Judicial Ideology as a Check on Executive Power

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The ideological outlook of federal judges has long been a focal point for criticism of the judiciary, but it has taken on new urgency with the escalating political rhetoric and polarization in Washington. President Trump's recent reference to a district court judge as an "Obama Judge," after the judge ruled against the Administration in an immigration case, exemplifies the increasingly partisan view of federal judges. In an unusually high-profile response, Chief Justice Roberts defended the judiciary by asserting categorically that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."

Justice Roberts's statement may appear defensive or naive, particularly in an era of hyper-politicized judicial confirmations. However, setting aside the Supreme Court, the evidence that exists on the influence of judicial ideology is mixed at best, as most empirical studies find that a judge's politics have only a modest impact on case outcomes. Existing studies also overlook how changes in executive branch policies affect judicial review and thus confound the influence of judicial ideology with presidential politics. In this study, we find that the influence of judicial ideology on case outcomes is mediated by the partisanship of the executive branch. Thus, while public debates about the federal judiciary focus on whether judges are political, the underlying driver is often politically driven conflicts between executive branch policies and governing statutes.

Overall, judicial ideology affected case outcomes in less than five percent of the appellate cases we analyzed over roughly a fifteen-year period spanning the George W. Bush and Barack Obama Administrations. The influence of ideology on case outcomes was lowest during the Obama Administration, when presidential politics aligned strongly with the environmental laws we studied. Moreover, when it was a factor during the Bush Administration, judicial ideology had a moderating effect on executive branch policies through judicial

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opinions that guided policies towards centrist positions more in line with statutory mandates, which may or may not align with the current political views of the executive branch or Congress.

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I. INTRODUCTION

The ideological outlook of federal judges has long been a focal point for criticism of the judiciary, but it has taken on new urgency with the escalating

political rhetoric and polarization in Washington.[1] President Trump's recent reference to district court Judge Jon Tigar as an "Obama Judge," after he ruled against the Administration in an immigration asylum case, exemplifies the increasingly partisan view of federal judges.[2] In an unusually high-profile response, Chief Justice Roberts defended the judiciary by asserting categorically that:

> We do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.[3]

Justice Roberts's statement may appear defensive or naive, particularly in an era of hyper-politicized judicial confirmations.[4] However, setting aside the

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[1] *See, e.g.*, Daniel Bush, *Trump's Conservative Picks Will Impact Courts for Decades*, PBS NEWSHOUR (Oct. 25, 2019), https://www.pbs.org/newshour/politics/trumps-conservative-picks-will-impact-courts-for-decades [https://perma.cc/UR7K-99NV]; Kevin Schaul & Kevin Uhrmacher, *How Trump Is Shifting the Most Important Courts in the Country*, WASH. POST (Sept. 4, 2018), https://www.washingtonpost.com/graphics/2018/politics/trump-federal-judges/ [https://perma.cc/V9AD-DXUJ]; Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html [https://perma.cc/L4QG-VJM8].

[2] Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html [https://perma.cc/E3L7-83ZY]; *see also* Jess Bravin, *No Obama or Trump Judges Here, Appointees of Both Declare*, WALL ST. J. (Sept. 15, 2019), https://www.wsj.com/articles/judges-say-they-arent-extensions-of-presidents-who-appointed-them-11568566598 [https://perma.cc/RUJ6-JCLX].

[3] Liptak, *supra* note 2. President Trump followed up with "[s]orry Chief Justice John Roberts, but you do indeed have 'Obama judges,' . . . and they have a much different point of view than the people who are charged with the safety of our country." *Id.*

[4] Joan Biskupic, *The 'Partisan' Players Transforming the Supreme Court*, WASH. POST (June 21, 2019), https://www.washingtonpost.com/outlook/the-partisan-players-transforming-the-supreme-court/2019/06/21/9cc6596a-8964-11e9-98c1-e945ae5db8fb_story.html [https://perma.cc/L5AN-VHAY]; Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html [https://perma.cc/8DE2-M5VC]; Rorie Spill Solberg & Eric N. Waltenburg, *Are Trump's Judicial Nominees Really Being Confirmed at a Record Pace? The Answer Is Complicated*, WASH. POST (June 14, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/14/are-trumps-judicial-nominees-really-being-confirmed-at-a-record-pace-the-answer-is-complicated [https://perma.cc/UY6U-7HV7]; Sean Sullivan & Mike DeBonis, *With Little Fanfare, Trump and McConnell Reshape the Nation's Circuit Courts*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/powerpost/with-little-fanfare-trump-and-mcconnell-reshape-the-nations-circuit-courts/2018/08/14/10610028-9fcd-11e8-93e3-24d1703d2a7a_story.html [https://perma.cc/PF3T-P9H4]; Evan Thomas, *How Supreme Court Nominations Became So Partisan*, N.Y. TIMES (June 23, 2019), https://www.nytimes.com/2019/06/23/books/review/carl-hulse-confirmation-bias.html [https://perma.cc/

Supreme Court, the evidence that exists on the influence of judicial ideology is mixed at best, as most empirical studies find that a judge's politics have only a modest impact on case outcomes.[5] The disconnect between perceptions and empirics persists, in part, because most studies emphasize the disparities between Republican- and Democratic-appointed judges through the exclusive use of *relative* rates for case outcomes without considering the small *absolute* number of cases impacted.[6] Further, existing studies overlook how changes in executive branch policies affect judicial review and thus confound the influence of judicial ideology with presidential politics.[7] We find that the influence of judicial ideology on case outcomes is mediated by the partisanship of the executive branch.[8] Thus, while public debates about the federal judiciary focus on whether judges are political,[9] the underlying driver is often politically driven conflicts between executive branch policies and statutory mandates.

This Article examines the influence of judicial ideology in administrative review cases and presents new empirical results that qualify its significance in district and appellate courts. Focusing on litigation under two prominent environmental laws, the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), we observe statistically significant differences in plaintiffs' success rates across circuits and presidential administrations. Our data span the George W. Bush and Barack Obama Administrations, which provide contrasting ideological outlooks for assessing the impact of presidential politics on judicial review. Overall, we find that the influence of judicial ideology affects case outcomes in less than five percent of the appellate cases.[10]

J2QM-484P] (reviewing CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH (2019)).

[5] *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 807 (2008) [hereinafter Miles & Sunstein, *Real World*] (finding that "our data demonstrate that judicial ideology is not playing a dominant role and that judicial policy choices are not driving arbitrariness review").

[6] *See, e.g.*, *id.* (explaining that "Republican appointees vote to validate most liberal agency decisions, and Democratic appointees vote to validate most conservative agency decisions").

[7] *See, e.g.*, Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304 (2004) (proposing three hypotheses to explain ideological voting but not addressing the role of presidential ideology).

[8] *See infra* Part IV.

[9] *See, e.g.*, Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html [https://perma.cc/MDY9-Z686].

[10] We define each judge's political/ideological outlook by the party of the appointing president: judges appointed by Republican presidents were designated as Republican judges; judges appointed by Democratic presidents were designated as Democratic judges. The party of the appointing president is a rough proxy for judicial ideology, but it has the virtue that it errs on the side of obscuring the impact of ideology because the party of the appointing president does not necessarily reflect the ideology of the judge. Accordingly, if we observe a statistically significant effect, it is likely to be a lower bound on the actual influence of ideology.

In absolute terms, this translates to about 9 cases out of 180 under the ESA and 11 cases out of 334 under NEPA over roughly a fifteen-year period. The influence of judicial ideology was lowest during the Obama Administration, when presidential politics aligned strongly with the two environmental statutes.[11] Moreover, when it was a factor, judicial ideology had a moderating effect on executive branch policies through judicial opinions that guided policies towards centrist positions consistent with statutory mandates.[12] These findings demonstrate the critical role that external political factors play in mediating the influence of judicial ideology and elucidate the conditions under which they can break down.

A rich literature, focused largely on the Supreme Court and federal appellate courts, has evolved over the last two decades and examines the influence of ideology on judicial review.[13] Researchers have found that judicial ideology is a statistically significant factor in the resolution of cases over a wide range of legal areas, and that the Supreme Court—as opposed to the Executive or Congress—has the greatest influence on judicial decision-making.[14] They also find that the influence of judicial ideology is moderated on appellate panels with a mix of Republican- and Democratic-appointed judges, largely owing to the

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[11] *See, e.g.*, *President Obama Brings Back ESA Consultation*, WILDLIFE MGMT. INST. (Mar. 15, 2009), https://wildlifemanagement.institute/outdoor-news-bulletin/march-2009/president-obama-brings-back-esa-consultation [https://perma.cc/W7ZS-MANR]; *Steps to Modernize and Reinvigorate NEPA*, OBAMA WHITE HOUSE, https://obama whitehouse.archives.gov/administration/eop/ceq/initiatives/nepa [https://perma.cc/7564-YGL2].

[12] *See infra* Part IV.D.

[13] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 28 (2017); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2155–56 (1998); Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781, 781 (2011) [hereinafter Fischman, *Estimating Preferences*]; Joshua B. Fischman, *Interpreting Circuit Court Voting Patterns: A Social Interactions Framework*, 31 J.L. ECON. & ORG. 808, 808 (2013) [hereinafter Fischman, *Voting Patterns*]; Morgan Hazelton et al., *Panel Effects in Administrative Law: A Study of Rules, Standards, and Judicial Whistleblowing*, 71 SMU L. REV. 445, 445 (2018); Stefanie A. Lindquist & Susan B. Haire, *Decision Making by an Agent with Multiple Principals: Environmental Policy in the U.S. Courts of Appeals*, *in* INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 230 (James R. Rogers et al. eds., 2006); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–26 (2006) [hereinafter Miles & Sunstein, *Policy*]; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717–19 (1997) [hereinafter Revesz, *Ideology*]; Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 988; Matthew Spitzer & Eric Talley, *Left, Right, and Center: Strategic Information Acquisition and Diversity in Judicial Panels*, 29 J.L. ECON. & ORG. 638, 638 (2013); Sunstein et al., *supra* note 7, at 304.

[14] *See, e.g.*, Revesz, *Ideology*, *supra* note 13, at 1767–68 (explaining that the D.C. Circuit regards the Supreme Court, rather than Congress, "as the primary reviewer of their decisions").

strong norm of unanimity that exists on appellate courts.[15] The prominence of these "panel effects" has produced different models of judicial decision-making, ranging from deliberative theories, in which judges influence each other through persuasive argumentation, to whistleblower theories, in which a judge's threat to dissent in a case provides leverage for compromise with her colleagues.[16] The literature explores the practical and normative implications of these and other theories, but no single theory has prevailed that explains why ideologically mixed panels have such a powerful moderating effect on opinions.[17] We extend this work by incorporating new factors into the analysis and by evaluating the results in context to assess their practical significance.

This study differs from the existing literature by covering an extended time period, roughly fifteen years, and by including geographic information at the national, circuit, and state levels. We focus on litigation under NEPA and the ESA because they are frequently the subject of litigation and have long been the target of intense political battles.[18] Both statutes are currently the target of major regulatory and legislative reform efforts,[19] and concerns about litigation are a prominent theme.[20] Litigation under NEPA and the ESA has the additional

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[15] *See* Sunstein et al., *supra* note 7, at 337–38 (explaining the phenomenon of "collegial concurrences").

[16] *See id.* at 344–45 (describing the "whistleblower effect").

[17] *See infra* Part II.

[18] *See* Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the US Endangered Species Act*, 112 PNAS 15,844, 15,844 (2015); Marion D. Miller, *The National Environmental Policy Act and Judicial Review After* Robertson v. Methow Valley Citizens Council *and* Marsh v. Oregon Natural Resources Council, 18 ECOLOGY L.Q. 223, 236 (1991) ("NEPA thus remains a lightning rod for conflicting views concerning the degree to which environmental protection should be implemented through federal planning procedures.").

[19] *See, e.g.*, Timothy Cama, *Senate GOP Seeks Overhaul of Endangered Species Act*, HILL (July 2, 2018), http://thehill.com/policy/energy-environment/395135-senate-gop-seeks-overhaul-of-endangered-species-act [https://perma.cc/UK6K-8JAY] (describing "an ambitious effort to overhaul the [ESA]"); Coral Davenport & Lisa Friedman, *Lawmakers, Lobbyists and the Administration Join Forces to Overhaul the Endangered Species Act*, N.Y. TIMES (July 22, 2018), https://www.nytimes.com/2018/07/22/climate/endangered-species-act-trump-administration.html [https://perma.cc/972N-D5DR]; DIANE KATZ, HERITAGE FOUND., TIME TO REPEAL THE OBSOLETE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) (Mar. 2018), https://www.heritage.org/sites/default/files/2018-03/BG3293_0.pdf [https://perma.cc/9KM7-6YPK] (urging NEPA's repeal); Laura Zuckerman, *Scientists Voice Opposition to Weakening of U.S. Endangered Species Act*, REUTERS (Sept. 24, 2018), https://www.reuters.com/article/us-usa-wildlife-endangered/scientists-voice-opposition-to-weakening-of-u-s-endangered-species-act-id USKCN1M42PG [https://perma.cc/5VDY-NS4H] (describing accusation that the Trump Administration is trying to erode the ESA in favor of commercial interests).

[20] *See, e.g.*, *Examining 'Sue and Settle' Agreements: Part I: Joint Hearing Before the Subcomm. on Interior, Energy, and Env't and the Subcomm. on Intergovernmental Affairs of the H. Comm. on Oversight and Gov't Reform*, 115th Cong. 55–63 (2017) (statement of Kent Holsinger, Manager, Holsinger Law, LLC), https://oversight.house.gov/wp-content/uploads/2017/05/Holsinger_Testimony_Sue-and-Settle_05242017.pdf [https://perma

virtue that it is unevenly distributed across the country (nearly two-thirds of the cases were filed in the Ninth and D.C. Circuits), which strengthened our statistical analyses and inter-circuit comparisons.[21] Finally, both statutes have powerful procedural mandates that federal judges interpret strictly.[22] The legal posture of the cases consequently heightens the influence of judicial ideology because judges are less deferential to federal agencies when such procedural claims are raised than, for example, when administrative challenges implicate agency expertise or experience.[23]

The distinctive attributes of the cases and the duration of our study expose the conditions under which judicial review is more likely to check executive power. In district courts, we find that plaintiffs were 1.8 times more likely to prevail before a Democratic than a Republican judge, and they were 2.5 times more likely to prevail in the Ninth Circuit than in other circuits.[24] At the appellate level, environmental plaintiffs were two to four times more likely to prevail before an all-Democratic panel than before a majority-Republican panel, and they were about twice as likely to prevail during the Bush Administration as during the Obama Administration.[25] However, the disparity in case outcomes between appellate panels dominated by judges with opposing political affiliations largely disappeared during the Obama Administration, falling from roughly thirty to five percentage points.[26] Most of this convergence was attributable to a decline in the rate at which majority-Democratic panels ruled in favor of environmental plaintiffs, whereas little change was observed for Republican-majority panels.[27] In other words, judicial ideology had a *moderating* effect overall on administrative policies during the Bush

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.cc/BPR9-WC9E]; Press Release, House Comm. on Nat. Res., How Environmentalist Litigation Is Sending Our National Forests up in Smoke (June 8, 2017), http://www.freerangereport.com/how-environmentalist-litigation-is-sending-our-national-forests-up-in-smoke/ [https://perma.cc/PCV6-84DK] (asserting that litigation under NEPA and the ESA is "significantly hindering active management" of the national forests); *cf.* Patrick Parenteau, *Citizen Suits under the Endangered Species Act: Survival of the Fittest*, 10 WIDENER L. REV. 321, 351 (2004) (characterizing the ESA's citizen suit as "a potent weapon for conservationists," but noting the "ferocious political backlash" and legislative reform efforts that such litigation has prompted).

[21] *See infra* Figures 1–2.

[22] *See* 42 U.S.C. § 4332 (2012); 16 U.S.C. § 1536(a)(2) (2012); *see also* Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) ("[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions."); Daly v. Volpe, 350 F. Supp. 252, 257−58 (W.D. Wash. 1972) ("The provisions of NEPA are not highly flexible, but establish a strict standard of procedure.").

[23] *See, e.g.*, Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n, 606 F.2d 1031, 1044–45 (D.C. Cir. 1979) (justifying less deferential review of NEPA procedural mandates than of challenges to substantive matters based on relative expertise of courts and agencies).

[24] *See infra* notes 163–66 and accompanying text.

[25] *See infra* notes 168–70 and accompanying text.

[26] *See infra* notes 170–71 and accompanying text.

[27] *See infra* Part III.B.1.

Administration, with Democratic judges guiding executive branch policies towards a centrist position when they considered them to be inconsistent with statutory mandates.

We believe that the variation observed in the influence of judicial ideology is structural and that it is active during liberal and conservative administrations. The principal factor is the political alignments and misalignments between judges, the statute under review, and the presidential administration in power. If a statute associated with liberal values, such as NEPA or the ESA, is under review, the influence of judicial ideology will depend on the political orientation of the presidential administration. During a Republican administration, Republican judges will be sympathetic to the administration and unsympathetic to the liberal goals of the statute (both factors aligning *against* plaintiffs seeking to enforce statutory requirements), whereas Democratic judges will be sympathetic to the goals of the statute but unsympathetic to the administration (both factors aligning *in favor* of plaintiffs). Further, while ideological differences between judges may be exacerbated by more extreme policies, the effect on case outcomes will be asymmetric due to the deferential standards of review under the Administrative Procedure Act (APA) and associated judicial doctrines.[28] During a Democratic administration, by contrast, Republican judges will be unsympathetic to the statute's goals and to the administration (both factors essentially neutral towards plaintiffs), whereas Democratic judges will be sympathetic to both (one factor favoring and the other working against plaintiffs). These dynamics will reverse for statutes associated with conservative values, such that judicial ideology will be influential during liberal administrations but have little effect during conservative ones. The ideological outlook of a judge therefore is most likely to be a factor when the politics of a presidential administration are most at odds with the legal mandate of a statute under review.

The Article is divided into three principal parts. We review the existing literature on the influence of judicial ideology in federal courts in Part I, focusing on the more complex dynamics of appellate courts and current theories of judicial decision-making. In Part II, we present our study results and discuss the inferences that can be drawn from several statistical regressions. The broad descriptive statistics highlight the modest influence of judicial ideology in the decisions of district and appellate courts, whereas the regression results provide insights into the relative importance of different factors on case outcomes—the influence of judicial ideology, presidential politics, and circuit-level attributes (i.e., volume of cases, political balances of judges within a circuit, and any systematic ideological bias of judges in a circuit). This analysis provides a more complete picture of the factors that mediate the impact of a judge's ideological outlook on judicial review. Finally, Part III examines the normative and

[28] For judges politically aligned with the administration, their only option is deferring to the agency on issues concerning agency fact-finding, statutory interpretation, or the adequacy of agency reason-giving, whereas judges with opposing political views can overturn agency action in any of these areas.

practical implications of our results. We argue that the influence of judicial ideology can enhance the likelihood of judicial checks on executive overreach, but we caution that this is contingent on structural features of the federal courts system and, in the administrative law context, the deferential nature of judicial review. The insights provided by the expanded framework we propose is then illustrated by applying that framework to three contemporary debates that center on structural and jurisdictional aspects of the federal courts—proposals to break up the Ninth Circuit, statutory provisions creating exclusive jurisdiction over certain types of cases in specific courts, and partisan schemes to dramatically expand the number of federal judges.

