

The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi- Specialized Courts

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Introduction

A string of reversals by the Supreme Court of the United States has helped create an impression that the patent jurisprudence of the United States Court of Appeals for the Federal Circuit is under siege.¹ But the experience of another semi-specialized court of appeals, the United States Court of Appeals for the D.C. Circuit,² suggests that such Supreme Court intervention is likely to be less than cataclysmic. In the 1970s and 1980s, the Supreme Court reversed the D.C. Circuit in administrative law cases with a ferocity that makes the Court's present-day interventions in patent law look timid. Despite the onslaught, however, much of the D.C. Circuit's work survived. The D.C. Circuit's experience thus suggests at least two lessons that might extend to the Federal Circuit today: first, Supreme Court intervention does not necessarily prevent a semi-specialized circuit from putting a strong stamp on an area of relative expertise; and second, even when Congress has created a semi-specialized circuit, spates of Supreme

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¹ See Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 791 (2008) (observing that "the Supreme Court's unprecedented activity in the patent arena indicates that it too is concerned about the Federal Circuit's performance"); cf. Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1621 (2007) (reporting that "several commentators and other legal actors are beginning to place blame . . . squarely on the Federal Circuit").

² The D.C. and Federal Circuits are more properly considered "semi-specialized" than specialized because substantial portions of their dockets encompass issues outside administrative law and patent law, respectively. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 84 tbl.B-1 [hereinafter 2008 REPORT] (classifying less than half of the D.C. Circuit's pending cases as "administrative appeals"); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 360 (1991) (describing the Federal Circuit as "a semi-specialized court"); John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 675 (2009) (discussing the Federal Circuit's semi-specialization).

Court scrutiny and reversal might be essentially inevitable and possibly even desirable.

I. The D.C. and Federal Circuits as Semi-Specialized Appellate Courts

The D.C. and Federal Circuits both provide examples of relatively new experiments in semi-specialization.³ Although the D.C. Circuit is technically a regional circuit, it has exclusive jurisdiction over a variety of challenges to administrative action⁴ and hears a disproportionate share of the United States' administrative law cases.⁵

The D.C. Circuit's status as "a de facto, quasi-specialized administrative law court"⁶ is substantially a product of the late 1960s and early 1970s.⁷ In 1970, Congress stripped the circuit of its status as a local appeals court for the District of Columbia.⁸ This loss of jurisdiction was counterbalanced, however, by substantial additions under a sheaf of new regulatory statutes.⁹ Rapid growth of agency rulemaking helped ensure that such jurisdiction was frequently invoked.¹⁰ Exclud-

³ But cf. Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 614 (1989) ("Among the existing regional circuits there is already a de facto division of judicial labor along subject matter lines.").

⁴ JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA* CIRCUIT 285 (2001) (listing various regulatory statutes giving the D.C. Circuit exclusive appellate jurisdiction).

⁵ See John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376-77 (2006) (observing that, whereas "[o]ne-third of the D.C. Circuit appeals are from agency decisions," "[t]hat figure is less than twenty percent nationwide").

⁶ CHRISTOPHER P. BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT*, at xiii (1999); see also Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 n.1 (1990) (distinguishing the D.C. Circuit from the "generalist, regional circuits").

⁷ John F. Belcaster, *The D.C. Circuit's Use of the Chevron Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745, 748 (1992) ("[P]articularly in the 1970s, the D.C. Circuit established prominence within the field of administrative law."); see also Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 562 (2002) (describing how the D.C. courts "became specialists in separation of powers disputes and oversight of administrative actions").

⁸ See Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste*, in *ADMINISTRATIVE LAW STORIES* 125, 144 (Peter L. Strauss ed., 2006) ("[S]parked by the Nixon administration's opposition to [the D.C. Circuit's] liberal criminal and poverty law decisions, Congress ended the D.C. Circuit's appellate jurisdiction over local D.C. courts . . .").

⁹ See BANKS, *supra* note 6, at 32 (describing the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, tit. I, 84 Stat. 475, and "burgeoning social regulation" as "alter[ing] the nature and composition of the D.C. Circuit's docket").

¹⁰ See Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in*

ing appeals from the National Labor Relations Board, tax courts, and bankruptcy courts, the total number of administrative appeals filed in the D.C. Circuit during successive eight-year periods grew from 976 in fiscal years 1965 through 1972, to 3824 in fiscal years 1973 through 1980, to 5629 in fiscal years 1981 through 1988.¹¹

The Federal Circuit represents an even more recent and radical experiment in semi-specialization. The Federal Circuit did not exist until 1982, and as Daniel Meador has emphasized, the circuit was specifically formed to be the first “federal intermediate appellate court whose jurisdiction was in no way defined in territorial terms.”¹² The circuit’s jurisdiction features a broad but discrete spectrum of appeals and subject matter over which the circuit has exclusive hold.¹³

Notably, the Federal Circuit’s grip on patent appeals is much more complete than the D.C. Circuit’s grip on appeals involving administrative law. Whereas administrative law appeals still routinely reach circuits other than the D.C. Circuit,¹⁴ the Federal Circuit has exclusive jurisdiction over appeals in all cases “arising under” U.S. patent law.¹⁵ Since the Federal Circuit’s creation, other circuits’ role in the interpretation and application of patent law has been insubstantial.¹⁶

the 1960s and 1970s, 53 ADMIN. L. REV. 1139, 1147 (2001) (reporting that notices of proposed rulemaking rose from “about 41 per month” in 1960 to “over 190 per month in 1974”).

¹¹ The figures presented in the text are based on data in issues of the *Annual Report of the Director of the Administrative Office of the United States Courts* that were published during the years 1969 through 1988, which issues are hereinafter cited as “[Year of Report] REPORT,” rather than via the full citation form “ADMIN. OFFICE OF THE U. S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ([Year of Report]).” See 1988 REPORT, at 150 tbl.B3 (providing data on appeal origins); 1985 REPORT, at 253 tbl.B3 (same); 1980 REPORT, at 358 tbl.B3 (same); 1979 REPORT, at 349 tbl.B3 (same); 1974 REPORT, at 369–70 tbl.B3 (same); 1969 REPORT, at 190 tbl.B3 (same).

¹² Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581, 581 (1992).

¹³ See Golden, *supra* note 2, at 664–66 (describing the Federal Circuit’s multiple exclusive jurisdictions).

