Note, *Court of Appeals Review of Agency Action: The Problem of En Banc Ties*, 100 YALE L.J. 471, 481 (1990) ("Courts of appeals sitting under direct review statutes are generally precluded from making any determinations of fact. They cannot take evidence. There is no means by which parties can obtain discovery. The courts engage in what has traditionally been viewed as an appellate function: application of the law to an extant record."). But see John C. Godbold, *Fact Finding by Appellate Courts—An Available and Appropriate Power*, 12 CUMB. L. REV. 365, 383 (1982) (drawing on the author's experience as an appellate court judge to argue that courts of appeals can and should conduct factfinding under certain circumstances); Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 440 (2004) ("[A]ppellate courts are at least as well equipped as trial-level fact finders to assess documentary and circumstantial evidence, and also enjoy advantages arising from experience and perspective. In sum, there are fundamental respects in which appellate courts can function as superior fact finders."). Professor Steinman's article responds to several of Judge Godbold and Professor Oldfather's counterarguments. Steinman, *supra*, at 1569–71.

<sup>32</sup> *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

<sup>33</sup> *Ind. & Mich. Elec. Co. v. EPA*, 733 F.2d 489, 490 (7th Cir. 1984); see also *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 656 (7th Cir. 1986) (Posner, J.) (arguing that a district

The D.C. Circuit has openly sought to avoid “factual inquiries we are ill-equipped to judge in the first instance.”<sup>34</sup> And the Supreme Court recently held that district courts must be available to hear habeas corpus petitions for Guantánamo Bay detainees, citing district courts’ greater “institutional capacity for factfinding.”<sup>35</sup>

The failed experiment of three-judge district courts provides another illustration of the problems with factfinding by bodies not suited to the task. Congress introduced three-judge courts in 1910<sup>36</sup> to prevent lone federal judges from issuing injunctions against state officers.<sup>37</sup> But, as Professors Wright and Miller note, these courts created major hassles as well.<sup>38</sup> Notably, a study prepared for the Federal Judicial Center found that “[a] three-judge court is not well adapted for the trial of factual issues,” so these courts generated insufficient factual records for the Supreme Court to review.<sup>39</sup> Professor Wright and Judge Skelly Wright testified to the same effect before the

---

court should review an agency’s failure to act, in part because “a district court has . . . (as we do not) the practical ability[ ] to compile a record . . . reconstructing . . . the agency’s reasoning process”).

<sup>34</sup> *Kennecott Corp. v. EPA*, 804 F.2d 763, 768 (D.C. Cir. 1986); *see also* *Massachusetts v. EPA*, 415 F.3d 50, 55 (D.C. Cir. 2005) (“As an appellate court we do not conduct evidentiary hearings in order to make findings of fact.”), *rev’d*, 549 U.S. 497 (2007). The Second Circuit was more sanguine about its ability to find facts, but it still seemed to grumble about having to do it. *See Nat’l Nutritional Foods Ass’n v. FDA*, 491 F.2d 1141, 1144 (2d Cir. 1974) (“The difficulties in a court of appeals’ informing itself . . . are imaginary. There is nothing to prevent the hearing of evidence by three judges, . . . *cumbersome though it be.*” (emphasis added)).

<sup>35</sup> *Boumediene v. Bush*, 553 U.S. 723, 778 (2008); *cf.* *Koon v. United States*, 518 U.S. 81, 82 (1996) (“To determine if a departure [from criminal sentencing guidelines] is appropriate, the district court must make a refined assessment of the many facts that bear on the outcome, informed by its vantage point and day-to-day sentencing experience. . . . District courts have an institutional advantage over appellate courts in making these sorts of determinations.”). *See generally* Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535 (2010) (arguing that this language in *Boumediene* implied that lower courts must exist to fulfill this factfinding responsibility, although the Constitution does not explicitly authorize any lower courts).

<sup>36</sup> Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557 (repealed 1976).

<sup>37</sup> 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, *FEDERAL PRACTICE AND PROCEDURE* § 4234 (3d ed. 2007). In an attempt to save state and federal enactments “‘from improvident doom at the hands of a single judge,’” Congress significantly expanded these courts’ purview over the following decades. *Id.* (citation omitted).

<sup>38</sup> *See id.* (observing that the three-judge courts served a “worthy goal” but noting problems they caused for courts, including “an enormously complicated body of law”).

<sup>39</sup> FED. JUDICIAL CTR., *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT* (1972), *reprinted in* 57 F.R.D. 573, 599 (1973). The Supreme Court had direct review over decisions by three-judge district courts. 17A WRIGHT ET AL., *supra* note 37, § 4234.

Senate.<sup>40</sup> As a result, Congress abolished almost all uses of three-judge courts.<sup>41</sup> The only remaining exceptions are certain voting rights cases,<sup>42</sup> but, even in this limited context, factfinding has presented issues.<sup>43</sup>

Keeping in mind, then, that factfinding should be left to district courts whenever possible, Professors Currie and Goodman proposed a framework for how to split judicial review between district and appellate courts. For formal administrative adjudications, where an agency has already developed a factual record, they generally favored direct review in appellate courts, except as necessary to reduce the courts' workload.<sup>44</sup> For informal agency rulemaking, Currie and Goodman evaluated at some length the possibility that appellate courts would have to find facts in deciding whether to uphold a regulation.<sup>45</sup> They concluded that factfinding in agency rulemaking review would come up only rarely<sup>46</sup> and suggested that "it would seem unfortunate to sacrifice the obvious economies of direct [appellate court] review in the many manageable cases in order to avoid an occasional burden."<sup>47</sup>

---

<sup>40</sup> See *Federal Question Jurisdiction Stays in Certain Cases; Three-Judge Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 773 (1972) (statement of Charles Alan Wright, Charles T. McCormick Professor of Law, the University of Texas) ("Because a three-judge tribunal is not well-equipped to conduct to a trial or to pass on evidentiary questions, the record in cases from three-judge courts is often seriously defective."); *id.* at 774 (arguing that three-judge courts are inappropriate "for cases that require extensive evidentiary hearings"); *id.* at 791 (statement of J. Skelly Wright, Judge, U.S. Court of Appeals for the District of Columbia Circuit) (suggesting leaving redistricting cases to three-judge panels in part because they do not require "taking evidence and so on").