II. JUDICIAL IDEOLOGY AND THE MODERATING EFFECT OF CONSENSUS VOTING

Studies examining the influence of judicial ideology on case outcomes date back to the early 1990s.[29] Over this time, the analytical methods have evolved from simple hypothesis testing to multivariate methods and sophisticated study designs developed to elucidate the influence of appellate judges on each other.[30] At the same time, the areas of law studied have expanded from discrete fields, such as environmental law, and specific courts, typically the D.C. Circuit, to national studies that encompassed the most ideologically freighted fields of law, including civil rights, labor law, affirmative action, constitutional takings, and capital punishment.[31] Throughout much of this work, the party of the appointing president is used as a proxy for the ideological outlook of federal judges, with judges appointed by Democratic presidents presumed to be "liberal" and judges appointed by Republican presidents presumed to be "conservative."[32] Moreover, despite a proliferation of alternative, seemingly more sophisticated proxies, the party of the appointing president remains a valid and robust proxy for judicial ideology.[33]

Numerous hypotheses have been tested over the years, often formulated through the lens of principal-agent theory.[34] For example, scholars have

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[29] *See, e.g.*, Schuck & Elliott, *supra* note 13, at 984, 988.

[30] *See, e.g.*, Hazelton et al., *supra* note 13, at 447.

[31] *See, e.g.*, Sunstein et al., *supra* note 7, at 311–12.

[32] *See* Revesz, *Ideology*, *supra* note 13, at 1718–19.

[33] *Compare* Fischman, *Voting Patterns*, *supra* note 13, at 819 (observing that "[w]hile [the party of the appointing president is] admittedly a simplistic measure of judicial ideology, this variable has been demonstrated to robustly correlate with judicial voting behavior across a wide variety of issue areas"), *and* Jessie Allen, *A Theory of Adjudication: Law as Magic*, 41 SUFFOLK U. L. REV. 773, 822 (2008) ("The studies confirm that among federal appellate judges, the party affiliation of the president who appointed a judge is a fairly strong predictor of how the judge will rule in some types of cases whose outcomes are ideologically polarized."), *with* Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 155 (2009) (noting that "proxy variables have traditionally included the party of the President who appointed the judge").

[34] Lindquist & Haire, *supra* note 13, at 234–35.

evaluated whether strong congressional support for a challenged policy increases the likelihood that judges will decide cases in its favor; whether district and appellate court judges will be more (less) likely to decide cases in favor of a policy when it is supported by the Supreme Court; and whether judges appointed by a Democratic (Republican) president will be more (less) likely to decide a case in favor of a liberal (conservative) policy.[35] This work has shown that the influence of Congress is typically weak and short-lived,[36] and that the influence of the Supreme Court's jurisprudence is by far the most important factor, although it too is found to have a relatively short half-life.[37] The work on judicial ideology, particularly in the Supreme Court and appellate courts, has generated a greater mix of results and competing theories of judicial decision-making, with no single theory clearly receiving consensus support.[38] To this day, theories of judicial decisions premised on "deliberative processes,"[39] "whistleblowing dissents,"[40] "collegial concurrences,"[41] and "group polarization"[42] are debated and remain in contention with each other. We will review the evolution of the leading empirical studies, focusing on appellate

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[35] *Id.* at 240–46 (concluding that busy judges will defer to expert agencies).

[36] *Id.* at 255 (finding little evidence that presidential administrations influenced circuit court decisions); Revesz, *Ideology*, *supra* note 13, at 1735 (suggesting, but not finding, that the political balance of Congress could affect judicial votes due to the risk of a legislative override).

[37] Lindquist & Haire, *supra* note 13, at 255–56; Revesz, *Ideology*, *supra* note 13, at 1767–68 (finding support for the hypothesis that "judges act more ideologically when their decisions are unlikely to be reviewed," notably where only procedural challenges were at issue, and that the Supreme Court, rather than Congress or the president, had the greatest influence on D.C. Circuit judges).

[38] *See* Hazelton et al., *supra* note 13, at 447–51 (discussing the competing theories of judicial decision-making).

[39] Revesz, *Ideology*, *supra* note 13, at 1732–34 (explaining that, according to the "deliberation hypothesis" and "dissent hypothesis," judges moderate their respective positions through reasoned analysis of cases).

[40] Cross & Tiller, *supra* note 13, at 2156 (stating that that the potential that a "whistleblower" on an appellate panel "whose policy preferences differ from the majority's . . . will expose the majority's manipulation or disregard of the applicable legal doctrine" greatly diminishes the influence of ideology).

[41] Sunstein et al., *supra* note 7, at 337–38 (providing a variety of reasons for the prominence of "collegial concurrence" on ideologically mixed panels, ranging from the impact of collective deliberations, to the burden and perceived futility of writing a dissent, to conflict aversion among judges). The "dissent hypothesis" overlaps with collegial concurrences, but it is limited to judges in the ideological minority moderating their position to be consistent with the majority to avoid the burden of writing a dissent. Revesz, *Ideology*, *supra* note 13, at 1732–34.

[42] Sunstein et al., *supra* note 7, at 340–41 (attributing "group polarization" and the tendency to "go to extremes" of ideologically uniform panels to the lack of opposing views and arguments, the propensity for like-minded views to be self-reinforcing, and social pressures between judges to align their views with those of their colleagues).

courts because so few studies of district courts exist, and critically assess their implications.[43]

A. *Empirical Studies of Politics in Judicial Decision-Making*

Professor Richard Revesz published an early study of judicial ideology in 1997 that focused on environmental decisions in the D.C. Circuit between 1970 and 1994.[44] Revesz's findings centered on three hypotheses: (1) that the political outlook of appellate judges would influence their decisions;[45] (2) that ideological voting would be a greater factor in cases less likely to be reviewed by the Supreme Court;[46] and (3) that "panel effects" driven by the politics of judges on appellate panels would influence their decisions.[47] While the results had many nuances, the politics of the plaintiff(s) and panel effects were observed to be important factors.[48] The most consistent finding was that appellate judges favored plaintiffs with interests consistent with their own ideological preferences.[49] By contrast, panel effects were more variable and found to be particularly strong in industry challenges—both Republican and Democratic judges "voted more ideologically on panels [with] at least one colleague of the same party," and the influence was substantially greater on all-Republican panels.[50] Revesz concluded that his data provided, at best, mixed support for the "deliberation" and "dissent" hypotheses, with the only support coming from industry challenges.[51] In addition, Revesz found some evidence that Republican judges were more likely to uphold decisions of the U.S.

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[43] *But cf.* Herbert M. Kritzer, *Polarized Justice? Changing Patterns of Decision-Making in the Federal Courts*, 28 KAN. J.L. & PUB. POL'Y 309, 373 (2019) (finding evidence of increasing polarization among district court judges, but to a lesser extent than among Supreme Court justices, and positing that this difference may be because district judges' decision-making "is primarily driven by law, facts, and precedent rather than their own personal policy preferences").

[44] Revesz, *Ideology*, *supra* note 13, at 1721.

[45] Specifically, Democratic judges will be more likely to reverse the U.S. Environmental Protection Agency (EPA) if the plaintiff is an environmental organization, whereas Republican judges will be more likely to reverse EPA if an industry group is the plaintiff. *Id.* at 1728.

[46] Revesz reasoned that, because procedural matters tend to be "very fact specific" and rarely "involve . . . legal principle[s] of general applicability," the Supreme Court very seldom grants certiorari on such issues. *Id.* at 1729–31.

[47] *Id.* at 1719. Revesz suggested further that "the party affiliation of the other judges on the panel [will have] a greater bearing on a judge's vote than his or her own affiliation." *Id.*

[48] For example, Revesz observed that environmental organizations have "far greater success" in statutory cases than industry challengers and suggested that this difference could be due to stricter triaging of cases given their limited resources. *Id.* at 1749.

[49] *Id.* at 1742–43. However, while Republican judges were significantly more likely to rule against the government in procedural challenges brought by industry, this was not true of Democratic judges when the plaintiff was an environmental organization. *Id.* at 1749.

[50] Revesz, *Ideology*, *supra* note 13, at 1756.

[51] *Id.*

Environmental Protection Agency (EPA) "when they are defended in court by a Republican administration, and that Democratic judges [will be] more likely to do the reverse."[52]

Frank Cross and Emerson Tiller[53] published a similarly groundbreaking study centered on judicial review of statutory interpretation by federal agencies under the *Chevron*[54] doctrine.[55] Premising their analysis on a whistleblower hypothesis,[56] they argued that an appellate panel would be more likely to comply with a legal doctrine "when [it] is politically or ideologically divided."[57] Their empirical results revealed that appellate panels were 31% more likely to defer to an agency's interpretation when the policy under review was in alignment with the panel majority's political preferences.[58] Further, they found that while ideologically divided panels adhered to the deferential *Chevron* standard 62% of the time, ideologically uniform panels did so in only 33% of

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[52] *Id.* at 1735.

[53] Cross & Tiller, *supra* note 13, at 2155.

[54] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). *Chevron* enunciates a two-step standard for judicial review of agency statutory interpretations. *Id.* As interpreted by the lower courts, if a statute is clear, review is de novo. *Id.* at 842−43; U.S. Sugar Corp v. EPA, 830 F.3d 579, 663 (D.C. Cir. 2016) (quoting Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (explaining that at step one of *Chevron*, the court must "first examine the statute de novo, employing traditional tools of statutory construction")); Sung Kil Jang v. Lynch, 812 F.3d 1187, 1190 (9th Cir. 2015) ("At step one of the familiar *Chevron* analysis, we ask whether, 'applying the normal tools of statutory construction,' the statute is ambiguous, INS v. St. Cyr, 533 U.S. 289, 321 n.45 (2001); we consider this question de novo."); Mizrahi v. Gonzales, 492 F.3d 156, 158 (2d Cir. 2007) ("At *Chevron* step one, we consider de novo whether Congress has clearly spoken to the question at issue."). If the statute is ambiguous, however, courts are obliged to defer to any permissible (reasonable) interpretation by the agency. *Chevron*, 467 U.S. at 843.

[55] Cross and Tiller cite several preceding studies in the early 1990s of judicial review under *Chevron* that were ultimately inconclusive regarding the significance of judicial ideology. Cross & Tiller, *supra* note 13, at 2163 n.26, 2166 n.53; *see* Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L. & CONTEMP. PROBS. 65, 68 (1994) (describing how a conservative Supreme Court signals to lower courts when to grant greater deference to conservative agencies); Schuck & Elliott, *supra* note 13, at 991 (arguing that *Chevron* represented a major change in administrative law and standards for judicial review of an agency's interpretation of its governing statute); *see also* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1052 (1995) (concluding that *Chevron* freed appellate courts to render essentially political, outcome-oriented decisions).

[56] Cross & Tiller, *supra* note 13, at 2156.

[57] *Id.* at 2159.

[58] *Id.* at 2169, 2171 (concluding that "when the agency's policy outcome is consistent with the policy preferences of the panel's majority, the court is more likely to defer than if there is no such convergence").

the cases.[59] The authors concluded that "the presence of a whistleblower makes it almost twice as likely that [*Chevron*] will be followed when doctrine works against the partisan policy preferences of the court majority."[60] Cross and Tiller's paper bolstered the empirical grounds for the influence of judicial ideology on appellate courts and provided the clearest support to that date for the mitigating effects of politically divided panels.

Professor Cass R. Sunstein along with several co-authors has published a series of papers further exploring the impact of the ideological composition of appellate panels on case outcomes.[61] In a 2004 paper, he and his co-authors examined the panel effects in appeals that spanned a broad range of subject areas.[62] Their principal findings were (1) that judges in the political minority on politically divided panels often issue "collegial concurrences" that correspond closely to the views of their panel colleagues; and (2) that judges on politically uniform panels often succumb to "group polarization" when they amplify each other's ideological preferences.[63] This study is also one of the few to examine differences across circuits.[64] The authors' strongest finding was that case outcomes were closely correlated with the balance of Republican and Democratic judges in a circuit; specifically, the opinions in the Ninth and Second Circuits were observed to be significantly more liberal than those in the other circuits.[65]

In two subsequent papers, Professors Sunstein and Thomas Miles evaluated the influence of ideology on judicial review of agency action.[66] Focusing exclusively on cases filed against the EPA and the National Labor Relations

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[59] *Id.* at 2171–72 (observing that "although the significance of these results is somewhat less (p = 0.09)[,] . . . it is 17% less likely that the court will defer [under the *Chevron* doctrine] when it is unified than when it is split 2-1").

[60] *Id.* at 2172.

[61] Miles & Sunstein, *Policy*, *supra* note 13, at 823; Miles & Sunstein, *Real World*, *supra* note 5, at 766; Sunstein et al., *supra* note 7, at 304.

[62] Sunstein et al., *supra* note 7, at 304. The legal fields included affirmative action, campaign finance, sex discrimination, disability discrimination, race discrimination, and environmental regulation. *Id.*

[63] *Id.* at 337–38, 340. The authors found that group polarization was most pronounced on panels with exclusively Republican-appointed judges, who "vote[d] against industry challenges" in environmental cases "just 27% of the time," whereas panels with a Republican majority did so in 50% of the cases, and those with a single Republican judge did so in 63%. *Id.* at 323.

[64] *See id.* at 307.

[65] *Id.* at 332. The authors found that "[t]he rankings, in terms of ideology, correlate strongly but not perfectly with the percentage of Democratic appointees on the relevant court in 2002 (r = .59)," and that disparities in case outcomes between exclusively Democratic and exclusively Republican panels in each circuit varied from less than 8% in the Third, Seventh, and Fifth Circuits to 27% in the Ninth Circuit. *Id.*

[66] Miles & Sunstein, *Policy*, *supra* note 13, at 825; Miles & Sunstein, *Real World*, *supra* note 5, at 766.

Board (NLRB),[67] the studies examined judicial voting patterns in cases reviewing agency decisions defined as "conservative" if the plaintiff was a public-interest organization and "liberal" if the plaintiff was a business entity.[68] Following the work of Tiller and Cross, the first study focused on judicial review under the *Chevron* doctrine and the results of this study reinforced those of the prior one.[69] The authors found that Democratic appointees were fourteen percentage points more likely to affirm liberal agency decisions than Republican appointees, while Republican appointees were nineteen percentage points more likely to affirm conservative agency decisions than Democratic appointees.[70] Their results also showed that panel effects were an overriding factor: the presence of just one judge appointed by the opposing political party essentially neutralized the influence of ideology.[71] In summary, the authors concluded that most of the differences observed in case outcomes were attributable to group polarization on ideologically uniform panels.[72]

The second Miles and Sunstein study focused on judicial review under the "arbitrary and capricious" standard of the APA.[73] The most striking feature of their results is a "seesaw pattern" in Republican and Democratic voting, which they characterize as the "smoking gun" of ideological voting.[74] Specifically, "[w]hen the agency decision is liberal, the Democratic validation rate is 72 percent and the Republican validation rate is 58 percent. When the agency decision is conservative, the Democratic validation rate drops to 55 percent and

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[67] Miles & Sunstein, *Policy*, *supra* note 13, at 825 (noting that the authors coded all published opinions between 1990 and 2004; of the 253 opinions, "183 involved the EPA, and 70 involved the NLRB"); Miles & Sunstein, *Real World*, *supra* note 5, at 774 (involving coding of all published opinions between 1996 and 2006; of the 653 opinions, 554 involved the NLRB and 99 involved the EPA).

[68] Miles & Sunstein, *Policy*, *supra* note 13, at 830–31 (explaining that an agency decision was coded as "conservative" or as "liberal" based, "simply and crudely, by reference to the identity of the party challenging it"). The authors eschew using the party of the president at the time the case was heard because administrations typically make a mix of conservative and liberal decisions; empirically, they also observe little differences in judicial voting across administrations. *Id.* at 850 tbl.8, 860 (finding about a twenty-four percentage-point difference between Democratic and Republican judges during Democratic administrations versus a thirteen percentage point difference during Republican administrations).

[69] *Compare* Cross & Tiller, *supra* note 13, at 2172, *with* Miles & Sunstein, *Policy*, *supra* note 13, at 826–27.

[70] Miles & Sunstein, *Policy*, *supra* note 13, at 826–27, 849. These differences more than doubled for ideologically uniform panels to thirty-one percentage points for Democratic panels reviewing liberal agency decisions and forty-nine percentage points for Republican panels reviewing conservative agency decisions. *Id.* at 855 tbl.9, 856.

[71] *Id.* at 858.

[72] *Id.*

[73] Miles & Sunstein, *Real World*, *supra* note 5, at 773–74. Similar to the *Chevron* study, this study also "classif[ied] agency decisions as 'conservative' or 'liberal' on the basis of the identity of the party making the challenge." *Id.* at 775.

[74] *Id.* at 806.

the Republican validation rate rises to 72 percent."[75] However, virtually all of the seesawing they observed was associated with the NLRB opinions, which accounted for 85% of the cases, whereas case outcomes before Republican and Democratic judges differed by just two percentage points in the EPA opinions.[76] The small sample sizes for the subclasses of conservative opinions and ideologically uniform panels also limited the statistical grounding of their results.[77] Nevertheless, the authors suggest that the disparities in voting are largely driven by ideologically uniform panels, citing the twenty-nine percentage point disparity in affirmation rates between all-Democratic and all-Republican panels.[78] Further, although they concede that judicial ideology was not a "dominant" factor,[79] they caution that "[a]n unbalanced federal judiciary might well act as a brake on agencies' ability to implement the liberal or conservative policies of a new executive."[80]

Subsequent studies have incorporated a variety of statistical methods and designs to elucidate the panel effects in appellate courts.[81] While the newest studies continue to find strong evidence that ideology is a factor in the decisions

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[75] *Id.* at 767. Similar to the earlier study, they did not observe statistically significant differences across administrations. *Id.* at 782–83, 783 tbl.2. Looking at their data, "[d]uring Democratic Presidencies, the validation rates of Democratic appointees in these cases were [fourteen] percentage points higher than that of Republican appointees, and during Republican Presidencies, this difference was only [six] percentage points." *Id.* at 783.

[76] *Id.* at 774, 779. Republican judges voted to validate EPA decisions in 73% of the cases versus 71% for Democratic judges. *Id.* at 779, 779 fig.1. By contrast, the validation rate of Democratic appointees for NLRB and EPA cases together was ten percentage points higher than that of Republican appointees. *Id.* at 777 tbl.1. Moreover, this difference cannot be accounted for by countervailing trends for liberal and conservative decisions by EPA because almost 90% of the cases (580 out of 653) involved liberal decisions. *See id.*

[77] *Id.* at 790.

[78] *Id.* at 788–89.

[79] Miles & Sunstein, *Real World*, *supra* note 5, at 807 (stating that "our data demonstrate that judicial ideology is not playing a dominant role and that judicial policy choices are not driving arbitrariness review").