¹⁴ See 2008 REPORT, *supra* note 2, at 96 tbl.B-3 (listing 11,583 administrative agency appeals as filed in the year ending on September 30, 2008, with 456 such appeals filed in the D.C. Circuit).

¹⁵ Compare 28 U.S.C. § 1295(a)(1) (2006) (providing the Federal Circuit with “exclusive jurisdiction” over various appeals where “the jurisdiction of [the district] court was based, in whole or in part, on section 1338”), with *id.* § 1338(a) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . .”).

¹⁶ With the benefit of prior work by Craig Nard and John Duffy, see Nard & Duffy, *supra* note 1, at 1650 n.107, I know of four regional-circuit opinions that have addressed questions of United States patent law since 2002, all of which opinions involved patent questions raised in counterclaims or defenses: *County Materials Corp. v. Allan Block Corp.*, 502 F.3d 730 (7th Cir. 2007); *Schinzing v. Mid-States Stainless, Inc.*, 415 F.3d 807 (8th Cir. 2005); *Telecom Technical*

There are other differences between the D.C. and Federal Circuits. The Federal Circuit's relative youth and lack of a regional *raison d'être* leave its very existence more open to question. In contrast, even in comparison to other regional circuits, the D.C. Circuit enjoys unmatched prestige. Such prestige results at least in significant part from (1) the D.C. Circuit's role as a "feeder court" for four of the Supreme Court's current nine Justices¹⁷ and (2) the D.C. Circuit's regular handling of high-profile administrative law cases involving questions of broad significance.¹⁸ When the D.C. Circuit addresses questions such as the constitutionality of legislative vetoes of agency rulemaking¹⁹ or the validity of agency rules of facially national scope, such as those setting national air-quality standards,²⁰ the significance for policymakers and members of the general public is plain. Despite patent law's commonly acknowledged status as an important aspect of economic policy, the general social significance of the Federal Circuit's patent docket can be comparatively difficult to trace because the individual patent cases heard by the circuit tend to focus on highly case-specific issues, such as the scope or validity of one or more particular patent claims.

The nature of the D.C. and Federal Circuits' intracircuit divisions is another, likely correlated, point of difference. Although both courts have developed reputations for divisiveness and panel-dependent out-

Services Inc. v. Rolm Co., 388 F.3d 820 (11th Cir. 2004); and *XCO International Inc. v. Pacific Scientific Co.*, 369 F.3d 998 (7th Cir. 2004). Part of the reason for such opinions' relative insignificance is that they appear routinely to take instruction from Federal Circuit precedent. See *County Materials*, 502 F.3d at 735 (finding "helpful guidance" in a Federal Circuit opinion); *Schinzing*, 415 F.3d at 811 (explicitly "adopt[ing] the Federal Circuit's precedent"); *XCO*, 369 F.3d at 1006 (citing a 2002 Federal Circuit opinion). But see *Telecom Technical*, 388 F.3d at 830–32 (citing no prior opinion on patent-related issues other than a vacated Eleventh Circuit opinion).

¹⁷ See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Jan. 23, 2010) (indicating the D.C. Circuit service of Chief Justice Roberts and Associate Justices Scalia, Thomas, and Ginsburg).

¹⁸ See JOSEPH C. GOULDEN, *THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES* 252 (1974) (attributing the D.C. Circuit's status as "a 'mini supreme court'" to its jurisdiction over appeals from "key federal regulatory agencies" and the District Court of the District of Columbia).

¹⁹ *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 478–79 (D.C. Cir. 1982) (holding unconstitutional a "one-house veto" of an agency rule despite potential "far-reaching effects on the operation of the National Government"), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983) (per curiam).

²⁰ *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981) (upholding "national ambient air quality standards for ozone promulgated by the Environmental Protection Agency").

comes, the D.C. Circuit's divisions have, like the Supreme Court's,²¹ frequently had a significant political valence. Multiple empirical studies chronicle the extent to which Democratic-Republican distinctions explain D.C. Circuit decisionmaking in administrative law cases.²² Quite distinctly, analyses of Federal Circuit divisions in patent cases have tended to focus on facially nonpolitical axes, such as degrees of preference for "hypertextualism," as opposed to "pragmatic textualism," in interpreting patent claims.²³

Nonetheless, despite such distinctions, a comparison of Federal and D.C. Circuit experiences with Supreme Court review is instructive. At the very least, the comparison demonstrates that the Federal Circuit is not the only circuit court to have suffered repeated reversal in an area of relative expertise. Further, as Part IV argues, the D.C. Circuit's past experience suggests transferable lessons about the limitations and value of Supreme Court review of a semi-specialized circuit.

II. Patent Law Controversy and Reversals of the Federal Circuit

Over the past quarter century, the Federal Circuit's experience with Supreme Court review has been uneven. In the thirteen Terms from the October 1983 Term through the October 1995 Term, the Supreme Court issued only six patent decisions on the merits.²⁴ In these decisions, the Court confined its attention to issues generally at the margins of substantive patent law—issues of "procedure, jurisdiction,

²¹ See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1272–73 (1999) (characterizing political differences as having "even more profound" effects at the Supreme Court than at the D.C. Circuit).

²² *Id.* (discussing empirical studies showing "political effect[s]" in D.C. Circuit decision-making); see also Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1100 (2001) (confirming "the author's earlier findings of ideological voting in the D.C. Circuit").

²³ See Craig Allen Nard, *A Theory of Claim Interpretation*, 14 HARV. J.L. & TECH. 1, 4–6 (2000) (describing "schools of interpretation" at the Federal Circuit); see also R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1160 (2004) (classifying Federal Circuit judges based on approaches to claim construction). Compare Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 334 (2007) (noting an apparent lack of evidence that judges "appointed by Presidents from different parties" tend to decide patent cases differently), with ISAAC UNAH, *THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY-MAKING* 163 (1998) (finding that, from the 1980s to 1990, Federal Circuit judges' "political party affiliation[s]" had an apparently "strong effect" on decisions in international trade cases).