<sup>41</sup> Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, 1119 (repealing 28 U.S.C. §§ 2281–2282); see 17A WRIGHT ET AL., *supra* note 37, § 4235 ("The mounting volume of three-judge court cases and the increased dissatisfaction with that procedure led Congress, in 1976, virtually to end the use of those courts.").

<sup>42</sup> See 28 U.S.C. § 2284(a) (2012) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.").

<sup>43</sup> See Spencer Overton, *Judicial Manageability and the Campaign Finance Thicket*, 6 U. PA. J. CONST. L. 113, 114–16 (2003) ("Although lower courts generally handle factfinding, the three judges' disagreements prevented them from developing a complete factual record in the case." (citing *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (three-judge court))).

<sup>44</sup> See Currie & Goodman, *supra* note 12, at 5–23 (laying out the arguments for and against direct appellate review, exclusive district court review, and two-tier review of formal agency actions).

<sup>45</sup> See *id.* at 41–53 (appraising the need for factfinding in reviewing agency rulemaking).

<sup>46</sup> See *id.* at 49–50 ("We do not say the occasion for taking evidence in court will never arise. But on the strength of our examination to date, we think such occasions may be the exception rather than the rule.").

<sup>47</sup> *Id.* at 50; see also *id.* at 52 ("[T]he occasions for factfinding in pre-enforcement review . . . of informal rulemaking seem likely to be relatively minor. . . . If other considerations cut strongly in favor of direct appellate review of such regulations, it may be

Although Currie and Goodman's recommendations were straightforward, Congress has created a confusing network of statutes to control which court should review an agency action. A forthcoming article by Professors Mead and Fromherz elaborates on this problem.<sup>48</sup> The authors count over a thousand provisions scattered across forty-three titles of the U.S. Code that determine whether a plaintiff should first approach a district court or an appellate court to challenge an agency action.<sup>49</sup> These combine with an often inconsistent body of judge-made jurisdictional law.<sup>50</sup> As a result, even sophisticated litigants sometimes bring suit in the wrong forum.<sup>51</sup> The ambiguity in this statutory framework not only harms litigants but also reflects the incoherent way that Congress has assigned jurisdiction to review agency decisions.<sup>52</sup> This much is clear, however: Appellate courts now directly review a broad range of agency decisions.<sup>53</sup>

## II

### FACTFINDING IN APPELLATE COURTS

When assigning so much initial judicial review to appellate courts, perhaps Congress hoped, as Currie and Goodman did,<sup>54</sup> that this review would not require appellate courts to engage in factfinding.

---

inappropriate to let the tail wag the dog by requiring a trial court forum rather than allowing a modicum of awkwardness at the appellate level.”). *But see* Mead & Fromherz, *supra* note 10, at 27 (“[T]here are times when the agency’s administrative record is not controlling, and the comparatively robust civil rules make district courts the premiere triers of fact. To the extent that facts are at play in an administrative review case, we think the district court’s advantage here would be dispositive.”).

<sup>48</sup> *See* Mead & Fromherz, *supra* note 10, at 2–4 (describing the “untenable” complexity of the statutory scheme governing review jurisdiction).

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *See id.* at 2–3 (“On top of these statutory provisions are decades of judicial interpretations, often pointing in inconsistent directions and further clouding the question of jurisdiction.”).

<sup>51</sup> *See, e.g.*, *Nuclear Info. & Research Serv. v. U.S. Dep’t of Transp. Research & Special Programs Admin.*, 457 F.3d 956, 959 (9th Cir. 2006) (holding that plaintiff should have brought its claim against the Department of Transportation directly in the appellate court); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 191–94 (2d Cir. 2004) (same, for a claim against the Department of Energy).

<sup>52</sup> *See* Mead & Fromherz, *supra* note 10, at 3 (“Few patterns emerge from the seemingly random distribution of initial agency review between circuit and district courts, and Congress generally (though not always) declines to explain its choice of forum.”).

<sup>53</sup> *See* 16 WRIGHT ET AL., *supra* note 31, § 3940 (“Beginning with passage of the Federal Trade Commission Act of 1914, Congress has frequently chosen to provide for direct review of administrative actions in the courts of appeals.”); *see also, e.g.*, 15 U.S.C. § 57a(e)(1)(A) (2012) (certain Federal Trade Commission rules); *id.* § 78y(b)(1) (certain SEC rules); 28 U.S.C. § 2342 (2012) (rules issued by the Secretary of Transportation, the Federal Maritime Commission, and the Surface Transportation Board); 42 U.S.C. § 300j-7(a) (2012) (drinking water regulations); *id.* § 7607(b)(1) (air quality regulations).

<sup>54</sup> *Supra* notes 45–47 and accompanying text.

Unfortunately, in practice, judicial review of rulemaking regularly implicates issues of fact, and the statutory framework leaves it to appellate courts to resolve many of them. This Part describes the situations in which factual disputes arise and then explores some of the problems this creates.

### A. *Factfinding in Judicial Review of Agency Rulemaking*

In theory, appellate courts should never need to discover facts beyond an agency record, but the reality is more complicated. Even when an agency has promulgated a rule and produced a record, reviewing courts are often forced to look elsewhere to understand the underlying factual considerations or to consider the basis of a plaintiff’s contentions. Moreover, many suits against agencies challenge agency *inaction*. In those cases, the agency has not produced a record, but appellate courts still have to decide whether the agency should have acted. Finally, the Court’s reinforcement of standing restrictions in recent years has invited agencies, and courts on their own initiative, to question plaintiffs’ standing. Resolving standing issues requires the reviewing court to navigate another set of facts outside the agency record.

#### 1. *Challenges to Agency Rulemaking*

The Supreme Court has done its best to restrict reviewing courts to examining the factual record an agency produces when it promulgates a rule. In *Camp v. Pitts*, the Court held that “[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”<sup>55</sup> In light of this “record rule,”<sup>56</sup> the Court has observed that “[t]he factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking.”<sup>57</sup> In general, the agency record provides at least the starting point for judicial review.