[80] *Id.* at 811 (internal citations omitted). Similarly, they state that "[o]ur findings offer a clear prediction for the future: when a judiciary consisting mostly of Democratic appointees confronts a conservative executive branch, the rate of invalidations will be unusually high, and so too when a judiciary consisting mostly of Republican appointees confronts a liberal executive branch." *Id.* at 768.

[81] *See, e.g.*, VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 2–3 (2006) (explaining their analysis); Fischman, *Estimating Preferences*, *supra* note 13, at 781 (discussing the model used in the study); Fischman, *Voting Patterns*, *supra* note 13, at 808 (discussing how the approach is different from other empirical studies); Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the US Courts of Appeals*, 23 J.L. ECON. & ORG. 421, 421 (2007) (explaining the model used in their study); Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685, 686, 688 (2000) (discussing the purpose and layout of the study); Spitzer & Talley, *supra* note 13, at 638 (explaining the model used in their study).

of appellate judges,[82] the strong norm of consensus is consistently found to be a crucial mitigating factor.[83] Among the recent work, Joshua Fischman has conducted several of the most innovative studies of panel effects. In a 2011 study of immigration cases in the Ninth Circuit, Fischman finds that Democratic appointees supported asylum claimants in 25% of the cases they heard, whereas Republican appointees did so in just 12%.[84] Similar to Miles and Sunstein, he finds that judges' opinions were reinforced on ideologically uniform panels and moderated on ideologically mixed ones.[85] Fischman concludes that "the hypothesis that judges vote independently can be rejected" and that "a norm of consensus pushes judges' voting rates toward the mean."[86] Fischman quantifies this effect through a simulation, which estimates that judges voted consistent with their personal views in only 55% of the cases.[87] The striking disconnect that Fischman uncovers between judges' political outlooks and their voting refutes claims that low dissent rates reflect the relative ease of deciding cases and limited discretion that judges have in resolving them.[88]

In a subsequent meta-analysis of eleven prior studies and three new datasets,[89] Fischman provides compelling evidence that judges are influenced by their colleagues' votes in a case rather than their colleagues' ideological outlook.[90] Across a wide range of legal areas, Fischman finds that "each colleague's vote increases a judge's probability of voting in the same direction

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[82] *See, e.g.*, Fischman, *Estimating Preferences*, *supra* note 13, at 793.

[83] *See, e.g.*, JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 102 tbl.6 (2002) (observing that about 95% of appellate cases have no dissent, which reflects a strong norm of consensus among judges); Fischman, *Estimating Preferences*, *supra* note 13, at 803–04 (recognizing the influence of "consensus voting").

[84] Fischman, *Estimating Preferences*, *supra* note 13, at 793.

[85] *See id.* (finding that all-Democratic panels decided for the asylum claimant 35% of the time, majority-Democratic panels 20% of the time, majority-Republican panels 15% of the time, and all-Republican panels 6% of the time).

[86] *Id.* at 796–98 (finding that a "consensus voting model correctly classifies 76 percent of votes, the sincere voting model correctly classifies 67 percent, and the party-of-appointment model correctly classifies 65 percent").

[87] *Id.* at 803.

[88] *See, e.g.*, Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 838; Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 470 (2007).

[89] Fischman also exposes shortcomings in prior studies that qualify their findings statistically; specifically, because they rely on judges' political affiliation as a regressor, the statistical models are misspecified due to endogenous effects. Fischman, *Voting Patterns*, *supra* note 13, at 820–21.

[90] *See id.* at 809 (describing the study as "compar[ing] two empirical models of panel voting—one that models influence using colleagues' characteristics, the other using colleagues' votes—and reexamin[ing] data from 11 prior studies of panel voting and three novel data sets"). Fischman characterizes voting as an "endogenous" effect and judicial ideology as a "contextual" effect: "*Endogenous effects* occur when an individual's behavior is influenced by the behavior of the group. *Contextual effects* occur when an individual's behavior is influenced by the characteristics of the group members." *Id.* at 811.

by roughly 40 percentage points,"[91] whereas the influence of a colleague's ideological outlook varies widely depending on the nature of the case.[92] To put this in perspective, Fischman estimates that the influence of colleagues' votes is equivalent to roughly 80% of the effect that would be observed if appellate panels operated exclusively by consensus.[93] In other words, panel effects that mitigate the influence of judicial ideology are largely driven by the strong norm of consensus among appellate judges. Fischman suggests that this lends credence to theories, such as "dissent aversion" and "whistleblowing," that turn on votes in a specific case rather than colleagues' generally held ideological perspectives,[94] whereas deliberative theories are less plausible because they implicate the ideological perspectives of the judges.[95] This study provides the clearest empirical grounds for distinguishing among these competing theories.

Fischman concludes by estimating the influence of judicial ideology in conjunction with mediating panel effects. To do this, he posits that disparities in case outcomes between all-Democratic and all-Republican panels "correspond to *average* differences between Democratic and Republican judges if they voted autonomously."[96] Overall, he finds that the differences between ideologically uniform panels will be 2.3 times larger than the differences observed between *individual* Republican and Democratic judges.[97] This ratio

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[91] *Id.* at 809−10. According to Fischman, "The impact of the norm of consensus appears to be uniform across high- and low-profile cases, in complex cases as well as simple ones, and in all circuits studied." *Id.* at 829.

[92] *See id.* at 827–29 (finding that "[t]he number of Democratic panel colleagues has a significant effect on a judge's vote in nine of the 14 regressions, and the impact of each colleague's party is typically one-half to two-thirds as large as the impact of a judge's own party").

[93] *See id.* at 810–11 (observing that "[t]he distinction between these effects depends upon whether the colleagues' characteristics have a direct impact on the judge's vote or whether the colleagues' characteristics predict their votes, which in turn influence the judge's vote").

[94] *Id.* at 811–12 ("[Under] the 'dissent aversion' theory, a judge's willingness to vote in a particular direction is affected by the other judges' votes. Judges' votes may be correlated with their colleagues' characteristics, but only insofar as these characteristics predict the colleagues' votes. Similarly, 'whistleblowing' is a theory of endogenous effects, since the majority is influenced by the minority judge's willingness to dissent.").

[95] *See* Fischman, *Voting Patterns*, *supra* note 13, at 812 (suggesting that personal beliefs may cause judges to work harder to find information or legal theories to support a liberal vote, which will in turn influence their colleagues' votes).

[96] *Id.* at 834–35 (emphasis added). Fischman further observes that:

> It represents the average difference in voting rates between the two types of judges, given that they are constrained by panel colleagues. It does not predict how Democratic and Republican judges would differ if voting autonomously. Nor does it capture the full causal effect of substituting Democratic judges for Republican judges, since it does not account for the impact of such substitutions on panel colleagues.

Id. at 835.

[97] *Id.* at 835.

reflects the degree to which the views of the average judge are moderated on ideologically mixed panels relative to their voting patterns if they were to vote autonomously.[98] Using these estimates, he finds that "different panels would reach different results at least 20% of the time, and perhaps much more," assuming dissent rates that are typical of federal courts.[99] While the contingency rate he derives for panel-dependent case outcomes is significant, it is substantially lower than the 30%–40% disparities between ideologically uniform panels often highlighted in prior studies.[100] Fischman's work provides a rigorous measure of the mediating effect that randomized three-judge panels have on judicial ideology when the judiciary is ideologically balanced.[101] The picture that emerges is decidedly mixed—ideological differences between judges are much greater than dissent rates would suggest, but they are held in check by a strong norm of consensus and the low relative frequency of ideologically uniform panels.

In a more recent project, Kent Barnett, Christina Boyd, and Christopher Walker, based on a database of more than 1600 circuit court decisions over an eleven-year period, assessed the extent to which judicial ideology affects review of agency statutory interpretations.[102] The authors concluded that "politics play some role in how circuit courts review agency statutory interpretations," with conservative (liberal) panels being more likely to agree with conservative (liberal) agency interpretations.[103] They found, however, that "panels of all ideological stripes use the [*Chevron*] framework similarly and reveal modest ideological behavior."[104] Unlike Tiller and Cross, Barnett, Boyd, and Walker found no "whistleblower effects" in appellate court application of *Chevron*, concluding that:

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[98] *Id.* at 834–35. Fischman derives a within-panel multiplier for judges, as opposed to the average judge on each side and finds that in most cases it ranges from 3.6 to 8.2. *Id.* at 836.

[99] *Id.* at 836. Fischman notes that "[e]specially, ironic is Kress's claim that '[i]t would be surprising to find that the dissent rate was four percent yet judges disagreed in forty percent of all cases,' since his implied 10:1 ratio is easily within the plausible range for the within-panel multiplier." *Id.* at 836–38 (internal citation omitted).

[100] *See id.* at 837 tbl.5, 838.

[101] Fischman, *Voting Patterns*, *supra* note 13, at 838.

[102] *See generally* Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018). For additional empirical evaluation of panel effects on judicial review of agency statutory interpretations, see Hazelton et al., *supra* note 13, at 467−73.

[103] Barnett et al., *supra* note 102, at 1468.

[104] *Id.* They add:

> For instance, both liberal and conservative panels are more likely to find the statute unambiguous when the agency's interpretation is contrary to the panel's ideological preferences. Likewise, both liberal and conservative panels are more likely to find the statute ambiguous when the agency's interpretation aligns with the panels' ideological preferences. This means that panels permit agencies more policymaking space when the administrative interpretations are consistent with the panels' views.

Id. at 1468–69.

> [W]hether a panel is ideologically uniform or diverse does not affect whether circuit courts apply the *Chevron* framework, nor does it affect agency-win rates on judicial review. Indeed, we saw only minor differences at either ideological extreme (where we would have most anticipated whistleblowing effects to occur), and those differences were in the *opposite* direction than expected.[105]

The authors explain this apparently "startling" result as a product of *Chevron*'s powerful constraint on the influence of partisanship in judicial decision-making, leaving little room for a panel's ideological composition to play an additional constraining role.[106] Thus, the authors conclude the elimination or weakening of *Chevron* deference, as some scholars and judges have called for,[107] could enhance the role of partisanship in judicial review of agency statutory interpretations and foster greater interpretive disparities.[108]

Professors Barnett, Boyd, and Walker conducted another study, based on analysis of circuit court opinions handed down between 2003 and 2013, in which they assessed the political dynamics of deciding whether to apply *Chevron* deference.[109] They concluded that judges do not consistently apply *Chevron*.[110] In particular, they found that liberal, moderate, and conservative panels of appellate court judges are nearly equally likely to apply *Chevron* deference when reviewing liberal agency interpretations.[111] When reviewing conservative agency interpretations, however, "liberal panels apply *Chevron* significantly less frequently than conservative panels."[112] The authors argue that, in light of these findings, "notable prior empirical studies reporting that judges' political preferences drive case outcomes when utilizing the *Chevron* doctrine *underreport* the political dynamics at play in this arena."[113]

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[105] *Id.* at 1469–70.

[106] *Id.* at 1470.

[107] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design"); *see also* Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and* Chevron *Deference*, 70 ALA. L. REV. 733, 737 (2019) (noting the likelihood that Justice Gorsuch "will continue pushing the Court to curtail or even repudiate . . . *Chevron*").

[108] Barnett et al., *supra* note 102, at 1470.

[109] *See generally* Kent Barnett et al., *The Politics of Selecting* Chevron *Deference*, 15 J. EMPIRICAL LEGAL STUD. 597 (2018).

[110] *See id.* at 599.

[111] *Id.*

[112] *Id.* Liberal judges apply *Chevron* as much as 16% less frequently than conservative judges when reviewing conservative agency interpretations. *Id.* at 614.

[113] *Id.* at 599 (emphasis added). The authors also found no evidence of whistleblower or disciplining effects on mixed panels. *Id.* They posit that the increased flexibility courts have in deciding whether to apply *Chevron* after cases such as United States v. Mead Corp., 533 U.S. 218 (2001), which was decided before their study period began, may have lessened the need for "doctrine-based whistleblowing." *Id.* at 616.

B. *Viewing Judicial Politics in Absolute Rather than Relative Terms*

All of the existing studies present their results in relative terms as percentage differences, with little or no indication of the absolute number of cases at stake.[114] This oversight is important because ideologically uniform panels account for roughly 26% of the cases litigated, assuming roughly equal numbers of Republican and Democratic judges.[115] For example, in the Sunstein and Miles study of judicial review under the *Chevron* doctrine, there were twenty-two all-Democratic panels and forty all-Republican panels, which together accounted for about 25% of the total.[116] If you assume that the affirmation rates for the mixed panels reflected an "ideologically neutral" position, the "proper" affirmation rate would be roughly 62%.[117] Under this reading, all-Democratic panels would be overly deferential to agencies in about 25% of the liberal cases and not deferential enough in 8% of the conservative cases, whereas all-Republican panels would not be sufficiently deferential in 12% of the liberal cases and would be too deferential in 38% of the conservative cases. In absolute terms, four cases with all-Democratic judges and eight cases with all-Republican judges would have been wrongly decided over twenty-five years.[118] This amounts to a "departure rate" from neutrality of 5%, which while not *de minimis*, does not appear to be unreasonable—particularly given the vagueness of the *Chevron* doctrine. A similar departure rate, 4% (27 out of 653 cases over eleven years), is observed in Sunstein and Miles's study of judicial review under the arbitrary and capricious standard.[119]

The importance of considering absolute numbers of cases applies to all of the empirical studies to date, which report differences between ideologically mixed and uniform panels of roughly 10%–40%. Assuming, for example, an average of 25% for the "departure rate" from neutrality of ideologically uniform panels and relatively equal numbers of Democratic and Republican judges, the overall departure rate for ideologically uniform panels would be about 6%.

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[114] *See, e.g.*, Miles & Sunstein, *Policy*, *supra* note 13, at 870.

[115] *See id.* at 855 tbl.9.

[116] *See id.*

[117] *See id.*

[118] All-Democratic panels heard a total of fourteen liberal cases and 25% of fourteen is three cases, and they heard eight conservative cases, and 8% of eight is one (rounding up), for a total of four erroneous opinions. *See id.* Similarly, all-Republican panels heard a total of twenty-seven liberal cases and 12% of twenty-seven is 3.2 cases, and they heard thirteen conservative cases, and 38% of thirteen is 4.4, for a total of eight (rounding up) erroneous opinions. *See id.*

[119] Miles & Sunstein, *Real World*, *supra* note 5, at 788 tbl.3. In this study, the validation rate for mixed panels was 65%, and the all-Democratic panels were overly deferential in about 16% of the liberal cases and not deferential enough in 27% of the conservative cases, whereas Republican judges were not sufficiently deferential in 12% of the liberal cases and were too deferential in 17% of the conservative cases. *See id.* Thus, the decisions of ten all-Democratic panels and seventeen all-Republican panels were wrongly decided, for a total of twenty-seven out of 653 (4%) over eleven years, or about 2.5 per year. *Id.*

However, as the Sunstein and Miles studies illustrate, the actual number of "ideologically decided" cases annually will be very low, no more than a handful, in most areas of law.[120] Further, aggregate national statistics ignore the geographic structure of the appellate court system, which is in part designed to reflect differing ideological preferences across the country.[121] This variability is implicit in the deference given to senators for the states encompassed by the circuit to which a judge is being appointed; the appointment process is designed to ensure that the outlook and jurisprudence of federal judges will, at least in part, reflect the perspectives of the states from which the cases they hear originate.[122]

One of the most important points we draw from the literature is the resilience of the federal judiciary to ideological variance across judges. This is an inherent byproduct of randomized selection of three-judge panels in federal appellate courts.[123] In the current political context, it is especially important to be measured when interpreting the results of empirical studies on the influence of judicial ideology. Overall, the existing empirical studies provide few grounds for concluding that ideology is an overriding factor in appellate cases—in absolute or relative terms; in many areas of law, the studies suggest that ideology will affect a handful of cases over the course of a decade at the appellate level.[124] Further, national statistics can be misleading insofar as they convolve inter-circuit variance, which is built into the system, and inter-judge variance, which is potentially more problematic. Understanding the relative importance of circuit-level and inter-judge effects remains an open question of critical importance to the controversy surrounding judicial appointments and the politics of judges. The work reported below examines these inter-circuit effects and looks more closely at the influence of presidential politics by evaluating differences in case outcomes across administrations, which has been overlooked so far in the literature.

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[120] *See id.*; *see also* Miles & Sunstein, *Policy*, *supra* note 13, at 855 tbl.9.

[121] *See, e.g.*, Miles & Sunstein, *Real World*, *supra* note 5, at 765–66.

[122] *See* Ryan J. Owens et al., *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 369–70 (describing the "blue slip" process). During the Trump Administration, Republican majorities in the Senate ignored blue slips filed by Democratic senators, reflecting the increasingly partisan nature of judicial nominations in the Senate. *See* Seung Min Kim, *Grassley Rips up 'Blue Slip' for a Pair of Trump Court Picks*, POLITICO (Nov. 16, 2017), https://www.politico.com/story/2017/11/16/chuck-grassley-trump-court-picks-245367 [https://perma.cc/RN6J-4THK]; *see also* Jordain Carney, *Senate Reignites Blue Slip War over Trump Court Picks*, HILL (Feb. 24, 2019), https://thehill.com/homenews/senate/431232-senate-reignites-blue-slip-war-over-trump-court-picks [https://perma.cc/576W-6AR5].

[123] *See* Fischman, *Estimating Preferences*, *supra* note 13, at 782 (noting that the cases assigned to and composition of judicial panels are random).

[124] *See, e.g.*, Miles & Sunstein, *Policy*, *supra* note 13, at 855 tbl.9.

III. REEXAMINING JUDICIAL REVIEW IN LIGHT OF CIRCUIT STRUCTURES, JUDICIAL IDEOLOGY, AND PRESIDENTIAL POLITICS

NEPA and the ESA are among the most important and most heavily litigated federal environmental statutes.[125] Within the broader domain of public law, NEPA is exemplary of a purely procedural legal framework that covers all federal agencies, whereas the ESA is much narrower in scope and contains a mix of procedural elements (that mirror those found in NEPA) and strict standards.[126] Both statutes implicate important economic interests in the public and private spheres, and they often involve highly technical questions that require difficult scientific judgments to be made by government officials.[127] These characteristics create a valuable context in which to assess the influence of judicial ideology, as they raise countervailing factors that weigh for or against deferring to agency judgment. For example, the complexity and uncertainty in environmental science often favors greater deference to agencies, particularly on substantive regulatory determinations, but the procedural focus and express purpose of each statute to promote adequate consideration of environmental impacts by federal agencies is premised on a less deferential approach to judicial review. In addition, to the extent that purely procedural questions are less likely to be reviewed by appellate courts or the Supreme Court, there is evidence that judicial ideology has greater influence on case outcomes.[128]

NEPA, which went into effect on January 1, 1970, established a national policy to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent, or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation."[129]

It declares a "continuing policy of the Federal government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[130]

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[125] *See* Malcom & Li, *supra* note 18, at 15,844; *see also* Miller, *supra* note 18, at 223–24.

[126] *Compare* National Environment Policy Act of 1969, 42 U.S.C. § 4321 (2012), *with* Endangered Species Act of 1973, 16 U.S.C. § 1531 (2012).