²⁴ See Golden, *supra* note 2, at 668 (discussing Supreme Court merits decisions).

or the interaction between patent law and another legal regime.”²⁵ Further, the Court’s treatment of Federal Circuit decisions was not markedly unfavorable: the Court disagreed with the Federal Circuit no more than half, and arguably less than half, of the time.²⁶

Subsequent years witnessed a sea change in Supreme Court scrutiny.²⁷ Although the Court’s level of involvement varied from Term to Term, an overall trend was clear. In the thirteen Terms from the October 1996 Term through the October 2008 Term, the Supreme Court decided thirteen patent cases on the merits, more than double the number decided on the merits in the prior thirteen Terms.²⁸ Only five of these cases focused on questions of procedure, jurisdiction, or the interaction between patent law and another legal regime.²⁹ In the remaining eight, the Court addressed basic aspects of patent law: questions of patentability and the effective strength of patent holders’ rights to exclude.³⁰ Further, the results of Supreme Court review were generally unfavorable to the Federal Circuit. The Court reversed the Federal Circuit in seven of the thirteen cases, vacated the Federal Circuit’s judgment in four, and affirmed in only two.³¹ In one of those two affirmances, the Supreme Court rejected the Federal Circuit’s approach to a crucial legal test.³²

Moreover, the Supreme Court hardly seemed to break a sweat in overturning the more expert circuit’s decisions. Since the October 1996 Term, the Court’s rejections of Federal Circuit positions were unanimous in eight of twelve cases.³³ The cumulative votes in the

²⁵ *Id.* (footnotes omitted).

²⁶ In three of the six cases, the Supreme Court agreed with the Federal Circuit on the principal issue of concern. *Id.* at 668 (describing results of Supreme Court review). In two cases, the Supreme Court disagreed with the Federal Circuit. *Id.* (same). In the sixth case, the Court vacated and remanded so that the Federal Circuit could better explain its reasoning. *Id.* at 668 & n.58 (discussing *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809 (1986) (per curiam)).

²⁷ See John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 283 (“[I]n the mid-1990s, . . . the Court began exercising its certiorari power more frequently in Federal Circuit patent cases.”); Timothy R. Holbrook, *The Return of the Supreme Court to Patent Law*, 1 AKRON INTELL. PROP. J. 1, 25 (2007) (“No longer is the Court . . . interceding only on issues peripheral to patent law . . .”).

²⁸ See Golden, *supra* note 2, at 670 (graphing term-by-term numbers of Supreme Court patent decisions on the merits). The Supreme Court made no patent decisions on the merits in the October 2008 term. *Id.*

²⁹ See *id.* at 670–71.

³⁰ See *id.* at 671.

³¹ See *id.* at 669, 671 (describing results of Supreme Court review).

³² See *id.* at 671 n.80.

³³ See *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109, 2122 (2008) (reversing); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 427–28 (2007) (same); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (vacating); *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S.

other four cases were twenty-six to nine against the Federal Circuit, and twenty-one to five in the trio of cases not featuring a classic five-to-four split on state sovereign immunity.³⁴

The way in which the Supreme Court speaks in patent cases has also changed. The language of recent Court opinions has struck some commentators as “increasingly disdainful”³⁵ and “harsh.”³⁶ At the very least, the Court has made clear that its lack of relative expertise is no barrier to its finding what it considers to be gross error in the Federal Circuit’s caselaw.

*Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*³⁷ is a case in point.³⁸ In this 2002 decision, a unanimous Court rejected the en banc circuit’s recently adopted approach to determining the scope of a form of estoppel.³⁹ When the Supreme Court previously addressed the applicability of such estoppel in 1997, it reversed the circuit’s judgment but went out of its way to express general confidence in the circuit’s “sound judgment in this area of its special expertise.”⁴⁰ The Court’s later opinion in *Festo* included no such commendatory language and, instead, sternly criticized the en banc circuit for “ignor[ing] the guidance of” the Court’s 1997 decision.⁴¹

Justices have voiced similarly critical views at oral argument and in nonprecedential opinions. During oral argument in November 2006, Justice Scalia characterized a description of a Federal Circuit

193, 208 (2005) (same); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 741–42 (2002) (same); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002) (same) (unanimous in judgment only); *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67–69 (1998) (affirming a Federal Circuit judgment but embracing an alternative test); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 41 (1997) (reversing).

³⁴ See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458–59 (2007) (seven to one); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007) (eight to one); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999) (involving a five-to-four vote on the constitutionality of Congress’s effort to abrogate state sovereign immunity); *Dickinson v. Zurko*, 527 U.S. 150, 165 (1999) (six to three).

³⁵ Gretchen S. Sween, *Who’s Your Daddy? A Psychoanalytic Exegesis of the Supreme Court’s Recent Patent Jurisprudence*, 7 NW. J. TECH. & INTELL. PROP. 204, 204–05 (2009).

³⁶ Debra D. Peterson, *Can This Brokered Marriage Be Saved? The Changing Relationship Between the Supreme Court and Federal Circuit in Patent Law Jurisprudence*, 2 J. MARSHALL REV. INTELL. PROP. L. 201, 245 (2003).

³⁷ *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002).

³⁸ See, e.g., Peterson, *supra* note 36, at 246 (describing *Festo* as “dramatically illustrat[ing]” a change in Supreme Court treatment of Federal Circuit decisions).

³⁹ See *Festo*, 535 U.S. at 737.

⁴⁰ *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997); see also *id.* at 39 n.8 (expressing “confiden[ce] that the Federal Circuit can remedy” any concerns about certain potentially inappropriate jury verdicts).

⁴¹ *Festo*, 535 U.S. at 739.

test for nonobviousness as “gobbledygook.”⁴² In February 2009, Chief Justice Roberts remarked to laughter that the Federal Circuit seemed an exception to the rule that lower courts generally follow Supreme Court precedent.⁴³ In a concurring opinion in 2002, Justice Stevens at least hypothetically associated the Federal Circuit with poison by suggesting that regional-circuit involvement in patent law might act as “an antidote to” potential Federal Circuit bias.⁴⁴ Justice Breyer’s dissent from a 2006 dismissal added fuel to concerns about such bias by suggesting that the “generalist Court” might help bring better balance to United States patent law.⁴⁵

III. Administrative Law Tumult and Reversals of the D.C. Circuit

But these Supreme Court reversals and critiques should be kept in perspective. In this regard, comparison to the D.C. Circuit’s experience helps because, in many ways, recent Supreme Court setbacks for the Federal Circuit pale in comparison to past setbacks for the D.C. Circuit.