Nevertheless, courts look beyond the agency record when they have to. The need arises from time to time when a court must decide

---

<sup>55</sup> 411 U.S. 138, 142 (1973).

<sup>56</sup> LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING 6 (2013), available at <https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf>; see also Susannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 931 (1993) (“Under the record rule, courts refuse to consider evidence that was not first presented to the agency. Rather, review of agency action is limited to an examination of the record compiled by the agency at the time it made its decision.”).

<sup>57</sup> Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

whether an agency has weighed all of the relevant factors or relied on any inappropriate considerations.<sup>58</sup> In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court recognized that “the bare record may not disclose the factors that were considered or the [agency’s] construction of the evidence” and allowed a reviewing court to obtain “some explanation” of the agency’s decision.<sup>59</sup> Similarly, in *Camp v. Pitts*, the Court authorized lower courts to gather more evidence when “there was such failure to explain administrative action as to frustrate effective judicial review.”<sup>60</sup> Despite the Court’s intention to keep these exceptions narrow, scholars have noted that they have grown over time.<sup>61</sup> Moreover, although both *Overton Park* and *Camp* contemplated further explanation only from the agency itself,<sup>62</sup> courts have admitted extra-record evidence from other sources too.<sup>63</sup>

Appellate courts initially reviewing an agency rule thus can, and occasionally must, weigh new evidence. For example, a plaintiff may claim that an agency’s rulemaking was arbitrary or capricious because it “entirely failed to consider an important aspect of the problem.”<sup>64</sup> In these cases, the plaintiff often presents that aspect for the first time to the appellate court, which must then rule on its importance based

---

<sup>58</sup> See *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (ordering courts to consider these elements when deciding whether an agency action is arbitrary or capricious); Currie & Goodman, *supra* note 12, at 59 (“[I]t is hard to take . . . statements [broadly affirming the record rule] entirely at face value. In the class of situations with which we deal, the party tendering new evidence may have had no opportunity to be heard at the administrative level.”).

<sup>59</sup> 401 U.S. 402, 420 (1971), *superseded by statute on other grounds*, Pub. L. No. 94-574, 90 Stat. 2721, *as recognized in* *Califano v. Sanders*, 430 U.S. 99, 104–05 (1977).

<sup>60</sup> 411 U.S. 138, 142–43 (1973).

<sup>61</sup> See BECK, *supra* note 56, at 67–74 (examining exceptions to the record rule); Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 339–40 (describing four categories of situations in which private litigants have won discovery against the government); Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 343–44 (1984) (describing eight exceptions that courts have used to allow extra-record evidence).

<sup>62</sup> See *Camp*, 411 U.S. at 143 (“[T]he remedy was . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.”); *Overton Park*, 401 U.S. at 420 (“The court may require the administrative officials who participated in the decision to give testimony explaining their action.”).

<sup>63</sup> See BECK, *supra* note 56, at 70–74 (discussing circumstances in which courts may admit extra-record evidence from sources other than the agency); Stark & Wald, *supra* note 61, at 336 (arguing that “industrious advocates now can introduce any evidence they choose in cases reviewing informal administrative action”).

<sup>64</sup> *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

largely on the parties' briefs and testimony.<sup>65</sup> The appellate court may also have to admit evidence outside the administrative record to help inform itself with regard to a complex technical issue.<sup>66</sup> At other times, the plaintiff or the agency may present evidence from after the date when the agency promulgated the rule at issue.<sup>67</sup> Plaintiffs sometimes try to use such evidence to show that the rule is not having its desired effect;<sup>68</sup> agencies introduce it to prove the opposite.<sup>69</sup> The point here is not that appellate courts are deciding these cases incor-

---

<sup>65</sup> See, e.g., *Prometheus Radio Project v. FCC*, 652 F.3d 431, 461 (3d Cir. 2011) (rejecting plaintiffs' contention that the FCC failed to consider the transition to digital television); *Medina Cty. Env'tl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 705–07 (5th Cir. 2010) (refusing to supplement the administrative record with plaintiff's proffered documents); *Miami-Dade Cty. v. EPA*, 529 F.3d 1049, 1069–71 (11th Cir. 2008) (rejecting the findings of plaintiffs' review of an agency risk assessment); *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216–23 (D.C. Cir. 2004) (holding that the agency had failed to consider how its rule would affect the health of commercial drivers); *Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 728 (D.C. Cir. 1994) (agreeing with plaintiffs that the ICC had failed to consider the impact on states of its rule about interstate motor carrier registration); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 544 (D.C. Cir. 1983) (considering plaintiffs' extra-record evidence of small refineries' inability to meet a new gasoline lead standard in holding that it was infeasible); *Cincinnati Gas & Elec. Co. v. EPA*, 578 F.2d 660, 661–66 (6th Cir. 1978) (considering only parties' briefs in deciding that the EPA should have considered the plaintiffs' alternative methodology for evaluating sulfur dioxide emissions from point sources); *H & H Tire Co. v. U.S. Dep't of Transp.*, 471 F.2d 350, 353–56 & n.10 (7th Cir. 1972) (considering extra-record evidence supplied by plaintiffs in deciding that a regulation effectively preventing the use of retreaded tires was arbitrary and capricious); see also *Stark & Wald, supra* note 61, at 346–47 (noting that plaintiffs' presentations of factors an agency failed to consider are a commonly recognized exception to the record rule).

<sup>66</sup> See, e.g., *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626–27 (10th Cir. 1985) (considering parties' extra-record evidence, in part to shed light on technical information); *Pub. Power Council v. Johnson*, 674 F.2d 791, 794–95 (9th Cir. 1982) (Kennedy, J.) (allowing limited discovery to help the court "understand certain allegedly complex and vague contract clauses"); *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977) (allowing parties to augment the record to help the court understand technical issues); see also *Stark & Wald, supra* note 61, at 348–49 (counting this as another exception to the record rule).

<sup>67</sup> See *Stark & Wald, supra* note 61, at 349–50 (discussing this possibility).