[127] Malcom & Li, *supra* note 18, at 15,845; *see also* Miller, *supra* note 18, at 223–24.

[128] *See, e.g.*, Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n, 606 F.2d 1031, 1044–45 (D.C. Cir. 1979) (stating that judicial review is appropriate for reviewing procedural decisions in a limited context).

[129] 42 U.S.C. § 4321 (2012).

[130] *Id.* § 4331(a). To fulfill this policy, the statute makes it "the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources." *Id.* § 4331(b).

Notwithstanding these ambitious goals, NEPA has only one significant operative provision. It directs all federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement,"[131] which is referred to as an environmental impact statement (EIS), that assesses the proposal's environmental impact.[132] Each EIS is also required to consider the alternatives to the proposed action, including a comparative evaluation of their environmental impacts.[133] If an agency determines that a proposed action lacks one of the triggers for preparation of an EIS, most commonly that it will not have significant environmental impacts, it may prepare an environmental assessment (EA) along with a finding of no significant impact.[134] However, judicial review is limited to procedural violations, such as failure to prepare an EIS when the statute required one[135] or preparation of an inadequate EIS.[136]

The ESA's goals are similarly ambitious. Its declared purposes are "to provide a means whereby the ecosystem upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species."[137] Two agencies are responsible for overseeing implementation of the ESA, the Interior Department's Fish and Wildlife Service (FWS) and the Commerce Department's National Marine Fisheries Service (NMFS) (the Services).[138] They are charged with listing species that qualify as endangered or threatened[139] and designating their critical habitat.[140] The statute provides for the preparation of recovery plans for listed species,[141] although the plans are largely immune to

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[131] *Id.* § 4332(C).

[132] *Id.* § 4332(C)(i).

[133] *Id.* § 4332(C). Agencies must consider appropriate alternatives even when not required to prepare an EIS. *Id*. § 4332(E).

[134] 40 C.F.R. §§ 1501.3, 1501.4(a)(2), 1508.13 (2017).

[135] *See, e.g.*, ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 300 (8th ed. 2019).

[136] *See, e.g.*, WildEarth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222, 1226 (10th Cir. 2017).

[137] 16 U.S.C. § 1531(b) (2012). In addition, Congress declared a policy "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance" of the ESA's purposes. *Id.* § 1531(c)(1).

[138] The NMFS has jurisdiction over anadromous fish and ocean-based aquatic life, while the FWS has jurisdiction over freshwater and land-based plants and animals. Jennifer Jeffers, Note, *Reversing the Trend Towards Species Extinction, or Merely Halting It? Incorporating the Recovery Standard into ESA Section 7 Jeopardy Analyses*, 35 ECOLOGY L.Q. 455, 457 n.3 (2008).

[139] 16 U.S.C. § 1533(a)(1), (b)(1). For the difference between endangered and threatened species, see *id.* § 1532(6), (20).

[140] *Id.* § 1533(a)(2), (b)(2). Critical habitat is defined at *id.* § 1532(5).

[141] *Id.* § 1533(f).

judicial challenges.[142] Other requirements are enforceable, however. Section 7 of the ESA imposes a duty on all federal agencies, in consultation with one of the Services, to ensure that the actions they authorize, fund, or carry out will not "jeopardize" the continued existence of listed species or adversely affect their critical habitat.[143] This mandate imposes strict procedural and substantive duties on federal agencies.[144] In addition, Section 9 of the ESA prohibits the taking of endangered species by either government agencies or private landowners.[145] The ESA authorizes any person to file a civil action in federal district court to enjoin any person, including a federal agency, alleged to be in violation of the statute or its implementing regulations.[146]

This study analyzes litigation under NEPA and the ESA between 2001 and 2016. On average, about 100 NEPA cases were filed in district court and about twenty-five appeals were filed annually. To make the review process manageable, we analyzed samples of about 500 district court and 330 circuit court opinions with NEPA claims. The volume of cases was much smaller under the ESA, however, with roughly thirty district court cases and about ten appeals filed each year. Given these modest numbers, we coded the entire population of ESA cases with dispositive opinions issued during this sixteen-year period.[147]

Under both statutes, the volume of cases litigated covers a very small percent of the actions subject to each statute, which number in the tens of thousands annually.[148] The relatively small volume of litigation under the two statutes suggests that, whether due to strategic considerations or limited resources, plaintiffs are selective in the cases they file. The selectivity of the cases filed is reflected in the success rates of environmental organizations,[149]

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[142] *See, e.g.*, Friends of Blackwater v. Salazar, 691 F.3d 428, 429 (D.C. Cir. 2012); Fund for Animals, Inc. v. Rice, 85 F.3d 535, 538 (11th Cir. 1996).

[143] 16 U.S.C. § 1536(a)(2) (2012).

[144] Courts may enjoin actions on which the agencies should have consulted with the Services but failed to do so, for example. *See, e.g.*, California *ex rel.* Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1005 (9th Cir. 2009); Nat. Res. Def. Council v. Houston, 146 F.3d 1118, 1123 (9th Cir. 1998).

[145] 16 U.S.C. § 1538(a)(1)(B). The Supreme Court deferred to the Interior Department's position that habitat modification may amount to a taking. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 687–88 (1995).

[146] 16 U.S.C. § 1540(g)(1). A citizen suit, for example, may seek to compel one of the Services to perform its nondiscretionary statutory duty to list a species or designate its critical habitat. *Id.* § 1540(g)(1)(C).

[147] The details of the empirical methods and protocols are the same as those described in David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 ARIZ. ST. L.J. 3 app. at 64–67 (2018) [hereinafter Adelman & Glicksman, *Judicial Politics*], except that we applied these methods to cases decided under the ESA as well as NEPA for this Article.

[148] David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 COLO. L. REV. 385, 385 (2020) [hereinafter Adelman & Glicksman, *Citizen Suits*].

[149] We divided plaintiffs into five broad classes: local environmental organizations; national environmental organizations; other nongovernmental organizations; businesses and

which filed about three-quarters of the cases under NEPA and the ESA.[150] The success rates of environmental organizations under NEPA and the ESA were higher than the averages for challenges to agency action in a wide range of empirical studies,[151] and they were far higher than during the Bush Administration.[152] The combination of careful selection of cases and the geographic concentration of cases in liberal states suggests that local politics were a significant factor in deciding where to file cases. Environmental plaintiffs sought to ensure that their cases were both legally meritorious and, to the extent possible, that they would not provoke a political backlash from local communities.

A. *Patterns of Litigation over Space and Time*

The NEPA and ESA cases we analyzed were concentrated in the Ninth and D.C. Circuits. Roughly half of them were filed in the Ninth Circuit and another 12−15% in the D.C Circuit. In district court, about 60% of the cases under each

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business associations; and cities, counties, states, and tribes. We defined "national environmental organizations" narrowly to include a small number of high-profile environmental organizations (e.g., Sierra Club, Natural Resources Defense Council, National Wildlife Federation, Center for Biological Diversity) to identify the organizations that litigated a large share of the NEPA and ESA cases. While there was substantial overlap between the organizations that dominated litigation under each statute, there were a few organizations in each case that were unique to the specific statute.

[150] Environmental plaintiffs, whether national or local organizations, were more successful—prevailing, on average, at rates ten to twenty percentage points higher—than other plaintiffs.

[151] *See* Miles & Sunstein, *Real World*, *supra* note 5, at 767–68 (reporting data on administrative review cases involving EPA indicating that agencies prevailed on average in 72% of administrative challenges on appeal); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 84–85 (2011) (synthesizing the results of numerous empirical studies of judicial review and finding that agencies prevail in 64%–81% of the cases at the circuit level); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515 (2011) (observing that "[c]ourts at all levels of the federal judiciary uphold agency actions in about 70% of cases" irrespective of the standard of review that they apply). A recent study finds that success rates in adjudicated cases in federal courts fell from 70% in 1985 to 30% in 2009. Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law*, 52 U.C. DAVIS L. REV. 1371, 1371 (2019). Thus, plaintiff success rates in ESA cases are similar to the recent figures on success rates in civil cases generally in the federal courts.

[152] The disparity in success rates between environmental and other plaintiffs was far greater during the Bush than the Obama Administration. Specifically, during the Bush Administration environmental organizations prevailed in 45% and other plaintiffs in just 20% of the cases; during the Obama Administration, they prevailed in 24% and 13%, respectively, of the cases. On appeal during the Bush Administration, environmental organizations prevailed in 35% of the cases and other plaintiffs prevailed in 16%, whereas during the Obama Administration, the success rates converged to 17% and 15%, respectively.

statute were filed in either the Ninth or Tenth Circuits and 15% were filed in the D.C. Circuit (Figures 1–2). Moreover, the distribution of appeals largely matches the district court filings.[153] Within each circuit, the actions on which NEPA and ESA cases originated were also overwhelmingly located in politically centrist or Democratic states, or they spanned multiple states. Only about 15% of the underlying actions originated in Republican states.[154]

[153] Under NEPA, 52% of the appeals were in the Ninth Circuit, 10% in the D.C. Circuit, 12% in the Tenth Circuit, and 5.1% in the Sixth Circuit; under the ESA, 64% of the appeals were in the Ninth Circuit, 15% in the D.C. Circuit, 7% in the Eleventh Circuit, and 5% in the Tenth Circuit.

[154] We used the index for citizen ideology developed by William D. Berry et al. *See* William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960–93*, 42 AM. J. POL. SCI. 327, 327–48 (1998). *See generally* Richard C. Fording, *State Ideology Data*, WORDPRESS (June 18, 2018), https://rcfording.wordpress.com/state-ideology-data/ [https://perma.cc/FBT7-UCJ8]. The citizen ideology index was used to categorize states into three categories: (1) Republican states (<45), (2) centrist states (45> and <55), and (3) Democratic states (>55). The index for each state was averaged over the years 2001–2016 to cover the period of the two studies.

Figure 1: *NEPA District Court Cases by Circuit*

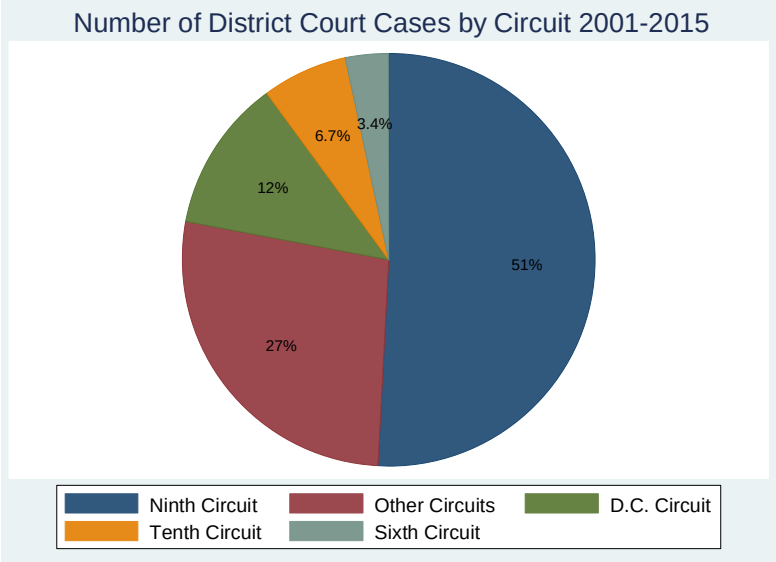
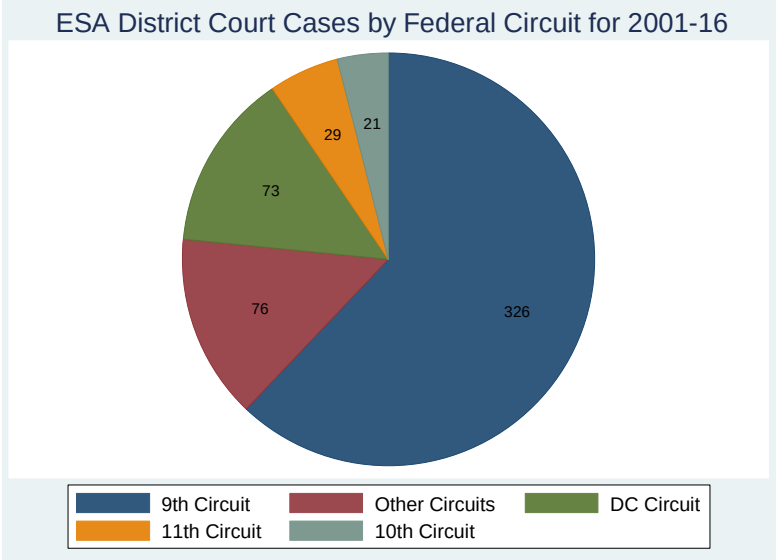


Figure 2: *ESA District Court Cases by Circuit*



The pattern of litigation observed was not preordained by the geographic distribution of the underlying actions. NEPA requires an EIS for any federal action that has "significant" environmental impacts,[155] and while one would anticipate some geographic variation, there is no reason to expect that the cases would be so disproportionately concentrated in these circuits, particularly given

[155] 42 U.S.C. § 4332(C) (2012).

population and development patterns nationally. Yet, EPA data reveal that roughly 47% of the EISs, the most rigorous level of environmental review engaged in by agencies, prepared from 2012 through 2016 involved actions that were located in the Ninth Circuit.[156] Similarly, under the ESA, while informal consultations were evenly distributed across the country, with no circuit containing more than about 15% of the consultations,[157] 60% of formal consultations from 2008 through 2016 involved actions based in the Ninth Circuit.[158] Accordingly, we find that although the universe of actions subject to the statutes is disbursed widely across the country, federal litigation was located disproportionately in the Ninth Circuit.

The reasons for the uneven distribution of cases likely reflect a mix of strategic and structural factors. In the case of the D.C. Circuit,[159] the location of most federal agencies in D.C. affords plaintiffs the option of selecting it as an alternative venue in most cases; in essence, plaintiffs can use it as an option for forum shopping.[160] The large number of cases in the Ninth Circuit is driven, in part, by the nature of the cases—most of which involve federal lands, which are heavily concentrated in the states encompassed by the Ninth Circuit.[161] Forum shopping is also a potential factor for the Ninth Circuit, particularly given, as discussed further below, that plaintiffs prevailed at higher rates in the Ninth Circuit. This explanation has an inherent limit, however, because only about 20% of the NEPA and ESA cases in district court involved actions that spanned more than one circuit.[162] Thus, the number of cases in which forum shopping could arise falls short of accounting for the number of cases in the Ninth Circuit. Inter-circuit disparities in plaintiffs' success rates could still operate as a

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[156] Adelman & Glicksman, *Citizen Suits*, *supra* note 148, at 408.

[157] *Id.*

[158] For the difference between informal and formal consultations, see 3 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW §§ 29:26–27 (2d ed. 2007). Informal consultation "is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required." 50 C.F.R. § 402.13(a) (2017). Formal consultation is required if an agency determines that its action may affect listed species or critical habitat. *Id.* § 402.14(a).

[159] Under NEPA, the D.C. Circuit cases involved challenged activities that were located in 11 circuits, with the highest number of cases originating from the Fourth Circuit (4), Sixth Circuit (4), Tenth Circuit (5), and Eleventh Circuit (3).

[160] *See* 28 U.S.C. § 1391(e)(1) (2012) (providing that a civil action in which a defendant is the United States, a federal agency, or an official of such an agency may be brought in any judicial district in which a defendant in the action resides).

[161] Most federal land is located in western states, suggesting that one would expect cases to be filed disproportionately in the Ninth and Tenth Circuits, which together encompass 99% of land managed by the Bureau of Land Management (BLM), 85% of U.S. Forest Service (USFS) land, and 91% of land under the jurisdiction of the National Park Service (NPS). *See* Adelman & Glicksman, *Judicial Politics*, *supra* note 147, at 31.

[162] Just 12% of the NEPA cases and roughly 17% of the ESA cases spanned more than one circuit.

deterrent to filing cases in other federal circuits. If this were a significant factor, it could depress the number of cases outside the Ninth Circuit and contribute to the skewed distribution of cases geographically.

The analysis that follows utilizes a variety of statistical methods to assess the relative influence of local, executive, and judicial politics on case outcomes and the geographic distribution of the cases. Starting with basic descriptive statistics, we find substantial differences in outcomes between cases filed during the Bush Administration and those filed during the Obama Administration. Environmental plaintiffs in NEPA cases were about twice as likely to prevail in district and appellate courts during the Bush Administration as during the Obama Administration.[163] The differences were smaller in the ESA cases, though, with environmental plaintiffs about 50% more likely to prevail during the Bush Administration at both the district and appellate court levels.[164] In absolute terms, the cross-administration differences were nineteen and fourteen percentage points for NEPA and ESA cases, respectively.

Geographically, the Ninth Circuit was not only the center of activity, it was also a favorable venue for plaintiffs. In the Ninth Circuit, environmental plaintiffs prevailed at the district court level in NEPA and ESA cases at rates ten to twenty-five percentage points higher than other circuits (collectively).[165] The D.C. Circuit was a somewhat less favorable venue, with rates that were about ten percentage points lower than those in the Ninth Circuit. On appeal, the Ninth Circuit stood out during the Bush Administration, with environmental plaintiffs advantaged in ESA and NEPA cases by fifteen and thirty percentage points, respectively. However, while this advantage persisted for the ESA cases, it largely disappeared for NEPA cases during the Obama Administration.[166] These findings reveal that district judges in the Ninth Circuit were consistently less deferential to agencies than their counterparts in other circuits, whereas Ninth Circuit appellate judges were less deferential in ESA cases across both

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[163] Environmental plaintiffs won 42% of the district court NEPA cases during the Bush Administration versus 23% of the district court cases during the Obama Administration; at the appellate level, plaintiffs won 36% of the NEPA cases during the Bush Administration versus 17% of the cases during the Obama Administration.

[164] Under the ESA, plaintiffs won 47% of the district court ESA cases during the Bush Administration versus 32% of the district court cases during the Obama Administration; at the appellate level, plaintiffs won 34% of the ESA cases during the Bush Administration versus 22% of the cases during the Obama Administration.

[165] Under NEPA, environmental plaintiffs won 50% of the district court cases in the Ninth Circuit, 42% in the D.C. Circuit, and 25% in other circuits during the Bush Administration; these rates dropped to 28%, 21%, and 6%, respectively, during the Obama Administration. Under the ESA, environmental plaintiffs won 52% of the district court cases in the Ninth Circuit, 42% in the D.C. Circuit, and 29% in other circuits during the Bush Administration; these rates dropped to 28%, 21%, and 6%, respectively, during the Obama Administration.

[166] Environmental plaintiffs in the Ninth Circuit during the Obama Administration prevailed in 19% of the NEPA cases versus 14% in all other circuits collectively; for ESA cases, plaintiff success rates were 27% and 11%, respectively.

administrations but in NEPA cases they were less deferential only during the Bush Administration.