In recent years, the D.C. Circuit has enjoyed a remarkably high Supreme Court affirmance rate.⁴⁶ During the 1970s and 1980s, however, the circuit was regularly the “most frequently reversed” court of appeals.⁴⁷ Moreover, the circuit’s high absolute number of reversals was not merely a byproduct of a high number of grants of certiorari.⁴⁸ The D.C. Circuit’s rate of affirmance was markedly low. From Octo-

⁴² Transcript of Oral Argument at 41, *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (No. 04-1350).

⁴³ Transcript of Oral Argument at 18, *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862 (2009) (No. 07-1437) (reporting Chief Justice Roberts’s remark that, “other than the Federal Circuit,” lower courts “can’t say, ‘I don’t like the Supreme Court rule so I’m not going to apply it.’”).

⁴⁴ *Holmes Group, Inc. v. Vornado Air Circulation Sys. Inc.*, 535 U.S. 826, 839 (2002) (Stevens, J., concurring in part and in the judgment).

⁴⁵ *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 138 (2006) (Breyer, J., dissenting).

⁴⁶ Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833, 838 (2009) (“[W]hile all other federal appellate court judges can expect the U.S. Supreme Court to reverse their decisions in about two out of every three disputes, those sitting on the D.C. Circuit actually enjoy a higher probability of being affirmed than reversed.”).

⁴⁷ Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 779 (2002).

⁴⁸ During the October 1980 through October 1983 Terms, the Supreme Court “granted 6.6% of the certiorari petitions from circuit courts other than the D.C. Circuit” and 18.7% of the petitions from the D.C. Circuit. Roy W. McLeese III, Note, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048, 1049 (1984).

ber 1971 through September 1987, the circuit's affirmance rate in cases in which the Supreme Court heard oral argument was about 21%, just over half the affirmance rate of the other regional circuits.⁴⁹ From the Supreme Court's October 1980 Term through its October 1983 Term, the D.C. Circuit had an even lower affirmance rate of 10.4% in granted cases that were not resolved summarily.⁵⁰ This affirmance rate barely exceeded one-fourth the 39.2% affirmance rate of the other regional circuits.⁵¹

The D.C. Circuit's administrative law jurisprudence bore a large share of the blame. From July 1, 1971, to June 30, 1987, appeals from agency actions accounted for nearly half of all Supreme Court grants of certiorari to the D.C. Circuit.⁵² More specifically, during the October 1980 through October 1983 Terms, administrative appeals accounted for over half of the grants that were not summarily disposed of.⁵³ The D.C. Circuit's affirmance rate in these cases was 9.6%.⁵⁴

⁴⁹ See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 712–14 tbl.7-27 (4th ed. 2007) (listing term-by-term data for the regional circuits). Sixteen-year affirmance rates have been derived from Epstein et al.'s data by (1) using the reported term-by-term circuit affirmance rates to calculate, to the nearest tenth of an integer, term-by-term affirmances for each circuit; and (2) dividing the total number of calculated affirmances for the relevant circuit or circuits by the total number of decisions. Fractional affirmance numbers presumably result when Supreme Court decisions include split judgments such as “affirmed in part, reversed in part, and vacated in part.” McLeese, *supra* note 48, at 1050 n.8 (describing a convention for assigning fractional affirmance values to split judgments).

⁵⁰ McLeese, *supra* note 48, at 1050.

⁵¹ *Id.*

⁵² About 46% of the Supreme Court's 269 grants of certiorari to the D.C. Circuit from July 1, 1971, through June 30, 1987, involved “[a]dministrative appeals.” 1972 REPORT, at 267 tbl.B-2 (providing data on certiorari petitions and grants); see also 1987 REPORT, at 146 tbl.B-2 (same); 1986 REPORT, at 146 tbl.B-2 (same); 1985 REPORT, at 252 tbl.B-2 (same); 1984 REPORT, at 236 tbl.B-2 (same); 1983 REPORT, at 228 tbl.B-2 (same); 1982 REPORT, at 198 tbl.B-2 (same); 1981 REPORT, at 350 tbl.B-2 (same); 1980 REPORT, at 357 tbl.B-2 (same); 1979 REPORT, at 347 tbl.B-2 (same); 1978 REPORT, at 296 tbl.B-2 (same); 1977 REPORT, at 303 tbl.B-2 (same); 1976 REPORT, at 278 tbl.B-2 (same); 1975 REPORT, at 327 tbl.B-2 (same); 1974 REPORT, at 367 tbl.B-2 (same); 1973 REPORT, at 304 tbl.B-2 (same). In a given year, the number of administrative appeals might be smaller than the number of administrative law cases on appeal because administrative law cases can originate in the district courts, rather than through application or petition to an agency. See, e.g., 1980 REPORT, at A-4 tbl.B-2 (“Administrative Appeals include applications for enforcement or petitions for review of orders of an Administrative Board or Agency.”).

⁵³ I algebraically derived a figure of twenty-six administrative appeals out of a total of forty-eight decided cases from McLeese's reporting on (1) the forty-eight “D.C. Circuit certiorari cases decided by the Supreme Court,” McLeese, *supra* note 48, at 1054; (2) the thirty-nine of these cases that were “administrative or United States civil cases,” *id.* at 1061 n.77; (3) the “4.5 affirmances” in these administrative or civil cases, *id.*; (4) the affirmance rate for granted administrative petitions, *id.* at 1065; and (5) the affirmance rate for granted United States civil petitions, *id.*

⁵⁴ *Id.* at 1065 (reporting affirmance rates).

When one combines such numbers with the language of Supreme Court decisions such as *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁵⁵ an inference that the Supreme Court had prioritized review of the D.C. Circuit's administrative law decisions becomes inescapable. *Vermont Yankee* featured "one of the harshest tongue lashings in [the D.C. Circuit's] history."⁵⁶ Although the identity of the opinion's author, then-Associate Justice Rehnquist, might partly account for the severity, the Court's unanimity in joining the opinion indicates that, in this instance, Justice Rehnquist did not speak as a "Lone Ranger."⁵⁷ Because *Vermont Yankee* is emblematic of an era of highly critical Supreme Court review, it is worth discussing at some length.