<sup>68</sup> See, e.g., *Charter Comm'ns, Inc. v. FCC*, 460 F.3d 31, 40 (D.C. Cir. 2006) (rejecting the relevance of plaintiffs' evidence of market development after the promulgation of the rule).

<sup>69</sup> See, e.g., *Am. Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976) (admitting postpromulgation evidence that spoke to the feasibility of compliance with a regulation); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974) (allowing into evidence testimony before a congressional committee by automakers because it "b[ore] directly upon the plausibility of certain predictions made by the Administrator in promulgating the Regulations").

rectly,<sup>70</sup> but that the jurisdictional scheme asks them to evaluate the credibility or relevance of extra-record evidence in the first place.

## 2. *Challenges to Agency Inaction*

Another group of cases includes challenges to an agency's unreasonable delay in regulating. The APA gives "the reviewing court" the power to "compel agency action unlawfully withheld or unreasonably delayed."<sup>71</sup> Under a widely accepted doctrine articulated by the D.C. Circuit, when an enabling statute requires an appellate court to directly review any agency action, that court must also review any challenge to that agency's inaction.<sup>72</sup>

The reasonableness of an agency's delay often turns on issues of fact, but the reviewing court typically has no factual record to evaluate.<sup>73</sup> The D.C. Circuit has held that courts should consider factors like "the consequences of the agency's delay" and "any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources."<sup>74</sup> Simpler cases in this vein involve an agency's

<sup>70</sup> They may well be. See *infra* notes 104–06 and accompanying text (discussing potential accuracy issues with appellate court factfinding).

<sup>71</sup> 5 U.S.C. § 706(1) (2012).

<sup>72</sup> See *Telecomm. Research & Action Ctr. (TRAC) v. FCC*, 750 F.2d 70, 72 (D.C. Cir. 1984) ("[W]here a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review."); *accord* *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 535 (1st Cir. 1997) ("It is well established that the exclusive jurisdiction given to the courts of appeals to review FAA actions also extends to lawsuits alleging FAA delay in issuing final orders."); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1421 (11th Cir. 1993) ("We are persuaded by the reasoning of the *TRAC* Court and conclude that a similar result should prevail here."); *Env'tl. Def. Fund v. U.S. Nuclear Regulatory Comm'n*, 902 F.2d 785, 786–87 (10th Cir. 1990) ("[P]etitions to compel final agency action which would only be reviewable in the United States Courts of Appeal are also within the exclusive jurisdiction of a United States Court of Appeals." (citing *TRAC*, 750 F.2d at 76)); *Pub. Util. Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (citing *TRAC*, 750 F.2d at 75) ("[W]here a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review."). *But see* *Env'tl. Def. Fund v. Thomas*, 870 F.2d 892, 897 (2d Cir. 1989) (distinguishing D.C. Circuit precedent and holding that a challenge to agency inaction could proceed in a district court). The APA does not itself confer this jurisdiction; instead, it derives from 28 U.S.C. § 1651(a) (2012), the All Writs Act. See *TRAC*, 750 F.2d at 76 (holding that the All Writs Act's broad grant of power to the court to issue "all writs necessary or appropriate in aid of [its] jurisdiction[ ]" allowed the court to "resolve claims of unreasonable delay in order to protect its future jurisdiction" (quoting 28 U.S.C. § 1651(a))).

<sup>73</sup> See *Stark & Wald*, *supra* note 61, at 350–51 (discussing the need for obtaining extra-record evidence when courts review agency inaction).

<sup>74</sup> *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987).

failure to adhere to a timetable.<sup>75</sup> More complex ones demand that the appellate court assess the effects of further delay, including the impact a rule would have on human health.<sup>76</sup> These are quintessential issues of fact.<sup>77</sup>

### 3. *Challenges with Questions of Standing*

A recent article by Professors Wildermuth and Davies<sup>78</sup> points to yet another set of cases in which an appellate court must find facts: cases in which the agency or the court disputes a plaintiff’s standing. The Court has interpreted the Constitution to require any plaintiff bringing a lawsuit to establish a concrete, particularized, and imminent injury in fact; “a causal connection between the injury and the conduct complained of”; and that a favorable decision will “likely” redress the injury.<sup>79</sup> The requirement applies to challenges to administrative decisions,<sup>80</sup> and, because it flows from the Constitution, Congress cannot reduce or eliminate it by statute.<sup>81</sup> The Court has recognized that deciding standing may well be a fact-intensive exercise.<sup>82</sup>

---

<sup>75</sup> See, e.g., *In re Core Commc’ns, Inc.*, 531 F.3d 849, 856–59, 861–62 (D.C. Cir. 2008) (finding unreasonable the FCC’s seven-year delay in issuing a final rule after promulgating an interim rule intended to last three years); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419–20 (D.C. Cir. 2004) (finding an agency’s six-year delay unreasonable, especially in light of its failure to claim any particular difficulties and its prompt response to other petitions); *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 549–51, 553–56 (D.C. Cir. 1999) (finding that an agency had violated a ninety-day statutory timetable and ordering the agency to come up with a reasonable schedule for action).

<sup>76</sup> See, e.g., *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 154–58 (3d Cir. 2002) (considering the scientific uncertainty surrounding the health effects of hexavalent chromium and other regulatory priorities that might have prevented OSHA from addressing this chemical over a nine-year period); *In re United Mine Workers*, 190 F.3d at 552–53 (finding that the chemical to be regulated had lower health impact than others on the agency’s docket); *Env’tl. Def. Fund.*, 902 F.2d at 789–90 (weighing “the extent to which the delay [in issuing radon regulations] undermines the statutory scheme” and “adversely affects the health of persons” before deciding not to force the agency to act); *Oil, Chem. & Atomic Workers Int’l Union v. Zegeer*, 768 F.2d 1480, 1481–83, 1488 (D.C. Cir. 1985) (recognizing the carcinogenic effects of radon gas exposure to miners but finding the agency’s delay in regulating radon exposure justifiable in light of difficulties of regulating).

<sup>77</sup> See *Oil, Chem. & Atomic Workers Union v. OSHA*, 145 F.3d 120, 123 (3d Cir. 1998) (“In the end, application of these [*Cutler v. Hayes*] factors to a particular case is fact-intensive.”).