The influence of judicial ideology on case outcomes was more nuanced and less pronounced than the impact of the circuit and presidential politics. At the district court level, plaintiffs' success rates were roughly fifteen percentage points higher before Democratic-appointed judges than Republican-appointed judges in cases filed during the Bush Administration;[167] however, the differential dropped to about ten percentage points during the Obama Administration and was no longer statistically significant.[168] This result suggests that the influence of judicial ideology declined with the shift in presidential politics—it was statistically significant when the conservative ideology of the Bush Administration conflicted with the liberal statutory mandates of NEPA and the ESA but was neutralized when the priorities of the Obama Administration were largely in alignment with those of the statutes.

At the appellate level, the influence of judicial ideology was complicated by the permutations of three-judge panels. Consistent with studies discussed above,[169] we observed the greatest differences in case outcomes between the two administrations when panels were ideologically uniform, either all Republican or all Democratic appointees, whereas ideologically mixed panels tended to moderate plaintiffs' success rates.[170] During the Bush Administration, environmental plaintiffs prevailed before all-Democratic panels at rates that were about fifty percentage points above those before all-Republican panels.[171] However, the impact of judicial ideology diminished during the Obama Administration, with plaintiffs' success rates in NEPA and ESA cases dropping overall and disparities across panels with different ideological mixes generally declining to ten to fifteen percentage points.[172] While we cannot know whether

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[167] For the NEPA cases, plaintiffs prevailed before Republican and Democratic judges in 31% and 44% of the cases (p-value of 0.046), respectively; for ESA cases, plaintiffs prevailed before Republican and Democratic judges in 33% and 51% of the cases (p-value of 0.003), respectively.

[168] For the NEPA cases, plaintiffs prevailed before Republican and Democratic judges in 16% and 23% of the cases (p-value 0.265), respectively; for ESA cases, plaintiffs prevailed before Republican and Democratic judges in 27% and 39% of the cases (p-value of 0.071), respectively.

[169] *See supra* Part II.A.

[170] The one exception was NEPA cases with majority-Democratic panels during the Bush Administration, before which plaintiffs prevailed at modestly higher rates than all-Democratic panels (53% versus 47%, respectively).

[171] For the NEPA appeals during the Bush Administration, plaintiffs prevailed 0% of the time before an all-Republican panel versus 48% before all-Democratic panels; for ESA appeals, plaintiffs prevailed 20% of the time before an all-Republican panel versus 73% before all-Democratic panels. The p-values were all below 5% with the exception of ESA cases during the Obama Administration.

[172] The one exception was plaintiff success rates before all-Democratic panels in NEPA cases, which remained static around 50%. By contrast, while the rate for all-Democratic panels in ESA cases remained relatively high, it fell by more than half and was not statistically significant.

the long-term baselines for plaintiffs' success rates under either statute are closer to the level observed during the Bush or Obama Administrations,[173] the observed declines in the influence of judicial ideology on politically uniform panels is striking.

We believe that the interplay we observe between judicial and presidential politics is likely generalizable to statutes that reflect conservative values (e.g., immigration, regulatory reform, school choice); however, for such conservative statutes, the influence of ideology on judicial review would decline during Republican administrations. We find evidence for this in the trends we observe across the two administrations. Specifically, the pattern for the influence of judicial ideology is inverted for cases filed by plaintiffs other than environmental organizations and it is Republican judges who favor them. In most of these cases, the plaintiffs are private entities (often landowners) or local governments seeking to weaken or avoid regulations under the ESA. Although the number of cases is much smaller (thirty-six appellate cases), the success rate of non-environmental plaintiffs before Republican-majority appellate panels doubled between the Bush and Obama administrations, from 23% to 44%, whereas it was essentially flat before Democratic-majority panels.[174] A similar pattern is observed in the district court cases, with non-environmental plaintiffs prevailing at double the rate before Republican judges during the Obama Administration (24% versus 48%), while their success before Democratic judges remained the same. The small number of cases, particularly at the appellate level, limits the inferences that we can draw from the data, but these findings are nevertheless consistent with either conservative or liberal presidential politics impacting the degree to which ideology is a significant factor during judicial review of agency action.

B. *The Relative Importance of Institutional and Political Factors*

We conducted multiple regressions using the district and appellate court data.[175] Table 1 below displays the results from four logistic regressions using

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[173] At least one earlier study suggests that the average is closer to rates observed during the Obama Administration. Robert W. Malmsheimer et al., *National Forest Litigation in the US Courts of Appeals*, 102 J. FORESTRY 20, 22 (2004) (finding that the USFS prevailed in 64% of the ESA cases during the George H.W. Bush Administration and 80% of the cases during the first Clinton Administration).

[174] During the Bush Administration, non-environmental plaintiffs won three out of thirteen cases before majority-Republican panels versus zero of five before majority-Democratic panels; during the Obama Administration, non-environmental plaintiffs won four out of nine cases before majority-Republican panels versus one of eight before majority-Democratic panels.

[175] Because the dependent variable—whether the plaintiff prevailed on at least one of its claims—was categorical, logistic regression was used in place of conventional ordinary-least-squares regression. ALAN C. ACOCK, A GENTLE INTRODUCTION TO STATA 302–04 (rev. 3d ed. 2012). This type of regression generates a "likelihood" or "odds" ratio, which in our analysis is simply the ratio of the likelihood of a plaintiff prevailing when the value of the

two variations on parameters for each statute to assess the influence of key variables relative to each other. The dependent variable in each regression is case outcome, where success was defined as a plaintiff prevailing on at least one of either the NEPA or ESA claims. Likelihood ratios for plaintiff success rates appear above the z-values,[176] which are in brackets, and the asterisks indicate the degree of statistical significance for each parameter. We conducted regressions with interaction terms to test whether the variables operated independently. None of the interaction terms were found to be statistically significant.

1. *The Principal Predictors of Case Outcomes*

The results in Table 1 confirm that the Ninth Circuit,[177] judicial ideology, and class of plaintiff, specifically environmental organizations, have a statistically significant impact on the outcomes of ESA and NEPA cases in district court.[178] Plaintiffs were 1.7–1.8 times more likely to succeed in an ESA or NEPA case before a Democratic judge than a Republican judge; they were roughly 1.7–2.5 times more likely to succeed in the Ninth Circuit; and plaintiffs were 1.5–2.5 times more likely to prevail if they were a national environmental organization.[179] The statistical significance of the circuit variable implies that inter-circuit differences cannot be reduced to the ideology of judges. Structural features of the circuits must also be factors, particularly the balance of Republican and Democratic district court judges in the circuit, and whether the

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applicable dummy variable is "one" over the likelihood when it is "zero." *Id.* For example, the dummy variable for presidential administration in our analysis designates the Bush Administration as "0" and the Obama Administration as "1." Accordingly, the likelihood ratio is the odds of a plaintiff winning its case during the Obama Administration *over* the odds of a plaintiff prevailing during the Bush Administration. In this case, a likelihood ratio of "0.5" implies that a plaintiff has a 50 percent *lower* chance of winning an ESA suit during the Obama Administration than during the Bush Administration; conversely, a likelihood ratio of "1.5" implies that a plaintiff has a 50% *greater* chance of prevailing during the Obama Administration.

[176] A "z-value" is a complementary measure of statistical significance that indicates the number of standard deviations the observed data deviate from the value predicted by the statistical model. *Z-Score: Definition, Formula and Calculation*, STATISTICS HOW TO, https://www.statisticshowto.datasciencecentral.com/probability-and-statistics/z-score [https://perma.cc/76M8-975A].

[177] The statistical significance of the coefficient for the D.C. Circuit may have been limited by statistical power. Only sixty cases were filed in the D.C. Circuit, which, while large relative to most circuits, was small for purposes of statistical power—for our data, the statistical power was less than sixty for any sample with fewer than ninety-four cases.

[178] The dummy variable, designating whether or not a case was published, was included as a control variable.

[179] The success rates of environmental plaintiffs diverged somewhat across administrations—national environmental organizations had higher success rates than local ones (53% versus 40% percent, respectively) during the Bush Administration, but they converged during the Obama Administration (25% and 21%, respectively).

politics of "Republican" and "Democratic" judges differ across circuits (i.e., a Republican judge in the Ninth Circuit may not be as conservative as one in the Fifth Circuit). For NEPA cases alone, environmental plaintiffs were about 2.7 times more likely to prevail during the Bush administration and two times more likely to prevail if they were a local environmental organization. Other potential factors, such as the identity of the defendant federal agency, were also evaluated but found not to be statistically significant.

The regressions for the appellate cases appear in Table 2 below.[180] The dependent variable in each regression is again case outcome, with success defined as a plaintiff prevailing on at least one of its NEPA or ESA claims. The other statistics in Table 2 mirror those of Table 1 apart from judicial ideology, which treats the four ideological combinations of three judges separately using panels with two Republican judges and one Democratic judge as the baseline against which the other panels were measured. An ideologically mixed panel was chosen as the baseline on the premise that it reflects a relatively neutral position ideologically. With regard to other ESA and NEPA claims, the smaller sample sizes of our appellate databases and the low rates at which most claims were raised limited the statistical power of our analysis.

Table 1: *Logistic Regression for District Court Case Outcomes*

	NEPA Ruling	NEPA Ruling	ESA Ruling	ESA Ruling
Administration	0.374***	0.362***	0.786	0.788
	(-4.34)	(-4.53)	(-1.25)	(-1.24)
Appointing President's Party for Judge	1.809**	1.851**	1.760**	1.776**
	(2.64)	(2.76)	(2.91)	(2.98)
DC Circuit	1.620	1.757	0.613	0.615
	(1.26)	(1.49)	(-1.43)	(-1.43)
Ninth Circuit	2.607***	2.468***	1.728*	1.745*
	(3.51)	(3.37)	(2.33)	(2.38)
National Environmental Organization	2.476**	2.539**	1.580	1.481*
	(2.93)	(3.02)	(1.78)	(2.04)

[180] We conducted multiple regressions on specific claims under the ESA and NEPA; only a single claim under NEPA, whether an agency took a "hard look" at the environmental impacts of a federal action, was statistically significant. However, judges may have used the hard look review in a generic manner that raises questions of endogeneity—in other words, judges convinced on independent technical grounds that the agency's analysis was adequate often ended their opinion by concluding that the agency had undertaken the required hard look.

Local Environmental Organization	1.945* (2.36)	1.972* (2.42)	1.106 (0.38)	
ESA Listing Petition			2.486** (3.00)	2.474** (2.99)
Case Published	1.375 (1.35)		1.766** (2.82)	1.765** (2.81)
N	462	462	521	521

Exponentiated coefficients; *z* statistics in parentheses; * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

The regression coefficients in Table 2 are roughly consistent across the ESA and NEPA cases for the presidential administration, whether the defendant (typically the government) was an appellee, and all-Democratic appellate panels.[181] On average, plaintiffs were about twice as likely to prevail during the Bush Administration, and they were two to four times more likely to prevail in cases before all-Democratic panels than panels with two Republican judges and one Democratic judge. The identity of the appellee, whether it was a defendant or plaintiff, was also a significant factor despite the small number of appeals initiated by defendants (fewer than twenty-five cases under either statute); defendants were about four times more likely to prevail on appeal than plaintiffs. For the NEPA cases, the Ninth Circuit and environmental plaintiffs were each statistically significant factors. Plaintiffs were roughly 2.5 times more likely to win in the Ninth Circuit, and environmental plaintiffs were about two times more likely to prevail than other classes of plaintiffs.

Table 2: *Logistic Regression for Appeals Outcome*

	NEPA Ruling	NEPA Ruling	ESA Ruling	ESA Ruling
Other Circuits-Ninth Circuit	2.294** (2.43)	2.757*** (3.25)	0.751 (-0.63)	0.740 (-0.67)
Administration[182]	0.537**	0.572*	0.462*	0.500*

[181] While the statistical significance is weaker under the ESA, this is likely due to the smaller number of cases. Given that our sample of NEPA cases includes over 340 cases and is almost equally divided between the Bush and Obama Administrations, statistical power is unlikely to be a problem.

[182] The time lag associated with appeals makes it more difficult to define when one administration stops and another begins. We experimented with different cutoff dates, but the results did not vary significantly. As a consequence, we adopted a "middle of the road" approach that defines the Bush Administration as encompassing all circuit cases filed

	(-2.06)	(-1.89)	(-1.85)	(-1.70)
Case Published[183]	2.646** (2.56)	2.611** (2.56)	1.243 (0.37)	1.269 (0.41)
Hard Look	0.448** (-2.33)	0.442** (-2.43)		
Appellee	0.219*** (-2.81)	0.223*** (-2.94)	0.218*** (-2.78)	0.257** (-2.54)
Environmental Organization	2.094** (2.21)	2.032** (2.17)	1.905 (1.51)	
Circuit Panel 3-Reps	0.770 (-0.43)		1.483 (0.58)	1.408 (0.51)
Circuit Panel 1-Rep/2-Dems	1.291 (0.70)		1.334 (0.37)	1.363 (0.40)
Circuit Panel 3-Dems	2.247* (1.86)		4.157* (1.94)	4.146** (1.97)
N	330	334	158	158

Exponentiated coefficients; *z* statistics in parentheses; * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

2. *Presidential Politics and Plaintiff Success Rates*

The results of the regressions for the appellate cases differ both across the two statutes and with those for district courts. Case outcomes under both statutes were influenced by the presidential administration, which was associated with a decrease in success rates of about twenty percentage points between the Bush and Obama Administrations. This result could be driven by multiple factors, including changes in the cases plaintiffs filed or the policies of the presidential

between 2002 and 2009, and the Obama Administration as encompassing all cases filed between 2010 and 2015.

[183] Whether the case was published is a control variable, but it does not change the results significantly if it is excluded. The principal impact is on the Ninth Circuit variable for NEPA cases, which falls below statistical significance if publication is removed. The coefficients for other independent variables change only modestly.

administration. Given the Bush Administration's deregulatory bias,[184] a plausible explanation is that the Bush Administration's compliance with the statutes was weak and that this caused appellate judges to rule in favor of plaintiffs more often—correcting instances in which district court judges were overly deferential. It is notable that plaintiffs' success rate on appeal was not affected by their high success rates in district court (and the resulting smaller pool of cases) during the Bush Administration—they won at higher rates in both district and appellate court. Thus, even though district court judges ruled in favor of plaintiffs at greater rates, the pool of cases for appeal was, on average, stronger during the Bush Administration than during the Obama Administration. While we cannot definitively distinguish between the potential factors at work, we believe that the high success rates of plaintiffs in district court and on appeal suggests strongly that administration policies and implementation were central factors.

Our reasoning turns on the inference that plaintiffs were not more selective in the cases they appealed during the Bush Administration, which is premised on three observations. First, the number of appeals filed annually was comparable during the two administrations, despite plaintiffs' success rate in district court during the Bush Administration being higher than it was during the Obama Administration. Second, the threshold for choosing a case to appeal was quite high (only about a quarter of NEPA and a third of ESA cases were appealed), which substantially narrowed the range of cases.[185] This selectivity would tend to diminish the differences observed in appellate outcomes across administrations assuming plaintiffs were effective in selecting cases with a

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[184] *See, e.g.*, Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 329 (2013) ("In general, the GW Bush administration's midnight regulations reflected what one would expect based on the policies of the administration, deregulating in the environmental area and regulating labor unions and abortion providers more strictly."); Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355, 1363 (2009) ("To the chagrin of public interest groups and the joy of industry-funded think tanks, OIRA greatly stemmed the flow of health, safety and environmental regulation during the Bush Administration."); Max R. Sarinsky, *Discount Double-Check: An Analysis of the Discount Rate for Calculating the Social Cost of Carbon*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 215, 243 (2016) (discussing "attempts by the George W. Bush administration to weaken environmental regulation based on politically motivated intervention in cost-benefit analysis").

[185] In essence, the more selective plaintiffs are in determining which cases to appeal, the narrower the range will be with regard to the strength of their claims. Their efficacy in this respect will depend on how proficient plaintiffs are at selecting stronger cases—and focused on this as a criterion. *See, e.g.*, Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337, 337–38 (1990) [hereinafter Eisenberg, *Selection Effect*]; Theodore Eisenberg & Henry S. Farber, *Why Do Plaintiffs Lose Appeals? Biased Trial Courts, Litigious Losers, or Low Trial Win Rates?*, 15 AM. L. & ECON. REV. 73, 105 (2013); John M. de Figueiredo, *Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation*, 21 J. L. ECON. & ORG. 501, 503–04 (2005).

higher likelihood of winning.[186] Third, if selection criteria did vary, one would expect environmental plaintiffs to be less selective—that is more aggressive—during the Bush Administration. But, contrary to our results, such a strategy would lead to lower, rather than higher, success rates in court. The higher success rates of plaintiffs during the Bush Administration therefore appear more likely to be attributable to shifts in administration policies and implementation rather than the litigation strategies of environmental plaintiffs.

3. *Appellate Panels Effects and Circuit Structure*

The other major factor that was common to both statutes was judicial ideology, but its impacts were statistically significant only for all-Democratic panels. As noted above, the role of ideology on three-judge panels is mediated by the strong norm of unanimity that exists among circuit judges.[187] This norm reduces the influence of judicial ideology on mixed panels, which predominate in circuits with relatively balanced numbers of judges based on political affiliation. This theory is consistent with the small, statistically insignificant differences we observe in the coefficients for ideologically mixed panels.[188] Unlike prior studies, however, we find that the coefficient for panels with all-Republican judges did not differ meaningfully from the ideologically mixed panels, whereas the coefficients for all-Democratic panels were higher by a factor of two to four.[189] This asymmetry is the opposite of what Revesz observed in his study of D.C. Circuit cases, where he found that all-Republican panels were the most extreme ideologically.[190] For the third common factor, whether

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[186] Eisenberg, *Selection Effect*, *supra* note 185, at 338 n.3 (affirming the importance of selection effects on appeal).

[187] This norm is clearly evident in our sample data: dissents were filed in just 5.5% of the cases. *See* Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 307 (2004) (observing that the norm of consensus among appellate judges stems from "a view among judges that unanimous court opinions promote the appearance of legal objectivity, certainty, and neutrality, which fosters courts' institutional legitimacy"); *see also* Renee Cohn Jubelirer, *Communicating Disagreement Behind the Bench: The Importance of Rules and Norms of an Appellate Court*, 82 L. & CONTEMP. PROBS. 103, 105–06 (2019) (contrasting collegial deliberative and adversarial collaborative processes of judicial decision-making).

[188] The baseline for the regression is a panel with two Republican-appointed judges and one Democratic. The results in Table 2 show that the increase in plaintiff success rate above this baseline for a panel with two Democratic-appointed judges and one Republican is less than 30% and that it is not statistically significant.

[189] *See supra* Table 2. Statistical power was likely a factor for the NEPA cases, given the small number of appeals with all-Republican panels. Because of the adverse combinatorics, uniform panels were relatively rare in our sample, representing thirty-seven and fifty-two cases for the all Republican-appointed and all Democratic-appointed panels, respectively.

[190] *See* Revesz, *Ideology*, *supra* note 13, at 1754 tbl.11. While the coefficient in *supra* Table 2 regression is not statistically significant at the 5% level, a much larger study would

the government was an appellee, the small number of defendant-initiated appeals limits what we can infer—beyond that appellate judges appear to be especially deferential to government agencies when they initiate an appeal.