Vermont Yankee involved two consolidated cases that derived from the D.C. Circuit's decisions in *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission*⁵⁸ ("NRDC") and *Aeschliman v. U.S. Nuclear Regulatory Commission*.⁵⁹ In *NRDC*, the D.C. Circuit vacated a Commission rule that had provided a basis for treating the environmental impacts of reprocessing and disposing of nuclear fuel as essentially negligible.⁶⁰ In *Aeschliman*, the D.C. Circuit additionally held (1) that an environmental-impact statement for a nuclear power plant was "defective for failure to examine energy conservation as an alternative" and (2) that an expert report on reactor safety required further explanation.⁶¹ In each case, the D.C. Circuit's opinion was written by Chief Judge Bazelon,⁶² a judge whom a

⁵⁵ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

⁵⁶ MORRIS, *supra* note 4, at 302; *see also* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 369 (describing *Vermont Yankee* as including "direct criticisms . . . extraordinary in their sharpness").

⁵⁷ R. Ted Cruz, In Memoriam: *William H. Rehnquist*, 119 HARV. L. REV. 10, 10–11 (2005) (recalling that, through frequent dissents in his early years on the Supreme Court, "Justice Rehnquist earned his 'Lone Ranger' nickname").

⁵⁸ *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

⁵⁹ *Aeschliman v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom.* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). The Atomic Energy Commission ("AEC") made the initial decisions involved in *NRDC* and *Aeschliman*, but was succeeded in relevant part by the Nuclear Regulatory Commission ("NRC"). *See Vermont Yankee*, 435 U.S. at 526 n.2 (reporting transfer of the AEC's "licensing and regulatory functions" to the NRC).

⁶⁰ *Vermont Yankee*, 435 U.S. at 530–35 (describing proceedings relating to the rule).

⁶¹ *Id.* at 536–37; *see also Aeschliman*, 547 F.2d at 630 (describing the Advisory Committee on Reactor Safeguards as "a group of outside experts").

⁶² *NRDC*, 547 F.2d at 637 (naming the opinion author); *Aeschliman*, 547 F.2d at 624 (same).

number of conservatives, including former D.C. Circuit judge and then–Chief Justice Warren Burger, had long viewed as “so soft-hearted he should be a social worker, not a jurist.”⁶³

The Supreme Court’s opinion initially responded to *NRDC* and *Aeschliman* with exasperated puzzlement. The Court indicated that it encountered difficulty even in determining what *exactly* the D.C. Circuit’s holding in *NRDC* was.⁶⁴ Nonetheless, the Court overcame this hurdle and concluded that the circuit had held the Commission rule invalid because of inadequate rulemaking procedures.⁶⁵ In the Supreme Court’s view, this conclusion made *NRDC* an easy case. There seemed to be no question that Commission procedures had complied with statutory requirements.⁶⁶ And the Court had, by its account, already “continually repeated” in an “absolutely clear” way that, “[a]bsent constitutional constraints or extremely compelling circumstances,” an agency’s choice of procedure would stand.⁶⁷

The Supreme Court could have concluded discussion of *NRDC* here. But the Court apparently believed that the D.C. Circuit—or, at least, Chief Judge Bazelon—needed more instruction. The Court described three further, “compelling reasons” to reject the D.C. Circuit’s approach to judicial review⁶⁸:

- First, the D.C. Circuit’s approach would make judicial review “totally unpredictable” and, by encouraging agencies to “adopt full adjudicatory procedures in every instance,” would “totally disrupt [a] statutory scheme” that had provided for informal rulemaking with relatively minimal procedure.⁶⁹
- Second, in evaluating agency procedures, the D.C. Circuit had engaged in “Monday morning quarterbacking” by relying on a post hoc record rather than “the information available to the agency” when it chose its rulemaking procedures.⁷⁰
- Third, the D.C. Circuit had “fundamentally misconceive[d] the nature of the standard for judicial review.”⁷¹ The circuit’s “unwarranted judicial examination” of

⁶³ GOULDEN, *supra* note 18, at 253.

⁶⁴ *Vermont Yankee*, 435 U.S. at 539 (characterizing this determination as “no mean feat”).

⁶⁵ *Id.* at 540–41.

⁶⁶ *Id.* at 548.

⁶⁷ *Id.* at 543–44 (internal quotation marks omitted).

⁶⁸ *Id.* at 546.

⁶⁹ *Id.* at 546–47.

⁷⁰ *Id.* at 547.

⁷¹ *Id.*

agency procedures could “do nothing but seriously interfere with that process prescribed by Congress.”⁷²

The Court followed this discussion with a paragraph emphasizing the Court’s belief that, in calling for additional procedure, the D.C. Circuit had acted without any legal justification:

In short, nothing in the [Administrative Procedure Act (“APA”)], [the National Environmental Policy Act], the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate [of the agency] permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed)⁷³

Remarkably, the Court escalated its hyperbole in reversing the D.C. Circuit’s additional holdings in *Aeschliman*. In reversing the D.C. Circuit’s conclusion that the Commission had acted arbitrarily and capriciously by relying on a deficient environmental-impact statement,⁷⁴ the Court described the circuit as having “basically misconceive[d] not only the scope of the agency’s statutory responsibility, but also the nature of the administrative process, the thrust of the agency’s decision, and the type of issues . . . intervenors were trying to raise.”⁷⁵ The circuit had reasoned contrary to “[c]ommon sense,”⁷⁶ had “seriously mischaracterized” “the nature of the [agency’s] test,”⁷⁷ and had “forgotten [the Court’s prior] injunction” of deference toward agency determinations.⁷⁸ In this context, the circuit’s finding of arbitrary and capricious conduct “deprive[d] those words of any meaning.”⁷⁹

But there was worse to come. The Court found it difficult to accept even the actuality of the D.C. Circuit’s holding on the *Aeschliman* expert report. It was “simply inconceivable that a reviewing court should find it necessary or permissible to order” the report returned for elaboration.⁸⁰ This was “judicial intervention run riot.”⁸¹

⁷² *Id.* at 548.

⁷³ *Id.*

⁷⁴ *Id.* at 549–55.

⁷⁵ *Id.* at 550.

⁷⁶ *Id.* at 551.

⁷⁷ *Id.* at 553–54.

⁷⁸ *Id.* at 555.

⁷⁹ *Id.* at 554.

⁸⁰ *Id.* at 557.

⁸¹ *Id.* (internal quotation marks omitted).