<sup>78</sup> Wildermuth & Davies, *supra* note 10.

<sup>79</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>80</sup> E.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (reciting these criteria in challenge against administrative action); *Lujan*, 504 U.S. at 559–60 (same).

<sup>81</sup> See *Summers*, 555 U.S. at 497 (“Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”).

<sup>82</sup> See *Lujan*, 504 U.S. at 561 (suggesting evidence plaintiffs can provide to establish standing and procedures courts can use to resolve disputes over that evidence).

When an appellate court must directly review an agency rule, then, it must also somehow rule on the plaintiff's standing.<sup>83</sup> The agency record will be of little help; agencies typically have far looser restrictions on participation in rulemaking than courts do for standing in court, so they are "unlikely to have engaged in any kind of standing inquiry at all."<sup>84</sup> The appellate court has no choice but to decide largely on its own factual record.

Wildermuth and Davies cite the illustrative example of *Massachusetts v. EPA*.<sup>85</sup> In that case, a group of plaintiffs including twelve states petitioned the D.C. Circuit Court of Appeals to force the EPA to regulate certain greenhouse gas emissions.<sup>86</sup> The plaintiffs "filed two volumes of declarations with the court" to establish standing,<sup>87</sup> but the court noted that some evidence in the administrative record contradicted their claims.<sup>88</sup> In light of this factual dispute, the court saw three options: assign the case to a special master to resolve the dispute, which it felt would duplicate the decision on the merits; remand to the EPA, which would delegate to the agency part of the "responsibility of the federal courts"; or assume standing and move on to the merits, because there was so much overlap between the standing and merits inquiries.<sup>89</sup> The court chose the third option,<sup>90</sup> but two members of the panel disagreed.<sup>91</sup> In reversing the D.C. Circuit, the Supreme Court said only that the plaintiffs' affidavits establishing standing were "uncontested"<sup>92</sup> and then found for the plaintiffs on the merits.<sup>93</sup> In effect, the two courts resolved the factual dispute without

---

<sup>83</sup> See Wildermuth & Davies, *supra* note 10, at 968 ("[A]ppellate courts, when faced with standing questions on direct review of agency decisions, must either attempt to rule without a concrete factual record, or create a factual record and then render factual findings.").

<sup>84</sup> *Id.* at 966–67.

<sup>85</sup> Wildermuth & Davies, *supra* note 10, at 969 (citing *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007)).

<sup>86</sup> 415 F.3d at 53.

<sup>87</sup> *Id.* at 54–55.

<sup>88</sup> *Id.* at 55.

<sup>89</sup> *Id.* at 55–56.

<sup>90</sup> *Id.* at 56.

<sup>91</sup> See *id.* at 59–61 (Sentelle, J., dissenting in part and concurring in the judgment) (finding that the plaintiffs had not proven standing but joining "in the issuance of a judgment closest to that which I myself would issue"); *id.* at 61–62, 64–67 (Tatel, J., dissenting) (arguing that at least one plaintiff had established standing, in part because the EPA had not explicitly challenged some of the plaintiffs' assertions, and that the plaintiffs should win on the merits).

<sup>92</sup> *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007).

<sup>93</sup> *Id.* at 534–35.

ever meaningfully adjudicating it.<sup>94</sup> Because Congress had conferred exclusive review jurisdiction on the D.C. Circuit,<sup>95</sup> they had no real choice in the matter. Worse yet, Wildermuth and Davies report that the problem of appellate courts having to decide standing on their own is widespread and growing.<sup>96</sup>

### B. *Appellate Factfinding and the Effectiveness of Judicial Review*

For several reasons, I believe that the examples above represent only the tip of the iceberg, and that appellate courts must examine facts quite often. First, the number of opinions mentioning factfinding outside the record likely understates how regularly it actually occurs.<sup>97</sup> Regardless, I have cited dozens of cases where an appellate court weighed evidence outside the record and published an opinion saying so. Second, a previous study on a related topic supports my hypothesis: Wildermuth and Davies, looking only at standing cases, found fifty-five that "involved declarations, affidavits, or other evidence submitted to establish standing on appeal."<sup>98</sup> Even by itself, that frequency of factfinding causes problems for appellate courts, and of course their figure includes only cases with disputed standing questions.

The third reason for the prevalence of appellate court factfinding is the character of two of the categories of challenges I have discussed. Whenever a plaintiff alleges to an appellate court that an agency has not considered an important factor, she must prove to the court that the factor is indeed important, even though it does not appear meaningfully, if at all, in the agency record.<sup>99</sup> Similarly, any plaintiff claiming that an agency has unlawfully failed to act or delayed its action must prove it without an agency record.<sup>100</sup> Inevitably, most

---

<sup>94</sup> See Wildermuth & Davies, *supra* note 10, at 969 ("There were serious questions about what the standing evidence was . . . . But neither the Supreme Court nor the D.C. Circuit had ready a mechanism to deal with these factual disputes.").

<sup>95</sup> See *Massachusetts v. EPA*, 415 F.3d at 53–54 ("EPA's denial of the rulemaking petition was . . . 'final action,' and since the petition sought regulations national in scope, § 307(b)(1) confers jurisdiction on this court to hear these consolidated cases.").

<sup>96</sup> See Wildermuth & Davies, *supra* note 10, at 990–94 (compiling empirical data on this category of cases and concluding that "standing on appeal cases . . . have increased substantially in the past decade, compared to previous years," and "that courts and litigants should expect to see the problem of standing on appeal to continue arising more often").

<sup>97</sup> See Stark & Wald, *supra* note 61, at 344 ("The number of times courts have allowed extra-record evidence far exceeds the cases cited here . . . because in most cases courts allow the introduction of extra-record evidence in the early, unreported stages of a case and without even discussing it in an opinion . . .").

<sup>98</sup> Wildermuth & Davies, *supra* note 10, at 993.

<sup>99</sup> See *supra* notes 64–65 and accompanying text.

<sup>100</sup> *Supra* note 73 and accompanying text.

such challenges will require some level of factfinding by an appellate court.