The results for NEPA cases exhibit two additional statistically significant factors at the appellate level—whether the case was filed in the Ninth Circuit and whether the plaintiff was an environmental organization. The persistence of circuit effects for appeals of NEPA cases is likely attributable, in part, to the large share (more than 50%) of the cases in the Ninth Circuit, which is important because the number of cases heard by ideologically uniform three-judge panels scales nonlinearly with the number of cases in a circuit.[191] In the Ninth Circuit, this effect was reinforced by the roughly 60%–40% split between Republican and Democratic circuit judges.[192] Accordingly, 65% of the NEPA appeals nationally were decided by majority-Democratic panels, and 83% of those with all-Democratic panels were Ninth Circuit cases.[193] Thus, rudimentary statistics effectively amplified the disparity in NEPA case outcomes between the Ninth Circuit and other circuits collectively. The second factor, the equal or higher success rates of environmental plaintiffs on appeal, underscores the relative merits of their claims, as they prevailed at higher rates than other plaintiffs before both Democratic and Republican judges.

It is notable that the Ninth Circuit is a favorable venue for ESA cases at the district court level but not on appeal.[194] This could simply be a matter of selection effects and the smaller number of ESA cases relative to those filed under NEPA. Since so few ESA cases were appealed, the high threshold for pursuing an appeal may have dampened any cross-circuit differences. The relatively small number of cases may also have resulted in somewhat idiosyncratic distributions of cases. For example, the principal difference between the two statutes appears to be with panels having two Democratic

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have to be conducted to achieve the necessary statistical power given that fifteen years of data produced just fifty-two cases with all Democratic-appointed panels. However, the sample size, which represents roughly two-thirds of the 2001–2016 appeals, gives us sufficient confidence to treat the coefficient as meaningful and not a statistical fluke.

[191] *See supra* Figure 1. By contrast, the small number of ESA cases heard in most circuits (typically less than one case per year) reduces the probability of having more than a couple of ideologically uniform panels to essentially zero.

[192] In our full sample, 49% of the judges were appointed by Democratic presidents and 51% were appointed by Republican presidents. The split in the D.C. Circuit was close to the national average—47% versus 53% for Democrat- and Republican-appointed judges, respectively; however, the split in the Tenth Circuit was 41% versus 59% for Democrat- and Republican-appointed judges, respectively.

[193] Similarly, *within* the Ninth Circuit, 73% of the ESA appeals were heard by majority Democrat-appointee panels and 25% were heard by all Democrat-appointee panels (roughly double the rate, on average, if there were equal numbers of Democratic- and Republican-appointed judges). By contrast, only a single appeal was heard by an all Democratic-appointed panel in the D.C., Tenth, or Sixth Circuits, which were the only other circuits with more than fifteen cases in our sample.

[194] *See supra* Tables 1 & 2.

judges and one Republican judge, which for ESA cases in the Ninth Circuit ruled against plaintiffs at a rate higher than panels on which Republicans were in the majority.[195] Two factors may be at play here: (1) a disproportionate share of the Republican-majority panels heard cases during the Bush Administration, which could raise plaintiffs' success rates in relative terms; and (2) while majority-Democratic panels were evenly distributed over time, panels with two Democrats were highly deferential to the Obama Administration, which prevailed in 94% of the cases. This speculative analysis illustrates the inherent indeterminacies created by the interplay of case selection effects, judicial panels, and the volume of cases. Resolving these effects is not always feasible; instead, the clearest inferences we can draw center on the relative importance of the statistically significant factors found in the regressions.

4. *Judicial Ideology and Case Outcomes*

The regression results make it clear that judicial ideology is not a predominant factor in case outcomes; while it is consistently a factor, the administration, the Ninth Circuit, and the class of plaintiff are often of comparable or substantially greater importance. In the district courts, we find that the influence of judicial politics, the Ninth Circuit, and the plaintiff are comparable for ESA cases and that the Ninth Circuit, presidential administration, and plaintiff have significantly greater influence than judicial ideology for NEPA cases.[196] On appeal, judicial ideology is a significant factor only for all-Democratic panels, which account for a small proportion of the cases under either statute.[197] For NEPA appeals, the ideological influence of all-Democratic panels is comparable to the influence of the administration, the Ninth Circuit, and the plaintiff.[198] By contrast, the influence of ideology on all-Democratic panels in ESA cases was roughly double that of the presidential administration, which was the only other statistically and practically significant factor.[199] Accordingly, judicial ideology is one of several factors in district court and, while still significant and even dominant in magnitude on appeal, its influence is discernable in a relatively small number of cases. Overall, judicial ideology is observed to impact more district court than appellate cases, but its influence is substantially smaller, on average, than in the subset of appeals with ideologically uniform panels.

More concretely, if we assume that the "ideologically neutral" rate for overturning agency decisions during the study period was midway between the rates observed for Democratic and Republican district court judges, roughly ten

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[195] By contrast, in the NEPA cases, such panels in the Ninth Circuit decided in favor of plaintiffs at rates just slightly lower than all-Democratic panels, whereas such panels in other circuits ruled at rates that were comparable to those of Republican-majority panels.

[196] *See supra* Table 1.

[197] *See supra* Table 2.

[198] *See id.*

[199] *See id.*

NEPA and four ESA cases were wrongly decided annually, with the cases evenly divided between those overly deferential and those second guessing the agency. At the appellate level, the numbers would be about two and one annually for NEPA and ESA appeals, respectively, assuming that the ideologically mixed panels represent the ideologically neutral position. These estimates lead to "departure rates" from nominally neutral adjudication of 10%–13% in district court cases and 3%–5% on appeal. These departure rates are useful proxies for estimating the number of cases that were decided on ideological grounds rather than on an admittedly idealized, neutral, or balanced legal basis. Whether expressed in absolute or relative terms, the departures from neutrality are modest, particularly given the imprecision of the statutory provisions and applicable legal doctrines on judicial review. Moreover, many of the ESA and all of the NEPA cases involved procedural issues for which judicial deference is likely to be low and thus the potential for ideological distortions would be higher than the average administrative review cases.[200] The final section explores potential explanations for the trends we observe and assesses their practical and normative implications.

IV. INSTITUTIONAL MECHANISMS THAT MEDIATE POLITICS IN THE FEDERAL JUDICIAL SYSTEM

The study results show that the influence of judicial ideology on case outcomes is mediated by two principal factors in addition to randomized selection of judges. The structure of circuits impacts the volume of cases in each circuit, which at the district court level can alter the balance of Republican and Democratic judges that hear cases and at the appellate level can affect the number of ideologically uniform panels. Presidential policies create alignments and misalignments between judicial ideology, statutory mandates, and the executive branch, which cause the politics of judges to figure more or less prominently in legal opinions.[201] We believe that identifying the conditions that moderate or exacerbate the influence of judicial ideology is critical to the legitimacy of judicial review. Our analysis of the NEPA and ESA cases indicates that concerns about judicial ideology at the district and appellate court levels tend to be overstated and that the escalating battles over judicial appointments appear to be out of step with reality. In most circumstances, judicial ideology plays a secondary role. Outside the Supreme Court, where a single appointment has the potential to flip the ideological balance of the Court, the politicization of judicial appointments has had limited effect.[202] If a single President is able to fill an unusually high number of lower court vacancies, as

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[200] Revesz, *Ideology*, *supra* note 13, at 1728.

[201] *Id.* at 1735.

[202] U.S. COURTS, JUDGESHIP APPOINTMENTS BY PRESIDENT (2019), https://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president [https://perma.cc/97ZD-FK9H]. All presidents' appointments are spread across the thirteen courts of appeals.

President Trump has been able to do during the first three years of his presidency, politicization becomes more of a threat. Understanding the institutional mechanisms that mediate the influence of judicial ideology and their vulnerabilities to being undermined or overridden is of critical importance to integrity of the legal system.

Our central finding is that presidential politics, the class of plaintiff, and the filing of a case in the Ninth Circuit frequently have a greater impact on case outcomes than judicial ideology. While we cannot definitively determine the reasons each of these factors affects case outcomes, we identify the most likely explanations. In the case of environmental plaintiffs, Republican judges are unlikely to be particularly sympathetic to their claims, and yet environmental groups prevail at higher rates before judges of either political affiliation.[203] We suggest that careful case selection, driven by resource constraints, is the most likely reason for these groups' higher success rates, which is consistent with the low frequency of litigation relative to the number of federal actions that could be challenged. Similarly, the higher success rates of environmental plaintiffs during the Bush Administration is most likely attributable to weaker agency compliance with the statutes, as opposed to greater selectivity in challenging agency actions or less aggressive litigation tactics. By contrast, the unique status of the Ninth Circuit is driven by circumstantial and structural factors—the high volume of cases, the balance of Republican and Democratic judges, and systemic differences in the politics of Republican and Democratic judges across circuits. Importantly, while the high threshold that must be cleared before environmental plaintiffs are willing to sue likely diminishes the potential influence of judicial ideology, the divergent policies of the two administrations and the large volume of cases in the Ninth Circuit provide statistical variance and power, respectively, that make it easier to discern the effects of the mediating institutional mechanisms in the federal judicial system.

This part of the Article incorporates and expands upon the literature on the impact that judges' politics have on judicial review. Most importantly, we consider institutional mechanisms that mediate the influence of judicial ideology beyond randomly selected three-judge appellate panels. While our empirical results for appellate cases are consistent with prior studies of judicial ideology, the mediating impact of circuit geography and the degree of alignment between presidential policies and statutory objectives also play an important role in mediating the influence of judicial ideology. Our study of district court cases also extends the existing studies, which have focused almost exclusively on the appellate courts. We begin with a discussion of how the different dynamics of trial and appellate court litigation reduce the impact of judicial ideology in the district courts. We then turn to evaluating the capacity of judicial review to moderate the influence of presidential politics by invalidating agency decisions in tension with statutory goals, and to the manner in which geographic

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[203] *See supra* Tables 1 & 2.

and ideological inter-circuit differences drive case outcomes. The final section focuses on the normative and practical implications of our findings.

A. *Institutional Constraints on the Influence of Judicial Ideology*

The structural differences and hierarchical relationship between district and appellate courts each impacts the influence of judicial ideology on case outcomes. Most importantly, district court cases are not subject to the mediating effect of three-judge panels.[204] Reliance on a single judge results in judicial ideology being a persistent factor in district court opinions, but its influence appears to be tempered by the low political salience of most cases.[205] District court cases, due to the heightened selectivity of appeals, are typically lower stakes and raise legal issues that are less contentious or problematic than the average case that is appealed.[206] These characteristics make it less likely that judges' ideological perspectives will become a significant factor, and this generalization is likely to be especially true for the highly technical issues often raised in NEPA and ESA cases. We observe this tempering effect in the modest influence judicial ideology has on case outcomes—about a fifteen percentage-point difference between Republican and Democratic district court judges across both administrations.[207] The influence of judicial ideology in district court opinions is further moderated by the potential for an appellate court to overturn district court opinions. This can occur directly, through actual appeals, or indirectly, through precedential opinions or the threat of an appeal. Moreover, the threat of a reversal on appeal is significantly greater for a district court decision than for a court of appeals case due to the small and dwindling number of cases that the Supreme Court agrees to review each year.[208] Thus, the consistent but modest influence of judicial ideology we observe in district court opinions has several institutional origins.

The influence of judicial ideology in appellate courts, as we have seen, has greater variance, but this variability is driven by a small subset of cases. Accordingly, while judicial ideology can lead to strikingly large disparities in the rates (often more than forty percentage points) at which plaintiffs prevail before ideologically uniform panels with opposing political affiliations, the actual number of cases implicated relative to the total appealed annually is quite

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[204] *See* Fischman, *Voting Patterns*, *supra* note 13, at 820–21.

[205] *See supra* Table 1.

[206] Carney, *supra* note 122 ("Appeals courts, in particular, are a top priority for McConnell because the circuit courts hear thousands of cases every year—compared to the Supreme Court, which heard 69 cases during their last term—and often have the final say for states within their jurisdiction.").

[207] *See supra* Table 1.

[208] *See* Kenneth W. Moffett et al., *The Supreme Court Is Taking Far Fewer Cases than Usual. Here's Why.*, WASH. POST (June 2, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/02/the-supreme-court-is-taking-far-fewer-cases-than-usual-heres-why/ [https://perma.cc/H87G-NK5D].

small. This pattern is observed throughout the literature[209] and follows from the institutional mechanism that drives it—the system of randomized selection of three-judge appellate panels. Simple combinatorics strictly bounds the number of ideologically uniform panels based on the numbers of Republican and Democratic judges in a circuit. The strong norm of unanimity among appellate judges, along with the relative infrequency of ideologically uniform panels, moderates the overall influence of ideology by tempering its influence on ideologically mixed panels and limiting the instances in which it is relatively unconstrained to a small subset of cases. We estimate that the departure rate from a nominally neutral position is roughly 5% and that, in absolute terms, this corresponds to fewer than a handful of appellate opinions annually being ideological outliers.[210]

These constraints are contingent on there being a fair balance of Republican and Democratic appellate judges. A large shift in the number of judges appointed by one political party could disrupt this dynamic by shifting the balance dramatically towards judges with views that align strongly with Democratic or Republican politics. Conservative scholars, for example, have urged Congress to double or triple the number of federal appeals court and district court judges with the explicit goal of "undoing the judicial legacy of President Barack Obama."[211] Such a plan would dramatically increase the number of ideologically uniform panels if all or most of the vacancies were filled by the same president and passing a strong ideological litmus test were a precondition to being appointed.

Barring such an effort, it is difficult to view modest departure rates from neutrality referred to above as posing a significant threat to the legitimacy of the federal court system. Given the indeterminacies of legal analysis and the imprecision of most statutory regimes, such deviations appear relatively benign. Some might argue that the relative differences in case outcomes are nevertheless troubling or, perhaps, that they are more important than the small absolute numbers would suggest. We recognize that the characterization of the observed

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[209] *See, e.g.*, Revesz, *Ideology*, *supra* note 13, at 1771–72.

[210] "Departure rate" is used loosely here to indicate the percentage of cases in which plaintiffs prevailed above what would be projected if plaintiffs' success rates before ideologically uniform panels were the same as those before ideologically mixed panels.

[211] Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/ [https://perma.cc/Z9R4-N48S]; *see also* STEVEN G. CALABRESI & SHAMS HIRJI, PROPOSED JUDGESHIP BILL 1 (2017), https://archive.thinkprogress.org/uploads/2017/11/calabresi-court-packing-memo.pdf [https://perma.cc/Y8PX-FU58]; Steven G. Calabresi, *Republicans Should Expand the Federal Courts*, NAT'L REV. (Nov. 15, 2017), https://www.nationalreview.com/2017/11/gop-tax-bill-should-expand-federal-courts/ [https://perma.cc/LYG5-ZWNM]; Linda Greenhouse, Opinion, *A Conservative Plan to Weaponize the Federal Courts*, N.Y. TIMES (Nov. 23, 2017), https://www.nytimes.com/2017/11/23/opinion/conservatives-weaponize-federal-courts.html [https://perma.cc/YBH6-772A].

trends in absolute or relative terms shapes how we view them. Pragmatically, we have emphasized the practical limits of judicial review—because perfection is unattainable, we should aim for a reasonable level of variance in case outcomes and a 5% departure rate from neutrality appears, to us at least, well within the bounds of reasonable expectations for complex and inherently discretionary judicial proceedings.

One potential critique of this approach is that the departure rate from neutrality that we derive is not a conventional stochastic error rate. To the contrary, the large variance observed in plaintiffs' success rates was associated with ideologically uniform panels, and more often panels from the Democratic end of the spectrum.[212] Typically, the rationale that underlies acceptance of stochastic error rates is that it is either impossible or extremely costly to reduce them below a certain point.[213] That is clearly not the case here, as a relatively low-cost option exists for reducing the variance in case outcomes observed across appellate panels—as several commentators have already advocated, a rule barring ideologically uniform panels could simply be adopted. We view this as a reasonable proposal if your principal objective is consistency. But as Ralph Waldo Emerson once observed, "[a] foolish consistency is the hobgoblin of little minds."[214] We believe that a risk exists here, if the tradeoffs are not adequately considered, of falling into a narrow focus on protecting the "rule of law" above all else.

Evaluating the potential tradeoffs necessarily implicates the other institutional mechanisms that mediate the influence of judicial ideology. It therefore requires that we work through them before a full assessment of the tradeoffs can be conducted. Anticipating the fuller discussion below, we believe that the enhanced check on executive branch policies provided by ideologically uniform panels, in part because it is structurally bounded, has significant value and minimal costs given that it has a moderating effect. To the extent that it cuts off innovative policies, it will do so on a limited basis given the relatively low frequency of such panels; on the other hand, such panels are substantially more likely, on average, to provide an effective check on agency policies when they stray significantly from statutory mandates. The legally centrist asymmetric nature of judicial review limits the threat to "rule of law" principles while enhancing the potential to protect against *ultra vires* executive branch policies.

B. *Judicial Ideology as an Instrument of Political Moderation*

The convergence we observe in the success rates of environmental plaintiffs before Republican- and Democratic-majority appellate panels is a striking result. We interpret it as evidence that the influence of judicial ideology was largely neutralized in appeals during the Obama Administration.

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[212] *See supra* Table 2.
[213] Spitzer & Talley, *supra* note 13, at 645–48.
[214] RALPH WALDO EMERSON, THE ESSAY ON SELF-RELIANCE 23 (1908).

Constitutionally, it reveals a mechanism by which the system of checks and balances adjusts to presidential policies that are in tension with statutory mandates. In essence, misalignment of presidential politics with a statute's mandate increases the influence of ideology on case outcomes because a judge's political sympathies will side either with the president or the statute. By contrast, when presidential politics and statutory mandates are aligned judges will be either indifferent, because their political sympathies favor neither the president nor the statute, or will be pulled in opposing directions, because their political sympathies are split between them. While this study centers on two environmental statutes, which are aligned strongly with the Democratic party, we believe that similar alignments and misalignments can occur with statutes associated with the Republican party or conservative politics. Thus, a Democratic administration's implementation of a politically conservative statute can be expected to heighten the likelihood of a Republican judge ruling against the government. To our knowledge, this is the first time that the interaction between presidential politics and judicial ideology has been elucidated in this manner.

We believe that several reasons exist for the absence of a similar convergence in the district court cases. First, because the influence of judicial ideology in the district court cases is relatively small across both administrations, the lower variance in case outcomes makes it harder to detect statistically meaningful changes.[215] By contrast, we observed a large drop in the disparity in appellate case outcomes between panels dominated by judges with opposing political affiliations from roughly 34% to 5%, between majority-Democratic and majority-Republican panels across the two administrations.[216] Moreover, essentially all of the convergence is attributable to majority-Democratic panels; while success rates of environmental plaintiffs were consistently about 18% before majority-Republican panels, they dropped from 52% to 20% before majority-Democratic panels.[217] In other words, majority-Democratic panels were much more deferential to the Obama Administration than the Bush Administration.[218] Indeed, we observe the opposite trend for cases brought by non-environmental plaintiffs under the ESA, many of which directly challenged ESA species protections: non-environmental plaintiffs prevailed before majority-Republican panels at a higher rate than before majority-

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[215] In the NEPA cases, we do not observe significant differences in the success rates of other plaintiffs either across administrations or between majority-Democratic and majority-Republican panels. In the ESA cases, we find that the success rates of other plaintiffs invert—they are relatively low before Republican judges during the Bush Administrations, and they double during the Obama Administration, whereas their rates before Democratic judges are essentially unchanged across the two administrations.