There was “absolutely nothing in the relevant statutes to justify” such an order.⁸² The circuit’s decision “border[ed] on the Kafkaesque.”⁸³

The sharpness of such language makes *Vermont Yankee* exceptional. But *Vermont Yankee* was far from the only administrative law decision in which the Supreme Court expressed frustration with the D.C. Circuit. In 1983, the Supreme Court unanimously reversed the circuit’s invalidation of the Commission rule that succeeded the one at issue in *Vermont Yankee*.⁸⁴ In an opinion by Justice O’Connor, the Court chided the circuit, saying that, as indicated in the Court’s “earlier encounter with these very proceedings, ‘[a]dministrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute . . . , not simply because the court is unhappy with the result reached.’”⁸⁵ In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁸⁶ a unanimous Court, per Justice Stevens, explained that “well-settled principles” made “clear that the Court of Appeals misconceived the nature of its role.”⁸⁷ In *Heckler v. Chaney*,⁸⁸ Justice Rehnquist, writing for all but one Justice,⁸⁹ characterized the D.C. Circuit as having “broke[n] with tradition, case law, and sound reasoning”⁹⁰—in short, as having acted extrajudicially in holding that the Food and Drug Administration had abused its discretion by failing to initiate enforcement actions against the use of certain drugs in capital punishment.⁹¹

What had become of the D.C. Circuit’s role as “a national court of administrative law”?⁹²

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 91–95 (1983) (describing the rule’s history).

⁸⁵ *Id.* at 97 (quoting *Vermont Yankee*, 435 U.S. at 558).

⁸⁶ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁸⁷ *Id.* at 845; see also *BANKS*, *supra* note 6, at 78 (“Like a parent scolding a child . . . , Justice Stevens reminded the D.C. Circuit of its apolitical responsibilities”); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 325 (“The Court used strong language in rebuking the D.C. Circuit . . .”).

⁸⁸ *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁸⁹ Justice Marshall disagreed with the Court’s “‘presumption of unreviewability,’” but agreed that the case was “easy,” *id.* at 840 (Marshall, J., concurring in the judgment), and that there was no evidence of an abuse of “enforcement discretion,” *id.* at 840–41.

⁹⁰ *Id.* at 831.

⁹¹ *Id.* at 837–38.

⁹² *MORRIS*, *supra* note 4, at 279.

IV. *Lessons from the D.C. Circuit's Experience*

In reality, the D.C. Circuit remained a leading court of administrative law throughout. Consequently, a first lesson from the D.C. Circuit's experience is that, even in the face of a barrage of Supreme Court reversals far beyond anything that the Federal Circuit has experienced, a semi-specialized circuit can retain a primary role in shaping decisional law in an area of relative expertise. A second lesson is that reversal of a semi-specialized circuit is not an unprecedented phenomenon and might even be a relatively healthy one.

A. *Distinguishing Supreme Court Scrutiny and Circuit Performance*

Followers of the Supreme Court should not be surprised at the potential for a disjunction between Supreme Court review of a semi-specialized circuit and the actual level of circuit influence or performance. A spike in Supreme Court reversals or grants of certiorari does not necessarily indicate that circuit performance is generally poor. Supreme Court Justices are apt to focus critical attention on issues that they perceive as unusually important.⁹³ Consistent with this observation, Roy McLeese found that, during the Supreme Court's October 1980 through October 1983 Terms, "the three circuit courts that commonly are thought to have the highest concentration of important cases"—the Second, Ninth, and D.C. Circuits—all had above-average grant rates.⁹⁴ Moreover, these circuits had "their highest grant rates in the areas of law that most likely contain[ed] their 'important' cases."⁹⁵ Whereas the average circuit grant rate was 6.6%, "the grant rate for Second Circuit private civil petitions was 12.5%; the grant rate for Ninth Circuit administrative petitions was 14.6%; and the grant rate for D.C. Circuit administrative petitions was 27.3%."⁹⁶

A second point is that overall circuit performance and influence might have relatively little correlation with Supreme Court characterization of circuit error as blatant or baseless. Even within the context of an individual case, Supreme Court rhetoric can be overblown. Overstatement of the strength and certainty of one's own position and

⁹³ See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 4.11, at 262 (9th ed. 2007) ("The importance of the issues involved in the case . . . is of major significance in determining whether the writ of certiorari will issue."); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 253 (1991) (indicating that importance is a primary factor in certiorari decisions); cf. Duffy, *supra* note 27, at 284 (asserting that patent law's economic importance "is surely one explanation for the [Supreme] Court's renewed interest").

⁹⁴ McLeese, *supra* note 48, at 1067.

⁹⁵ *Id.*

⁹⁶ *Id.* (footnotes omitted).

of the weaknesses of others' is a common malady of legal discourse—whether the medium is a judicial opinion, a brief, an oral argument, or a law review article.⁹⁷ In any of these fora, glorification of the logical inevitability of one's own conclusion and condemnation of the absurdity of another's can have polemical and rhetorical value. Perhaps because of this, Supreme Court justices commonly criticize one another, as well as lower-court judges, for putatively gross error.⁹⁸

Further evidence of the potentially misleading nature of the rhetoric of reversal comes from *Vermont Yankee* itself. Commentators have long lamented that *Vermont Yankee* turned out to be a kind of “paper tiger.”⁹⁹ After determining that there was no valid procedural ground for invalidating the Commission rule at issue in *NRDC*, the *Vermont Yankee* Court acknowledged that the rule might still be defective in substance, and remanded the case for further proceedings.¹⁰⁰ This remand turned out to be a harbinger of the Supreme Court's 1983 adoption of the hard-look doctrine,¹⁰¹ an aspect of administrative law jurisprudence for which the D.C. Circuit is commonly given primary credit (or blame).¹⁰²

⁹⁷ Cf. Richard J. Pierce, Jr., *The Relationship Between the District of Columbia Circuit and Its Critics*, 67 GEO. WASH. L. REV. 797, 797 (1999) (observing that “it would be easy to draw the erroneous inference that the academic critics of the D.C. Circuit consider it to be a low quality institution populated by political hacks”).

⁹⁸ Consider Justice Scalia's opinion for the Court in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002). En route to vacating a Federal Circuit judgment, the Court asserted that “[i]t would be an unprecedented feat of interpretive necromancy” to adopt a particular proposed statutory interpretation. *Id.* at 833. The Court thereby effectively ridiculed Justice Stevens's statement in a partial concurrence that “there is well-reasoned precedent supporting precisely that conclusion.” *Id.* at 835 (Stevens, J., concurring in part and concurring in the judgment). The Court did not display significantly greater generosity in responding to a concurring opinion that was written by Justice Ginsburg and joined by Justice O'Connor. According to the Court, a prior Supreme Court opinion had “rejected precisely [the] argument” on which these Justices relied. *Id.* at 832–33 n.3.