Having to find facts exerts a strain on limited judicial resources. In part because appellate court rules are not well-suited for it,<sup>101</sup> factfinding sharply increases appellate courts' workload. For example, in one case with a particularly unhelpful agency record and unwieldy technical background, Judge Charles Clark concurred separately "to highlight the adverse effects flowing from the legislative mandate that judicial review proceedings be injected into the court system at the appellate level," namely the extensive ad-hoc fact discovery procedures the court had to implement.<sup>102</sup> More simply, "initial circuit court review commits three judges' efforts to a challenge; district court review demands only a single judge's attention."<sup>103</sup>

Appellate courts' institutional weakness with respect to factfinding may also lead to inaccuracy. Wildermuth and Davies identify this problem in standing on appeal cases,<sup>104</sup> and their analysis extends beyond the standing context. When appellate courts have to find facts, "[t]here [is] no discovery, no cross-examination, and, obviously, the affiants' credibility [can]not be fully weighed because they testif[y] on paper, not before the court."<sup>105</sup> Without the procedural safeguards that district courts employ or the factfinding expertise that district courts naturally gain through experience,<sup>106</sup> appellate courts cannot effectively judge factual disputes.

Finally, when appellate courts are reluctant to engage in factfinding or uncomfortable with the exercise, they may be more likely to defer to the expertise of the agency. In other words, the inaccuracy may take the form of a structural bias towards the administrative state. A reviewing appellate court faced with a factual dispute can either resolve the dispute itself or rely on the agency to build a record.<sup>107</sup> The former option, as I have discussed above, is burden-

---

<sup>101</sup> See Mead & Fromherz, *supra* note 10, at 27 ("[T]he Federal Rules of Appellate Procedure are well tailored to the appellate-like quality of APA cases. . . . But there are times when the agency's administrative record is not controlling, and the comparatively robust civil rules make district courts the premiere triers of fact.")

<sup>102</sup> *Texas v. EPA*, 499 F.2d 289, 321–22 (5th Cir. 1974) (Clark, J., concurring). Currie and Goodman discussed this opinion in their study, but they dismissed it as an aberration. Currie & Goodman, *supra* note 12, at 53–54.

<sup>103</sup> Mead & Fromherz, *supra* note 10, at 34.

<sup>104</sup> Wildermuth & Davies, *supra* note 10, at 978–80.

<sup>105</sup> *Id.* at 979.

<sup>106</sup> *Supra* note 32 and accompanying text.

<sup>107</sup> *Cf. Massachusetts v. EPA*, 415 F.3d 50, 55–56 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007) (weighing these options for resolving a standing dispute). In *Massachusetts v. EPA*, the court also discussed what it called a third option of appointing a special master, *id.* at

some on courts,<sup>108</sup> and the Supreme Court has encouraged the latter.<sup>109</sup> Therefore, the reviewing court may be inclined to restrict itself to the agency record or remand to the agency to find the necessary facts. The agency, however, has every incentive to produce a record most favorable to its own interests, and an appellate court reviewing such a record will tend to rule in the agency's favor. For this reason, some commentators have criticized the record rule as hamstringing judicial review.<sup>110</sup> Perhaps, however, the problem is not the record rule—which courts can skirt when they really want to<sup>111</sup>—but merely appellate courts' unwillingness to look outside the agency record. District courts initially reviewing an agency rule would be less hesitant to embark on a factfinding adventure.

This last issue should concern those at all points on the ideological spectrum. Judicial review strikes down unlawful overregulation<sup>112</sup> and under- or deregulation<sup>113</sup> alike. To the extent the need for

---

55, but because special masters are adjuncts of the court, I consider that no more than another way for the court to find the facts itself.

<sup>108</sup> *Supra* notes 101–06 and accompanying text.

<sup>109</sup> *See* *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) (“If . . . there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a *de novo* hearing but . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.”); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (“[I]t may be necessary . . . to require some explanation in order to determine . . . if the Secretary’s action was justifiable . . . . The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings . . . that will provide an adequate explanation for his action.”), *superseded by statute on other grounds*, Pub. L. No. 94-574, 90 Stat. 2721, *as recognized in* *Califano v. Sanders*, 430 U.S. 99, 104–05 (1977).

<sup>110</sup> *See* French, *supra* note 56, at 958 (“Under the record rule, courts have no effective means of determining whether an agency fulfilled the congressional mandate to analyze all significant environmental effects.”); James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301, 1301–02 (2008) (highlighting the potential for agencies to manipulate the records before reviewing courts and thus exploit the record rule).

<sup>111</sup> *See* Stark & Wald, *supra* note 61, at 343 (“Without acknowledging the breadth of their exceptions, courts soon created so many such exceptions . . . that the rule limiting review to the record . . . ceased to have much meaning.”).

<sup>112</sup> *See, e.g.,* Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 448–49 (D.C. Cir. 2012) (striking down parts of an Obama administration education regulation governing for-profit universities as arbitrary and capricious for “want of adequate explanations”); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 469–72 (3d Cir. 2011) (finding that FCC rules intended to increase minority and female ownership of radio stations were arbitrary and capricious because the agency had failed to gather enough information before issuing them); *McCulloch Gas Processing Corp. v. Dep’t of Energy*, 650 F.2d 1216, 1225–29 (Temp. Emer. Ct. App. 1981) (rejecting parts of a DOE regulation as arbitrary and capricious).

<sup>113</sup> *See, e.g.,* *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007) (holding that EPA had acted unlawfully by refusing to address “whether greenhouse gases cause or contribute to climate change”); *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463

factfinding in appellate courts weakens that review, it frees agencies to change course with the political winds, unmoored from the need to justify their decisions. This is not to say that agencies should not regulate towards partisan ends,<sup>114</sup> but only that, when they do so, they must be able to explain and defend their decisions to a court.

### III

#### RESERVING FACTFINDING FOR DISTRICT COURTS

In light of the problems arising from appellate court factfinding in reviewing agency rulemaking, I propose allocating that responsibility where it belongs: the district court. In this Part, I explore possible procedural mechanisms for accomplishing this as well as a few milder alternatives. I then address some potential counterarguments.