[216] *See supra* Part III.B.

[217] This convergence is reflected in our regression results, where the presidential administration is a statistically and practically significant factor in the appellate cases under both statutes. *See supra* Table 2.

[218] If only the population of cases were changing, the success rates of plaintiffs might change but this alone could not affect differences based on judicial ideology.

Democratic panels, and this disparity *increased* during the Obama Administration.[219] Although the small number of cases limits what we can infer from these results, the pattern inverts for non-environmental plaintiffs because their interests were opposed to both the principal mandate of the ESA and the politics of the Obama Administration.

The alignment of interests between the judges, statutory mandates, and presidential politics is captured by four basic scenarios reflected in our data, namely, cases filed during each administration with either majority-Democratic or majority-Republican appellate panels.[220] Starting with the Bush Administration, Republican judges were sympathetic to the Administration and unsympathetic to the liberal goals of NEPA (both factors aligning *against* environmental plaintiffs), whereas Democratic judges were sympathetic to the goals of NEPA but unsympathetic to the politics of the Administration (both factors aligning *in favor* of environmental plaintiffs). However, during the Obama Administration, Republican judges were unsympathetic to NEPA's goals and to the politics of the Administration (both factors essentially neutral towards environmental plaintiffs), whereas Democratic judges were sympathetic to both (one factor favoring and the other opposing environmental plaintiffs). As a consequence, the ideological commitments of the judges were either split between the statutory mandate and the administration or neutral towards them, which diminished the influence of judicial ideology.

The interaction we observe between presidential politics and judicial ideology likely applies beyond NEPA and the ESA. However, empirical studies of judicial review under other statutes, particularly those aligned ideologically with Republican politics, must be conducted to substantiate this claim. In addition, while the degree to which judicial review places a check on executive branch policies will be greater when the politics of a presidential administration diverge from the mandate of a statute, the vibrancy of that check will depend strongly on the balance of judges with liberal or conservative views in each circuit and their alignment with the mandates of the governing statute. From a normative perspective, our data reveal that the influence of judicial ideology is not per se reason for concern. To the contrary, it provides an inherently centrist and moderating check on executive branch policies, at least as long as judicial appointments are not heavily skewed toward one political party or the other.

While we have focused on differences between majority-Democratic and majority-Republican panels, ideologically uniform panels, on average, tend to favor plaintiffs more strongly than ideologically mixed panels.[221] In our study,

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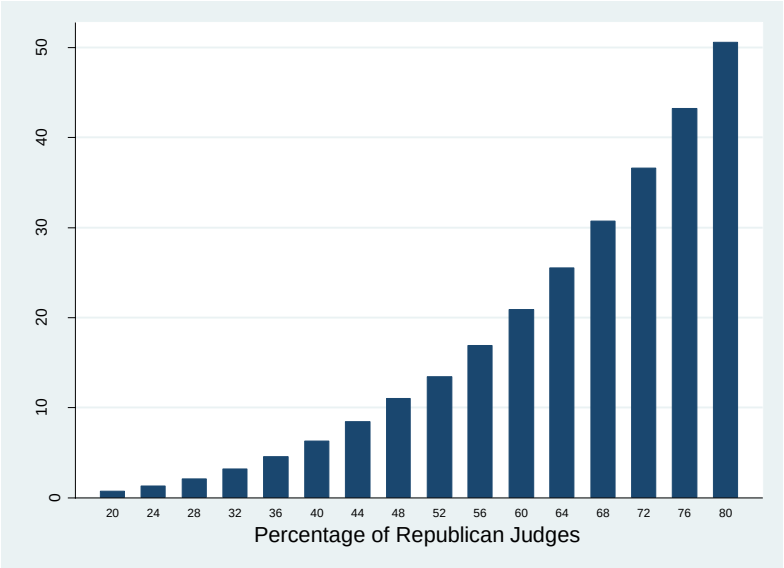
[219] During the Bush Administration, non-environmental plaintiffs won three out of thirteen ESA cases (23%) before majority-Republican panels versus zero of five ESA cases before majority-Democratic panels. During the Obama Administration, non-environmental plaintiffs won four out of nine ESA cases (44%) before majority-Republican panels versus one of nine ESA cases (11%) before majority-Democratic panels.

[220] *See supra* Table 2.

[221] An all-Republican panel that rejects an environmental group's NEPA challenge exercises its authority passively by confirming the administration's exercise of policy

their net effect was modest because they represent a small share of the total number of cases. However, because the number of ideologically uniform panels depends nonlinearly on the number of Republican and Democratic judges, they could have a much greater impact if the ideological balance of federal judges were upset significantly. As illustrated in Figure 3 below, the percentage of ideologically uniform panels rises rapidly, from essentially 2% to 50% of the panels, as the number of judges with a Republican (or Democratic) affiliation rises from 20% to 80% of the population of appellate judges. Maintaining a relatively even balance of Republican and Democratic judges is therefore of critical importance for our findings to hold.[222]

Figure 3: *Percentage of All-Republican Panels versus Percentage of Republican Appellate Judges*



judgment. Such decisions typically cannot push statutory policies in new directions. On the other hand, an all-Democratic panel that rules in favor of an environmental group's NEPA challenge serves the checking function we have described above. Thus, this asymmetry means that judicial intervention tends to push agency decisions toward the political middle. There are no circumstances in which a court could reverse an agency on the ground that its NEPA compliance was excessive. Such cases are possible under the ESA. *See, e.g.*, Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv., 268 F. Supp. 2d 1197, 1211 (E.D. Cal. 2003) (invalidating critical habitat designation due to agency's failure to identify physical or biological features that were essential to the conservation of the species).

[222] At the same time, even in the very unlikely scenario in which 80% of the judges were appointed by one party, 50% of appellate panels will still include judges from each party. *See infra* Figure 3.

In the near term, these dynamics show that judicial review can serve a valuable checking function in environmental cases when an administration, such as the Trump Administration, has an anti-regulatory outlook that conflicts with long-standing congressional mandates written into environmental statutes.[223] As the Senate confirms Trump appointees to the federal courts, however, this checking function could weaken, as an increasing number of environmental cases are heard by panels comprised of Trump, and other Republican, appointees and the number of majority-Democratic panels declines. The extent to which Trump Administration policies receive broad judicial deference will depend not only on the number of new appointments, but also their distribution across the federal circuits. The forty-one successful appointments made as of June 24, 2019, to the appellate courts, for example, are relatively evenly distributed across the federal circuits, with slightly higher numbers of appointments in the Fifth (five), Sixth (six), and Ninth (six) Circuits.[224] In many cases, the new appointments replace retiring Republican judges in conservative circuits, which will limit new appointees' potential impact on the overall balance of Republican and Democratic judges in the federal system.[225] To the extent that President Trump succeeds in making additional appointments, particularly those in more liberal circuits that replace Democratic judges, future Democrat administrations would be subject to review more often by Republican appointees who would be more likely to overturn executive actions in tension with statutes that reflect conservative values. Thus, while judicial ideology has the capacity to moderate presidential policies by ensuring that they conform with statutory mandates, the process of appointing and confirming federal judges influences whether the heightened checks associated with judicial ideology favor conservative or liberal statutes.

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[223] *See, e.g.*, Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "The Public" in Public Land Law*, 48 ENVTL. L. 311, 312–14, 314 n.4 (2018) (referring to the theory that "President Trump's hostility to environmental regulations is a consequence of a systematic undervaluing or ignoring of the environmental benefits provided by those regulations"); Anthony R. Raduazo, *The CO_2 Monetization Gap: Integrating the Social Cost of Carbon into NEPA*, 118 COLUM. L. REV. 605, 634–35 (2018) (referring to "the Trump Administration's open hostility toward . . . environmental regulation"); Phillip Dane Warren, *The Impact of Weakening* Chevron *Deference on Environmental Deregulation*, 118 COLUM. L. REV. ONLINE 62, 63 (2018) ("Trump and the Republican Congress seem especially hostile to environmental regulation."); Nadja Popovich et al., *95 Environmental Rules Being Rolled Back under Trump*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html [https://perma.cc/9FAN-MV8G]; Amanda Reilly & Sean Reilly, *Court Losses Pile Up for EPA*, GREENWIRE (Aug. 13, 2018), https://www.eenews.net/stories/1060093967 [https://perma.cc/2T2E-5KT4].

[224] *List of Federal Judges Appointed by Donald Trump*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Donald_Trump [https://perma.cc/LNC8-5RYD].

[225] Sullivan & DeBonis, *supra* note 4.

C. *Inter-Circuit Difference in Case Outcomes*

The circuit-level effects we observe at the appellate level are also conditional—the frequency with which they occur depends on the distribution of cases across circuits and the balance of Democratic- and Republican-appointed judges in each circuit. Litigation under NEPA and the ESA, fortuitously, provides a context in which such circuit-level effects are magnified by the disproportionate share of cases that were filed in the Ninth Circuit, where Democratic appellate judges were in the majority by a margin of 40% to 60% during the period covered by our study. The large number of cases improved the statistics but, more importantly, it led to the Ninth Circuit accounting for most of the majority—and all-Democratic panels nationally. The geographic distribution of cases further highlights the contingencies of circuit-level effects and the importance of taking into account the circuit structure of the federal judiciary and the ideological balance of judges within them.

The existing literature ignores systemic differences in the ideological outlook of Republican and Democratic judges across circuits by focusing either on a specific circuit or national trends.[226] For example, a Republican judge in the Fifth Circuit is likely to be more conservative than a Republican judge in the Second Circuit.[227] This oversight is particularly surprising given that there are structural reasons for such systematic inter-circuit differences in judicial ideology. In particular, the tradition of deferring to the senators for the state in which a judgeship is held reflects an understanding that the politics and ideological perspective of judges should, to some degree, be consistent with those of the surrounding state.[228] Yet, commentators typically assume that any intrusion of a judge's ideological views represents a threat to the "rule of law" and little effort is made to distinguish between inter-judge and inter-circuit sources of ideological variance.[229] In short, much as there is value in legislative experimentation, we believe that there is value in ideologically inflected variance in judicial review that is grounded on the structure of the federal circuits. Moreover, use of national statistics to assess the influence of judicial ideology must take into account that such statistics will reflect both inter-judge

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[226] *See, e.g.*, Sunstein et al., *supra* note 7, at 316–25, 331–33.

[227] *Id.* at 331 fig.6.

[228] *See supra* note 122 and accompanying text (discussing the blue slip practice).

[229] *See, e.g.*, Fischman, *Estimating Preferences*, *supra* note 13, at 782–83 (analyzing a data set of asylum cases in the Ninth Circuit to show that the "consensus voting model . . . has superior explanatory power compared to a sincere voting model," and attributing variance in case outcomes across judges to inter-judge, not inter-circuit differences in ideology); *cf.* Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (As a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1301 (2007) ("Ideological bias may also matter more for particular subject matter categories (civil rights more so than tax law for example) and the degree of de-biasing we undertake should take these differences into account.").

and inter-circuit variation in case outcomes between Republican and Democratic judges.

The factors that affect circuit-level statistics on case outcomes are threefold: the volume of cases in the circuit, the balance of Republican and Democratic judges in the circuit, and any systematic differences in judicial ideology, for both Republican and Democratic judges, noted in the preceding paragraph. The Ninth Circuit is an outlier with respect to the volume of cases and the ideological balance of its appellate judges, which is weighted towards Democratic judges—and many commentators believe that this liberal bias is systemic as well,[230] which would cut across judges with either political affiliation. The volume of cases and ideological balance of judges in a circuit can be amplified by the combinatorics of three-judge panels.[231] For example, because most circuits have very few NEPA appeals and all-Democratic panels are relatively rare (about 12% of the cases), the Ninth Circuit for statistical reasons alone should account for roughly half of the all-Democratic panels. Add to this the skew of the Ninth Circuit towards Democratic judges and it is unsurprising that the Ninth Circuit accounted for 83% of the appellate panels nationally with exclusively Democratic-appointed judges.

The concentration of cases in the Ninth Circuit both magnified inter-circuit differences in the rates at which environmental plaintiffs prevailed and skewed the cases towards panels with more liberal judges. In particular, all-Democratic panels, as reflected in our data and other studies, favored environmental plaintiffs, most likely because each judge's predilections were reinforced rather than tempered by their colleagues.[232] In addition, Ninth Circuit judges overall may be more liberal than judges in other circuits,[233] either because of the

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[230] *See, e.g.*, James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989–2000*, 17 J.L. & POL. 1, 28–30 (2001) (detecting liberal bias in criteria used by the American Bar Association to assess qualifications of judicial nominees).

[231] *See supra* Part IV.A.

[232] The statistics for the four combinations of judges on an appellate panel are as follows: (1) all cases in the sample—environmental plaintiffs prevailed on at least one claim in 8% of the cases before an all-Republican panel, 17% before a panel of two Republicans and one Democrat, 26% before two Democrats and one Republican, and 39% before an all-Democrat panel; (2) Bush Administration—plaintiffs prevailed on at least one claim in 5% of the cases before an all-Republican panel, 20% before a panel of two Republicans and one Democrat, 42% before two Democrats and one Republican, and 41% before an all-Democrat panel; (3) Obama Administration—plaintiffs prevailed on at least one claim in 12% of the cases before an all-Republican panel, 13% before a panel of two Republicans and one Democrat, 9% before two Democrats and one Republican, and 36% before an all-Democrat panel.

[233] *See, e.g.*, John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. TIMES (Apr. 24, 2010), https://www.nytimes.com/2010/04/25/us/25sfninth.html [https://perma.cc/AQT9-FCDE]. *But see* Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 1 (2003); Susan B. Haire, *Judicial Selection and Decisionmaking in the Ninth Circuit*, 48 ARIZ. L. REV. 267, 283–85 (2006) (concluding that while there is evidence that individual judges make decisions on ideological grounds, the Ninth Circuit as a whole is not more liberal than other circuits).

selection process noted above or because there may be strength in numbers at the circuit level that gives judges in the majority greater sway on panels. The strong coefficient for the Ninth Circuit in our regressions support this inference.[234] Further, as the regression results for district court cases bear out (plaintiffs were 1.7–2.5 times more likely to prevail at the district court level in the Ninth Circuit), one would expect this ideological influence to filter down to district court judges through precedent and their attentiveness to being overturned on appeal. Moreover, these results cannot be attributed to an ideological imbalance among the district judges because, unlike the appellate judges, they were evenly split between Democratic and Republican appointees.

As the Ninth Circuit cases demonstrate, these structural effects are magnified when one or a small number of circuits account for a disproportionate share of the cases litigated under a statute. Whether this set of conditions skews outcomes in a liberal or conservative direction, and how far, will depend on the balance of Democratic and Republican appellate judges on the circuit(s). Conversely, if cases are distributed relatively uniformly across circuits, perhaps due to geographic factors or the absence of forum shopping, circuit-level effects will be weak or disappear. These insights also provide new grounds for understanding the special status often attributed to the Ninth Circuit. Our findings suggest that the Ninth Circuit cannot be reduced to the ideological balance of its judges or its size; the strong norm of unanimity and random selection of appellate panels are critical mediating factors along with geographic and other factors that determine the distribution of cases across federal circuits.

In combination with the influence of presidential politics, particularly their alignment or misalignments with a governing statute, these circuit-level effects can enhance or erode the likelihood of judicial review at the appellate level checking agency action. While we have described the basic phenomenon, it would be useful to model systematically how circuit-level effects are likely to vary with the number of circuits in the federal system and their relative size, both geographically and with respect to numbers of cases. The importance of these factors also exposes the structural contingencies of judicial oversight and how they mediate the influence of judicial ideology in administrative cases. In doing so, it enhances our understanding of the institutional frameworks and political forces that shape the effectiveness of the checks and balances provided by an independent judiciary.

D. *Insights into Contemporary Debates About the Structure of Federal Courts*

We have identified a mix of institutional and structural factors that, to varying degrees, either restrain or magnify the influence of judicial ideology. Specifically, the check that judicial review provides on executive branch authority depends on the political alignments and misalignments between

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[234] *See supra* Tables 1 & 2.

judges, the statute under review, and the presidential administration in power.[235] Judicial ideology will be a significant factor, and judicial review more likely to limit agency action, when presidential politics are at odds with the politics of the governing statute *and* the ideological outlook of the judge(s); its influence will be nominal when presidential politics and statutory goals are in alignment. These alignments and misalignments, in conjunction with the deferential posture of judicial review, constrain the influence of judicial ideology to moderating presidential policies towards a centrist interpretation of statutory mandates. The same dynamic will cause judicial ideology to have a similar moderating effect when agencies exceed rather than fail to meet statutory mandates. The impact of this structural counterbalancing dynamic between judges, statutory mandates, and presidential administrations can be enhanced, as we observe in the Ninth Circuit, or moderated by the distribution of cases across circuits and the ideological balance of the judges in them.

To demonstrate the importance of considering the expanded range of factors that we have found to mediate the influence of judicial ideology, we reexamine three prominent debates about the structure of the federal judicial system: (1) recurrent proposals to split the Ninth Circuit into several smaller circuits; (2) statutory provisions creating exclusive jurisdiction of certain cases in a specific circuit or a specialized court; and (3) partisan schemes to dramatically expand the number of federal judges in order to tip the scales decisively in favor of a conservative agenda. These examples are not intended to be exhaustive; instead, they illustrate the ways in which a broader understanding of how ideology impacts judicial review can inform fundamental questions about the structure of the federal judiciary and the process of making judicial appointments.

1. *Anticipating the Consequence of Splitting the Ninth Circuit*

Practitioners[236] and politicians[237] have developed numerous proposals to divide the Ninth Circuit into several smaller circuits. Advocates have argued that the court's docket has become so large that it is preventing its judges from

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[235] *See supra* Part IV.B.

[236] *Compare* Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 877–78 (1998) (favoring the split), *with* Aaron H. Caplan, *Malthus and the Court of Appeals: Another Former Clerk Looks at the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 957, 957 (1998) (opposing it).