⁹⁹ Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 860 (2007); see also Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 418 (1981) (describing *Vermont Yankee* as “surprisingly limited in its holding”).

¹⁰⁰ See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978).

¹⁰¹ See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that an “agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” (internal quotation marks omitted)); see also Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 763 (2008) (describing *State Farm* as having “entrenched hard look review”).

¹⁰² See Miles & Sunstein, *supra* note 101, at 761 (describing “the federal courts of appeals, above all the United States Court of Appeals for the District of Columbia Circuit, [as having]

The hard-look doctrine provides that, in reviewing agency action to determine whether it is arbitrary or capricious,¹⁰³ a court must assess whether the agency engaged in properly “reasoned decisionmaking.”¹⁰⁴ The Supreme Court’s embrace of this doctrine was a threefold win for the D.C. Circuit. Not only did the Court adopt an approach that the D.C. Circuit had substantially developed, but the Court thereby ensured that the D.C. Circuit retained substantial power to invalidate agency action, and the circuit could do so in a fact-specific way likely to insulate the circuit’s decision from Supreme Court review.¹⁰⁵

Moreover, hard-look review is merely one example of how the D.C. Circuit of the 1970s and 1980s succeeded in shaping administrative law. Substantial judicial policing of agency procedures in informal rulemaking, another practice in which the D.C. Circuit was a leader, has endured. Given *Vermont Yankee*, circuit judges now know to be wary of requiring procedures that lack a hook in statutory language, but they have persisted in finding that even very tenuous hooks

developed the ‘hard look doctrine’”); Schiller, *supra* note 10, at 1156 (“The phrase ‘hard look review’ originated . . . in a 1970 D.C. Circuit opinion authored by Judge Harold Leventhal . . .”). *But cf.* Peter L. Strauss, *Overseers or “The Deciders”—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 821 (2008) (crediting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), with “plant[ing] the seeds that became ‘hard look’”). Hard-look review has provoked intense academic criticism. *See* Beermann & Lawson, *supra* note 99, at 881 (“Criticisms of this relatively intrusive form of substantive judicial review abound.”).

¹⁰³ Although the conjunctive phrase “arbitrary and capricious” is commonly used, the disjunctive phrase “arbitrary or capricious” seems more faithful to the APA’s text. *See* 5 U.S.C. § 706(2) (2006) (providing for court invalidation of actions judged “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

¹⁰⁴ HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 167 (2007) (“[T]he touchstone of arbitrary and capricious review is reasoned decisionmaking.”); *see also* Mark Seidenfeld & Janna Satz Nugent, “*The Friendship of the People*”: *Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 311 (2005) (“Under hard look review, a court determines whether an agency considered all relevant factors and whether an agency developed a rational connection between the evidence in the administrative record and an agency decision” (footnote omitted)).

¹⁰⁵ *See* BANKS, *supra* note 6, at 49 (remarking that “hard-look review . . . enabled the D.C. Circuit to become progressively a ‘mini Supreme Court’”); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1131 (1987) (observing that hard-look review typically produces decisions “limited to the particular administrative proceeding” and thus relatively unlikely to trigger Supreme Court merits review); *cf.* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1770 (1997) (suggesting “that it may be undesirable for the Supreme Court essentially to have abdicated the review of ‘hard look’ cases”).

suffice.¹⁰⁶ Likewise, much survives from the D.C. Circuit's work in other areas: (1) the development of relatively broad understandings of standing and rights to intervene, (2) the interpretation of statutory requirements for environmental-impact statements, and (3) the fashioning of standards to govern review of alleged conflicts of interest or inappropriate contacts.¹⁰⁷ Indeed, even the modern understanding of the Supreme Court's 1984 decision in *Chevron* might be attributable more to the D.C. Circuit than to the Supreme Court, which seems to have originally viewed the case as involving only a rather uneventful application of preexisting law.¹⁰⁸

The D.C. Circuit's experience during a period of tumult in administrative law thus teaches that a relatively high level of Supreme Court scrutiny does not necessarily mean that the Court has effectively supplanted a semi-specialized circuit in an area of circuit expertise. The Supreme Court averaged nearly thirteen substantial merits decisions on agency actions in each Term from October 1970 through September 1990.¹⁰⁹ Nonetheless, in the language of former-Professor

¹⁰⁶ Beermann & Lawson, *supra* note 99, at 893 (observing continued conversion of the APA's "meager requirements for notices of proposed rulemaking . . . into an elaborate set of legal mandates"); Metzger, *supra* note 8, at 162 ("Vermont Yankee has not called into question lower court decisions adopting expansive accounts of . . . terse and minimal requirements . . .").

¹⁰⁷ See MORRIS, *supra* note 4, at 294 ("If not all of [the D.C. Circuit's] work survived Supreme Court review, much did . . ."); cf. Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1041 (1997) (observing that "most of the innovations [in administrative law jurisprudence] spawned during the 1967–1983 period have endured").

¹⁰⁸ Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES, *supra* note 8, at 398, 422 (arguing that the D.C. Circuit might have played a crucial role in "establishing *Chevron* as a landmark").

¹⁰⁹ According to the *Harvard Law Review's* annual Supreme Court statistics, the Supreme Court decided on the merits 259 cases involving review of agency action from the October 1970 Term through the October 1989 Term. See *The Supreme Court, 1989 Term—IV. The Statistics*, 104 HARV. L. REV. 359, 364 tbl.III (1990) (reporting sixteen merits decisions with "Full Opinions" involving "Review of Administrative Actions"); *The Supreme Court, 1988 Term—IV. The Statistics*, 103 HARV. L. REV. 394, 399 tbl.III (1989) (reporting three); *The Supreme Court, 1987 Term—IV. The Statistics*, 102 HARV. L. REV. 350, 355 tbl.III (1988) (reporting six); *The Supreme Court, 1986 Term—IV. The Statistics*, 101 HARV. L. REV. 362, 367 tbl.III (1987) (reporting eight); *The Supreme Court, 1985 Term—IV. The Statistics*, 100 HARV. L. REV. 304, 309 tbl.III (1986) (reporting nineteen); *The Supreme Court, 1984 Term—IV. The Statistics*, 99 HARV. L. REV. 322, 327 tbl.III (1985) (reporting eleven); *The Supreme Court, 1983 Term—IV. The Statistics*, 98 HARV. L. REV. 307, 312 tbl.III (1984) (reporting nineteen); *The Supreme Court, 1982 Term—IV. The Statistics*, 97 HARV. L. REV. 295, 300 tbl.III (1983) (reporting nineteen); *The Supreme Court, 1981 Term—IV. The Statistics*, 96 HARV. L. REV. 304, 309 tbl.III (1982) (reporting eight); *The Supreme Court, 1980 Term—IV. The Statistics*, 95 HARV. L. REV. 339, 343 tbl.III (1981) (reporting thirteen); *The Supreme Court, 1979 Term—III. The Statistics*, 94 HARV. L. REV. 289, 293 tbl.III (1980) (reporting eleven); *The Supreme Court, 1978 Term—IV. The Statistics*, 93 HARV. L. REV. 275, 279 tbl.III (1979) (reporting fourteen); *The Supreme Court, 1977 Term—IV. The Statistics*, 92 HARV. L. REV. 327, 333 tbl.III (1978) (reporting fifteen); *The Supreme Court, 1976*