##### A. *Return to the District Courts*

The most direct solution would be to return initial review of agency rulemaking to district courts. This matters less for appeals of agencies' formal adjudicative hearings, where the appellate court takes on the familiar role of reviewing a factual record established through an adversarial, trial-like process.<sup>115</sup> When plaintiffs challenge agency rules, however, fact development takes on a greater role in judicial review for all the reasons above.<sup>116</sup> District courts are far better equipped to fulfill this role. At first, such a solution may seem to "amount to throwing the baby out with the bathwater."<sup>117</sup> However, as Mead and Fromherz point out, the theoretical advantages of direct appellate court review largely disappear in practice.<sup>118</sup> Having district courts review all agency rulemaking, then, would not dramatically impair judicial review on the whole.

---

U.S. 29, 34 (1983) (holding that NHTSA had "acted arbitrarily and capriciously in revoking the requirement . . . that new motor vehicles . . . be equipped with passive restraints to protect the safety of the occupants of the vehicle in the event of a collision").

<sup>114</sup> Cf. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

<sup>115</sup> See Currie & Goodman, *supra* note 12, at 13–16 (discussing the advantages of direct review of formal agency adjudication by appellate courts).

<sup>116</sup> See *supra* Part II.A (exploring the regular demand for factfinding in reviewing agency rulemaking). *But see* Currie & Goodman, *supra* note 12, at 49–50 (concluding that factfinding in appellate court review of rulemaking would not be a major problem).

<sup>117</sup> See Wildermuth & Davies, *supra* note 10, at 1002–03 (arguing that this would be too drastic a solution for resolving the issues with factfinding in the standing context).

<sup>118</sup> See Mead & Fromherz, *supra* note 10, at 29–54 (discussing and countering the arguments for direct appellate review, including authoritativeness, accuracy, and efficiency).

Confining district court jurisdiction to resolving issues of fact may seem like a reasonable compromise, but it would defeat the purpose. This option may appeal to Congress because it preserves the advantages of appellate court attention to issues of law. Congress could accordingly devise a system in which appellate courts would step in immediately after a district court has built up a factual record. The district court’s factfinding responsibility would consist only of building and verifying a set of facts from materials the plaintiff has put forth to supplement the record the agency has already provided. In other words, the district court would just preside over discovery, much as magistrate judges often do for district courts in more run-of-the-mill cases.<sup>119</sup> But most of the relevant questions in these cases will involve mixed fact and law. The district court that received the evidence will be in the best position to judge its credibility and issue an initial ruling.<sup>120</sup>

At the very least, Congress and appellate courts should develop a more systematic mechanism for remanding cases involving factfinding to district courts. Statutes already permit this when appellate courts are reviewing some agency orders.<sup>121</sup> Expanding this capability to cases involving rulemaking would allow appellate courts to decide for themselves when to refer factfinding to a more appropriate entity.

The alternative of expanding the use of remands to the relevant agency for factual development also has significant downsides. The

---

<sup>119</sup> See Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 665–66 (2005) (“The [Civil Justice Reform Act] ‘emphasized the importance of early involvement by a judicial officer in planning a case’s progress and controlling discovery.’ By and large, that ‘judicial officer’ has been the magistrate judge.” (quoting Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 998 (2003))); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 94–95 (1995) (“[M]agistrate judges have been authorized to . . . resolve a wide range of discovery issues [and] impose fees and attorney sanctions for discovery misconduct . . . . One study estimated that magistrate judges already play some role in up to fifty percent of district court cases.”).

<sup>120</sup> Cf. FED. R. CIV. P. 52(a)(6) (mandating that appellate courts apply the “clearly erroneous” standard when reviewing district court factfinding, “whether based on oral or other evidence,” and that they “must give due regard to the trial court’s opportunity to judge the witnesses’ credibility”); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (“[W]e have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question . . . .”).

<sup>121</sup> See 28 U.S.C. § 2347(b)(3) (2012) (allowing an appellate court to “transfer the proceedings to a district court . . . as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented”). However, “that section applies only to a small number of agency actions.” Wildermuth & Davies, *supra* note 10, at 999 n.245.

agency is itself a party to these cases, and delegating to it a critical part of the task of judicial review would create a conflict of interest.<sup>122</sup> If much of the purpose of judicial review is to legitimate administrative quasi-legislation by protecting against arbitrariness in its execution,<sup>123</sup> we must keep agencies as separate as possible from the review of their own actions.<sup>124</sup>

A better option would be for appellate courts to employ the services of special masters<sup>125</sup> to assemble the record, though this too has some drawbacks. The use of special masters by appellate courts may raise Article III concerns.<sup>126</sup> Moreover, Federal Rule of Appellate Procedure 48, which governs appellate courts' appointment of special masters, restricts them to "factual findings . . . in matters *ancillary* to proceedings in the court."<sup>127</sup> If the practice is permissible, however, appellate courts could hire factfinding experts, like magistrate judges, as special masters to resolve factual disputes.<sup>128</sup>

---

<sup>122</sup> Cf. Wildermuth & Davies, *supra* note 10, at 1001 (raising this concern regarding remands to the agency to resolve standing issues).

<sup>123</sup> See JAFFE, *supra* note 4, at 320–27 (describing this function).

<sup>124</sup> Cf. Wildermuth & Davies, *supra* note 10, at 1001 (arguing that "[t]he major—and perhaps determinative—problem" with the option of remanding to the agency to resolve standing issues "is that the agency is an interested party").

<sup>125</sup> See FED. R. APP. P. 48 ("A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court.").

<sup>126</sup> See U.S. CONST. art. III, § 1 (vesting "[t]he judicial power of the United States" in life-tenured judges). The argument against would go somewhat like this: In *United States v. Raddatz*, 447 U.S. 667 (1980), the Court voted 5-4 to uphold the delegation of factfinding from a district court to a magistrate judge. *Id.* at 677–84. The plaintiff in *Raddatz* claimed that the magistrate procedure violated due process, not Article III. *Id.* at 677. However, a plurality of the Court later cited *Raddatz* in an Article III case to help illuminate whether a non-Article III tribunal was merely serving as an "adjunct" to an Article III court and not ultimately taking on "the essential attributes of the judicial power." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 78–83 (1982) (plurality opinion) (internal quotation marks omitted).