[237] *See* Travis L. Schilling, Note, *Redefining the Waters of the United States: Did Government Overreach Just Get Trumped?*, 23 DRAKE J. AGRIC. L. 131, 145 (2018) (referring to "the Republican-led movement in the Senate to split the [Ninth] circuit"); Mark Brnovich & Ilya Shapiro, *Split Up the Ninth Circuit—But Not Because It's Liberal*, WALL ST. J. (Jan. 11, 2018), https://www.wsj.com/articles/split-up-the-ninth-circuitbut-not-because-its-liberal-1515715542 [on file with *Ohio State Law Journal*] (describing President Trump's support for such a split); Diamond Naga Siu, *Flake Hearing Airs Arguments to Break Up 9th Circuit*, POLITICO (Aug. 24, 2017), https://www.politico.com/blogs/under-the-radar/2017/08/24/flake-hearing-ninth-circuit-242007 [https://perma.cc/8K7K-GZZ3].

effectively, efficiently, and consistently[238] resolving cases.[239] Some claim that the geographic expanse of the circuit impairs "collegial relations among circuit judges [and] undermines their willingness to engage in good faith deliberations over case outcomes."[240] In some instances, support for dividing up the Ninth Circuit has come from states with smaller populations (and different political values) than California, seeking autonomy from the dominance of California judges,[241] who are often perceived to be too liberal.[242] As one commentator has aptly expressed it, "the proposed split [of the Ninth Circuit] is a form of gerrymandering intended to quarantine the court's liberal judges in a smaller, less powerful circuit."[243]

While the ultimate impact of splitting the Ninth Circuit would depend on the details of the proposal, our framework provides general insights into the potential tradeoffs. Recall that we identified three central factors that mediate the influence of judicial ideology on case results—the volume of cases, the

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[238] The theory is that smaller courts would require judges to keep track of fewer decisions, thus reducing the chance of inconsistent rulings among panels. *See* Bryan Wright, *But What Will They Do Without Unpublished Opinions?: Some Alternatives for Dealing with the Ninth Circuit's Massive Caseload Post F.R.A.P. 32.1*, 7 NEV. L.J. 239, 262 (2006).

[239] David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. 779, 789 (2011) [hereinafter Law, *Federal Courts*] (claiming that proposals to split the Ninth Circuit "are typically dressed in justifications of administrative necessity"); Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 660 (2007). Among the inefficiencies resulting from the current configuration is the need for Ninth Circuit judges to travel long distances to hear cases. Frank Tamulonis III, Comment, *Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?*, 112 PENN ST. L. REV. 859, 862 (2008). Some Ninth Circuit judges themselves have expressed this view. Anna O. Law, *The Ninth Circuit's Internal Adjudicative Procedures and Their Effect on Pro Se and Asylum Appeals*, 25 GEO. IMMIGR. L.J. 647, 667 (2011) (referring to Judge O'Scannlain); *see also* Crystal Marchesoni, *"United We Stand, Divided We Fall"?: The Controversy Surrounding a Possible Division of the United States Court of Appeals for the Ninth Circuit*, 37 TEX. TECH L. REV. 1263, 1264–65 (2005) ("The obvious sheer enormity of this circuit is causing many problems, namely: (1) waste of judges' travel time and money (from a geological standpoint); (2) case overload (from a population standpoint); (3) and a lack of a clear and consistent manner in which to decide and interpret law (from an increased Supreme Court reversal standpoint).").

[240] Lindquist, *supra* note 239, at 660. Some have asserted that the increased communication and collegiality among judges of smaller courts will reduce the high rate of reversal of Ninth Circuit decisions in the Supreme Court. Tamulonis, *supra* note 239, at 862.

[241] Tamulonis, *supra* note 239, at 861.

[242] *Id.* at 862–63. "Cases involving issues such as timber harvests in the Northwest, fishing rights in Alaska, and the death penalty in California have angered many conservatives." *Id.* (citing Howard Mintz, *GOP Closer to Splitting Up Left-Leaning 9th Circuit Appeals Court*, SEATTLE TIMES (Nov. 8, 2005), https://www.seattletimes.com/nation-world/gop-closer-to-breaking-up-left-leaning-9th-circuit-appeals-court/ [https://perma.cc/L7YY-CJKR]). For skepticism that splitting up the Ninth Circuit would reduce the influence of "extremist judges," see D.H. Kaye, *On a Mathematical Argument for Splitting the Ninth Circuit*, 48 JURIMETRICS J. 329, 334 (2008).

[243] Law, *Federal Courts*, *supra* note 239, at 789.

balance of Republican and Democratic judges in a circuit, and the political orientation of the judges, liberal or conservative, in the circuit relative to those in other circuits.[244] All three factors could be affected by such a division. Assume, for example, that the Ninth Circuit was divided into one circuit consisting of the coastal states and a second circuit consisting of the inland states along with Alaska, and that the existing judges were simply distributed according to the location of their chambers. If this proposal were instituted today, the balance of Republican and Democratic judges in each circuit would differ substantially. For example, at the appellate level, 61% of the judges on the coastal circuit would be Democratic versus 70% on the inland circuit.[245] In this context, about two-thirds of NEPA cases in the Ninth Circuit would be filed in the coastal circuit if the patterns of NEPA litigation remained stable over time. The new circuit structure would consequently result in NEPA cases being heard by more Republican judges and fewer all-Democratic panels than if the Ninth Circuit were retained in its current form. Moreover, because the number of all-Democratic panels scales nonlinearly with the volume of cases,[246] the impact would be greater on the all-Democratic panels, which would constitute 21% of the panels in the coastal circuit versus 34% in the inland circuit.

Although we cannot know without additional information whether the politics of the average judge in the two new circuits would differ substantially, they could either reinforce or counteract the other effects. For example, if the Senators from the affected states influenced the selection of nominees to ensure that their views were congruent with state politics, one would expect the judges in the coastal states to be more liberal, on average, than those in the inland states.[247] Under this scenario, the circuit-wide political bias would counteract the effect from the higher proportion of Democratic judges in the inland circuit and thus diminish the rightward shift in case outcomes associated with such a division of the Ninth Circuit. This example illustrates how the existing ideological balance of judges can, in effect, be reinforced or moderated depending on the volume and geographical distribution of cases across circuits. The fuller picture that emerges highlights the nonlinear nature of these feedbacks and the complex ways in which the circuit structure of the federal system mediates the impact of judicial ideology.

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[244] *See supra* Part IV.B.

[245] *See The Judges of this Court in Order of Seniority*, U.S. CTS. FOR NINTH CIRCUIT (Jan. 2020), https://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 [https://perma.cc/PTF5-GQLP].

[246] *See supra* Figure 3.

[247] *See Historical Presidential Elections*, 270 TO WIN, https://www.270towin.com/historical-presidential-elections/ [https://perma.cc/C4JS-PTGH] (showing that since 2000, west coast inland states have primarily voted Republican in presidential elections, and coastal states have voted Democrat).

2. *The Tradeoffs of General Versus Limited Appellate Court Jurisdiction*

Appellate court jurisdiction is rarely limited to specific circuits. The most notable—and still hotly debated—exception is the Federal Circuit, which essentially has exclusive jurisdiction over appeals involving patent disputes.[248] In the field of environmental law, several statutes contain provisions limiting the jurisdiction over certain types of claims to a specific court. In the case of the Clean Air Act (CAA), all challenges to national regulations must be filed in the D.C. Circuit.[249] However, little consistency exists across statutes, as illustrated by the Clean Water Act (CWA), which lacks an analogous provision despite its abundance of national implementing regulations.[250] Typically, jurisdictional restrictions, along with specialized courts, are created to manage the technical complexity of the subject cases,[251] to mitigate problems with doctrinal uniformity and consistency (including those associated with forum shopping),[252] or to enhance the efficiency of judicial proceedings.[253] To our knowledge, the existing literature has not considered how such jurisdictional limits affect the politics of judicial review or the judicial appointments process. The closest commentary involves concerns about doctrinal rigidity, a common critique of the Federal Circuit, but it focuses on particular judges and the insularity associated with jurisdictional limits rather than broader structural considerations.[254]

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[248] 28 U.S.C. § 1295(a)(4) (2012). For discussion of the debate over whether creation of such exclusive jurisdiction is an appropriate mechanism for promoting clearer and more uniform patent law, see Jason Rantanen & Lee Petherbridge, *Disuniformity*, 66 FLA. L. REV. 2007, 2042 (2014).

[249] 42 U.S.C. § 7607(b) (2012).

[250] *See* 33 U.S.C. § 1369(b)(1) (2012).

[251] *See, e.g.*, 28 U.S.C. § 1295(a)(4) (2012).

[252] *See* Lauran M. Sturm, Rapanos *and the Clean Air Act: Linking Wetland and Single Source Determinations*, 28 NAT. RESOURCES & ENV'T 27, 30 (2014); *see also* ROBERT L. CHIESA ET AL., AM. BAR ASS'N STANDING COMM. ON FED. JUD. IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 215 (1989) ("[C]ases of nationwide significance should be subject to review by a single, national forum. . . . [T]he principal benefit would lie in preserving nationwide uniformity in a program administered by a single, national agency. These benefits could be obtained by restricting the venue of judicial review of agency action, as is now done in some environmental legislation.").

[253] *See* Marchesoni, *supra* note 239, at 1264–65.

[254] *See* Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1502 n.101 (1995) (reviewing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994)) (arguing that "specialized courts also tend to become parochial and in so doing may, like some administrative agencies, focus on their particular 'constituencies' rather than broader public interests," and that "the area of law consigned to a specialized court, having become too rarefied for most lawyers or laypersons to understand, resists reform and innovation"). Professor Revesz has analyzed the relationship between the

Viewed through the lens of our framework, it is immediately apparent that centralizing cases in a specific court carries a significant risk that it will elevate the importance of judicial ideology. As we have shown, the influence of judicial ideology is mediated by the volume of cases and ideological balance of judges in a circuit—it rises when cases are concentrated in a circuit and with greater imbalances in the ideological outlook of the judges.[255] In our data, we observed these effects in the Ninth Circuit, which was dominated by Democratic judges and accounted for a disproportionate share of the cases heard nationally. Jurisdictional limits go further because they concentrate cases in a single court and, in doing so, eliminate the averaging across circuits with different mixes of judges. The absence of jurisdictional restrictions also makes it much harder for politicians to influence case outcomes through the judicial appointments process—the ideological balance would have to be shifted on multiple circuits, as opposed to just one.

Limiting challenges to national regulations under the CAA to the D.C. Circuit provides a concrete illustration of the tradeoffs and how they can vary. In the spectrum of issues that range from the purely local to the national, the CAA regulations are explicitly national in scope.[256] This simplifies the analysis because it effectively neutralizes concerns about federal courts fairly reflecting local values. In this light, the case for centralization appears to lack any countervailing considerations—except that it overlooks the ways in which circuit structure mediates the balance of Republican and Democratic judges that hear the cases. Restricting jurisdiction to the D.C. Circuit reduces the range of judges hearing the cases and, much like the Supreme Court, elevates the significance of individual judicial appointments—both because each appointment carries greater weight and because controlling the ideological balance on a single court is easier. Further, appellate courts, unlike the Supreme Court, hear cases as three-judge panels and, as we have seen, the frequency of ideologically uniform panels increases nonlinearly as the proportion of Republican or Democratic judges rises above 50%.[257] As a consequence, concentrating cases in a single circuit increases the likelihood that the checks provided by judicial review will occur disproportionately from a single political camp, or that the dominant ideological perspective will shift from one side to the other with the political party that has control over judicial appointments. The volume of cases and number of judges will determine the frequency of the

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structure of our system of administrative law and the arguments for and against specialized courts. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1115 (1990) (arguing that "in the context of judicial review of administrative action, there should be a presumption against establishing specialized courts to replace the functions of the regional, generalist courts of appeals. The arguments that counsel against specialization in this context, however, do not apply to specialized courts that are subject to review by the generalist courts of appeals").

[255] *See supra* Part IV.B.

[256] *See* 42 U.S.C. § 7607(b) (2012).

[257] *See supra* Figure 3.

resulting doctrinal changes, moderated by precedent, and the impact on a central rationale for jurisdictional restrictions—doctrinal uniformity. Limiting jurisdiction in this manner circumvents the decentralization of the federal court system that operates as a buffer to political forces. While the increased efficiency and efficacy may be worth the loss, the increased exposure to congressional politics and escalating battles over judicial appointments should also be factored into such jurisdictional decisions.

3. *Misconceptions About Ideologically Driven Court Packing*

If the two preceding examples highlight the nuances and pitfalls of circuit structure, recent calls to pack federal courts with conservative judges illustrate its resilience to such baldly partisan schemes. As noted above, a massive expansion of the federal judiciary was recently proposed, in all seriousness, by Steven Calabresi.[258] Some commentators have associated such proposals, not unreasonably, with Franklin Roosevelt's ill-fated court-packing plan of 1937.[259] One skeptical observer has noted that "it is not unfair to conclude that court-packing is a major objective of [such a] proposal, even if it is not the only one."[260] This begs the question of whether, and under what conditions, a court-packing plan could succeed or, to put it in the terms explored in this Article, whether it would upend the mediating effects that the circuit structure of the federal courts and mechanics of judicial decision making have on judicial ideology.

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[258] *See supra* note 211 and accompanying text.

[259] *See, e.g.*, Jeff Shesol, *Would Trump Consider a Court-Packing Scheme?*, NEW YORKER (Dec. 5, 2017), https://www.newyorker.com/news/news-desk/would-trump-consider-a-court-packing-scheme [https://perma.cc/M4GG-GXD8] ("[Steven] Calabresi's proposal owes a great, if unacknowledged, debt to Franklin Roosevelt's failed attempt to increase the size of the Supreme Court from nine Justices to fifteen . . . ."); Ilya Somin, *The Case Against Court-Packing*, WASH. POST (Nov. 27, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/?utm_term=.4e668627074b [https://perma.cc/Y5WK-5MKB]. Republican legislators have introduced legislation to increase the size of the federal judiciary. *See generally* Judiciary ROOM Act of 2018, H.R. 6755, 115th Cong. (bill introduced by Rep. Darryl Issa that would add fifty-two new district court judgeships). Democratic politicians have also suggested expanding the number of federal judges, but their efforts have focused on the Supreme Court. *See* Cara Bayles, *Is the High Court Due for a Revamp? Dems Say Yes*, LAW360 (June 25, 2019), https://www.law360.com/environmental/articles/1171768/is-the-high-court-due-for-a-revamp-dems-say-yes?nl_pk=6823ade7-090a-4d45-b28e-d8fdd4699435&utm_source=newsletter&utm_medium=email&utm_campaign=environmental [on file with *Ohio State Law Journal*]; Jordan Fabian, *Trump Dismisses Court Packing: 'It Will Never Happen,'* HILL (Mar. 19, 2019), https://thehill.com/homenews/administration/434761-trump-dismisses-court-packing-it-will-never-happen [https://perma.cc/4BB3-SU9Y].

[260] Somin, *supra* note 259; *see also* Shesol, *supra* note 259 (asserting that the Calabresi plan reflects conservatives' view that the institutions of government are "territory to be seized and held by whatever means").

Even though the Calabresi plan appears farfetched insofar as it calls for at least a 36% increase in the number of federal judges,[261] it nevertheless appears to be calibrated, knowingly or not, to overcome the inherent inertia of the appointments process. Although the Trump Administration has succeeded in accelerating the appointments process, these efforts have resulted, at the time of this writing, in the appointment of forty-one circuit court judges.[262] This is undoubtedly a significant number of judgeships, but they are spread over thirteen circuits. At least for now, about 40% of the appointments affected the balance of Republican and Democratic judges on a circuit, as the departing judges in 60% of the cases were Republican appointees.[263] One of the central reasons for this pattern is that judges can delay their retirement until the party with which they are affiliated is in power, a dynamic that may be particularly true now given the polarizing politics of the Trump Administration. This leaves, as Calabresi apparently recognizes, a major expansion of judgeships as the only viable option for decisively shifting the ideological orientation of federal judges. The breaks on the impact of judicial ideology may weaken if Trump appointments reverse the balance of a significant number of circuits.[264]

Yet, even if the Republicans succeeded with a plan like Calabresi's, the random appointment of three-judge panels would provide some ballast. For example, if Republican judges occupied 80% of the appellate judgeships, 50% of the panels would still have at least one Democratic judge, assuming that the balance of Republican and Democratic judges was consistent across circuits.[265] If, however, Republicans focused on specific circuits, the dominance of Republican judges could be much greater, with essentially no all-Democratic panels and few majority-Democratic panels hearing cases in most circuits. Further, plaintiffs would likely be far more selective in where they filed cases, which could exacerbate the inter-circuit differences we already observe in the implementation and interpretation of statutes under NEPA and the ESA. It is also important to recognize the limits of judicial review noted above, namely, that Democratic administrations would be largely immune to judicial review to the extent they operated within the clear bounds of their statutory authority.[266]

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[261] CALABRESI & HIRJI, *supra* note 211, at 21.

[262] *List of Federal Judges Appointed by Donald Trump*, *supra* note 224.

[263] Adam Feldman, *Changes to the Federal Courts: Trump's Most Significant and Lasting Legacy*, EMPIRICAL SCOTUS (Oct. 14, 2019), https://empiricalscotus.com/2019/10/14/changing-the-federal-courts/ [https://perma.cc/7KY4-DNRD] (showing retired judges' appointment party).

[264] As of May 2019, President Trump's appointments had flipped the Third Circuit to Republican-majority status and was "nearing potential flips" in three others (the Second, Fourth, and Eleventh). Tom McCarthy, *All the President's Judges: How Trump Can Flip Courts at a Record-Setting Pace*, GUARDIAN (May 11, 2019), https://www.theguardian.com/law/2019/may/11/trump-judge-nominees-appointments-circut-court-flip [https://perma.cc/VC35-LQV8].

[265] *See supra* Figure 3.

[266] The degree to which a Republican-dominated judiciary could constrain agency action and discretion will also necessarily depend on the nature of the statute that provides the

More importantly, given that most cases involve challenges premised on inadequate agency action, the impact of stacking the courts would be asymmetric—it would be most effective in protecting Republican administrations against claims that they were falling short of statutory mandates.

As these numbers illustrate, the transformation required goes far beyond anything ever contemplated, including Roosevelt's infamous court-packing plan. However, the structural sources of resilience in the judicial system on closer analysis demonstrate that more modest efforts are unlikely to have a sizeable impact because judges have control over the timing of their retirements and this naturally spreads judicial openings across administrations, and geographically over circuits, in ways that allow relatively modest shifts in the balance of Republican and Democratic judges. The system is not beyond breaking, as demonstrated by the heightened sensitivity of ideologically uniform panels to the volume of cases and ideological balance of judges, but the large scale of the federal courts and their circuit structure are powerful mediating elements.

V. CONCLUSION

The political controversies surrounding judicial review and appointments of federal judges overstate the influence of ideology in judicial opinions and presume that it is bad per se. The empirical study presented above shows that the influence of judicial ideology is of secondary importance in most cases and that when it is a significant factor in case outcomes, judicial ideology typically moderates executive branch policies towards centrist positions consistent with statutory mandates. We propose a novel framework that explains these dynamics and the contingencies that can enhance them as well as the conditions under which the limited but positive influence of judicial ideology can be seriously compromised.

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authority for the challenged decisions. As noted above, NEPA and the ESA differ in that judicial decisions under NEPA can uphold agency actions that give short shrift to NEPA procedures but cannot force agencies (under a Democratic administration) to curtail their NEPA responsibilities. *See supra* note 221. Judicial review of agency decisions under the ESA can narrow the scope of agency authority to take protective actions as well as forcing more aggressive regulatory action. *See supra* note 144 and accompanying text.