The plurality in *Northern Pipeline* was careful to authorize "the use of adjunct factfinders" only when "those adjuncts were subject to sufficient control by an Art. III district court." 458 U.S. at 78–79 (emphasis added). The restriction to district courts is significant. In *Raddatz*, the Court found it important that the district court retained ultimate discretion over factfinding, which included the power to "hear[ ] the witnesses live to resolve conflicting credibility claims" and to "conduct a hearing and view the witnesses itself." 447 U.S. at 680–81. In other words, the Article III judge must be able to evaluate witness credibility herself, a task for which appellate judges, working in panels of three, are not well-suited.

<sup>127</sup> FED. R. APP. P. 48(a) (emphasis added).

<sup>128</sup> See Wildermuth & Davies, *supra* note 10, at 1003–07 (evaluating this method of resolving fact-heavy standing disputes).

### B. Counterarguments

Although multiple tiers of potentially duplicative review may be less efficient, the gains in accuracy are so critical to the constitutional scheme that they outweigh the costs. Those costs are lower than they appear at first glance. In terms of judges' time, a system that leaves the task of building a factual record to a single judge accustomed to the job improves on one that assigns it to three who are new to it.<sup>129</sup> Moreover, as the Court has recognized, remands from a court of appeal to the district court or the agency for factual development may be more expensive than simply letting the district court have the first crack.<sup>130</sup> Finally, though two tiers of review might increase the cost to those challenging agency action,<sup>131</sup> plaintiffs may prefer paying more legal fees to litigating uphill on a regular basis.<sup>132</sup>

Currie and Goodman also praised the benefits of collaborative decisionmaking as a reason to reserve review to three-judge appellate panels,<sup>133</sup> but these benefits do not fully apply here. First, even if district courts resolve not just factual but also legal issues, appellate review remains available. Second, collaboration is far less helpful in determining facts.<sup>134</sup>

Reposing review in appellate courts also promotes uniformity and finality by binding more people to judgments and discouraging forum shopping. Aside from schemes consolidating review in a single appellate court like the D.C. Circuit<sup>135</sup> or the Federal Circuit,<sup>136</sup> the

---

<sup>129</sup> Of course, some circuit court judges have previously served on district courts, but not many or even most. See *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited June 18, 2015) (showing that only 92 active judges on federal appellate courts previously served on federal district courts, compared to 183 whose first federal judicial experience was an appellate court).

<sup>130</sup> See *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593–94 (1980) (“It may be seriously questioned whether the overall time lost by court of appeals remands to EPA of those cases in which the records are inadequate would exceed the time saved by forgoing in every case initial review in a district court.”).

<sup>131</sup> See Currie & Goodman, *supra* note 12, at 16–19 (arguing that two-tier review imposed significant and unjustifiable costs on litigants).

<sup>132</sup> See *supra* notes 107–11 and accompanying text (suggesting that just such a structural bias might result from forcing appellate courts to engage in factfinding).

<sup>133</sup> See Currie & Goodman, *supra* note 12, at 12 (“The process of collegial decisionmaking tends to counteract bias, subjectivity and incompetence. The need to persuade colleagues, and the opportunity to be persuaded by them, bring reason to the fore and subordinate considerations that cannot be defended in argument.”).

<sup>134</sup> See *supra* notes 39–40 and accompanying text (discussing the problems with factfinding in three-judge district courts).

<sup>135</sup> See generally Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131 (2013) (exploring the features of the statutory framework that have resulted in the D.C. Circuit’s caseload leaning so heavily towards agency appeals).

<sup>136</sup> See 17 WRIGHT ET AL., *supra* note 37, § 4104 (discussing the Court of Appeals for the Federal Circuit and its exclusive jurisdiction over appeals in a number of areas of law).

presence of eleven circuit courts means that finality may still be hard to come by absent a Supreme Court decision.<sup>137</sup> At a more basic level, the purpose of this exercise has been to point out the fact-specificity of appellate court review of rulemaking. Decisions that hinge on a particular factual situation are less generalizable and thus promote less finality.<sup>138</sup>

The largest obstacle to this proposal, though, remains the intransigence of Congress, which would ultimately have to modify the aforementioned thousands of statutes conferring exclusive review on the appellate courts. Congress could potentially pass a single bill to modify every judicial review provision of every statutory delegation to an agency.<sup>139</sup> If this is infeasible, expanding the availability of factfinding remands to district courts would be simpler and less likely to cause confusion. And increasing the use of special masters, if the Constitution and the rules of appellate procedure allow it,<sup>140</sup> is largely within the control of appellate courts themselves. Addressing the problem this Note has identified, then, does not pose an insurmountable challenge.

#### CONCLUSION

Recognizing the need for a check on agencies' discretion, Congress has given the judiciary the task of reviewing rulemaking. And yet, by allocating much of that review directly to appellate courts, Congress has forced them to find facts. At best, Congress has burdened courts and produced inaccuracy. At worst, it has weakened the entire institution of judicial review. Congress should return these factfinding responsibilities to district courts.

---

<sup>137</sup> See Mead & Fromherz, *supra* note 10, at 30–32 (arguing that “[t]he purported finality of circuit court rulings is, in many ways, illusory” unless the statutory scheme concentrates appeals in a single court, which has its own “serious drawbacks”).

<sup>138</sup> *Cf. id.* at 32–33 (“[T]he precedent-setting feature of circuit courts becomes far less useful when the agency decision under review is a fact-specific adjudication that applies only to a particular controversy—yet Congress often places this latter type of agency action directly in the circuit court.”).

<sup>139</sup> See Wildermuth & Davies, *supra* note 10, at 1002 (proposing “a single housekeeping bill” as a potential way for Congress to avoid having to “amend the many organic statutes that provide for direct review of administrative decisions in appellate courts”).

<sup>140</sup> See *supra* notes 126–27 and accompanying text (identifying potential problems with this approach).