Antonin Scalia, the Court remained largely an “absentee landlord” in the area of administrative law while the D.C. Circuit continued as “resident manager.”¹¹⁰

A comparable investment by the Supreme Court in the less capacious realm of patent law might well have greater relative effect. But despite ample opportunity to conduct merits review of a far greater number of patent cases,¹¹¹ the Court has shown no inclination to make such an investment. Perhaps tellingly, while controversy over the Federal Circuit’s claim-construction jurisprudence has swirled for more than a decade,¹¹² the Court has steadfastly declined to revisit this area since a 1996 decision declaring that that construction is wholly a question for judges.¹¹³ Just as the Court’s 1983 embrace of hard-look re-

Term—IV. The Statistics, 91 HARV. L. REV. 295, 299 tbl.III (1977) (reporting ten); *The Supreme Court, 1975 Term—V. The Statistics*, 90 HARV. L. REV. 276, 280 tbl.III (1976) (reporting twenty-two); *The Supreme Court, 1974 Term—IV. The Statistics*, 89 HARV. L. REV. 275, 279 tbl.III (1975) (reporting fourteen); *The Supreme Court, 1973 Term—IV. The Statistics*, 88 HARV. L. REV. 274, 278 tbl.III (1974) (reporting ten); *The Supreme Court, 1972 Term—IV. The Statistics*, 87 HARV. L. REV. 303, 307 tbl.III (1973) (reporting thirteen); *The Supreme Court, 1971 Term—VI. The Statistics*, 86 HARV. L. REV. 297, 304 tbl.III (1972) (reporting sixteen); *The Supreme Court, 1970 Term—V. The Statistics*, 85 HARV. L. REV. 344, 347 tbl.II (1971) (reporting twelve).

¹¹⁰ Scalia, *supra* note 56, at 371 (describing roles played by the Supreme Court and the D.C. Circuit).

¹¹¹ My review of petitions for certiorari to the Federal Circuit indicates that, from September 2007 through September 2008, for example, the Supreme Court granted only one of more than forty-five such petitions that raised a question of patent law. The resulting grant rate of just over two percent was lower than the three to four percent typical for paid petitions in recent years. See EPSTEIN ET AL., *supra* note 49, at 75 tbl.2-6 (listing grant rates through the October 2004 Term).

¹¹² See John M. Golden, *Construing Patent Claims According to Their “Interpretive Community”*: A Call for an Attorney-Plus-Artisan Perspective, 21 HARV. J.L. & TECH. 321, 324–27 (2008) (discussing commentary and intracircuit divisions relating to claim construction).

¹¹³ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) (“We hold that the construction of a patent . . . is exclusively within the province of the court.”). The Court has not lacked opportunities to revisit claim construction. From September 2007 through September 2008 alone, the Court denied at least nine petitions for certiorari that raised a claim-construction question. See *Petition for a Writ of Certiorari, at i, Stryker Corp. v. Trimed, Inc.*, 129 S. Ct. 144 (2008) (No. 07-1537) (questioning whether a claim limitation was outside 35 U.S.C. § 112, ¶ 6); *Petition for a Writ of Certiorari, at i, Ormco Corp. v. Align Tech., Inc.*, 128 S. Ct. 2430 (2008) (No. 07-1070) (questioning an assessment of patent scope); *Petition for a Writ of Certiorari, at i, CIAS Inc. v. Alliance Gaming Corp.*, 128 S. Ct. 2080 (2008) (No. 07-964) (questioning “use of patent prosecution history statements in claim construction”); *Petition for a Writ of Certiorari, at i, Maurice Mitchell Innovations, L.P. v. Intel Corp.*, 128 S. Ct. 1709 (2008) (No. 07-965) (questioning claim construction performed “without reference to record evidence”); *Petition for a Writ of Certiorari, at ii, All Computers, Inc. v. Intel Corp.*, 128 S. Ct. 1260 (2008) (No. 07-815) (questioning claim construction performed “without relying on expert testimony”); *Petition for a Writ of Certiorari, at i, iii, AFG Indus., Inc. v. Cardinal IG Co.*, 128 S. Ct. 1072 (2008) (No. 07-493) (questioning the Federal Circuit’s rejection of its prior claim construction); *Petition for a Writ of Certiorari, at i, Biomedino, L.L.C. v. Waters Tech. Corp.*, 128 S. Ct. 653 (2007) (No. 07-

view has left the D.C. Circuit with substantial responsibility for ultimate decisions on agency action, the Court's hands-off approach to claim construction might signal a fundamental lack of interest in competing with the depth and comprehensiveness of the Federal Circuit's oversight of questions of patent law.

B. The Inevitability and Potential Value of Supreme Court Scrutiny

A second lesson from the D.C. Circuit's experience is that critical scrutiny of a semi-specialized circuit's work is not unprecedented and might be inescapable. A semi-specialized circuit charged with resolving difficult legal issues is unlikely to blaze a path with which a majority of Supreme Court Justices always agrees. Different sets of judges are unlikely always to concur on how to resolve hard legal questions. This is particularly true for the Supreme Court's certiorari jurisdiction, which allows the Court to wait to review others' jurisprudential choices with the benefit of both hindsight and fresh eyes unlikely to be bound by recent, on-point precedent.¹¹⁴ Moreover, the fact that an issue lies within a realm of relative circuit expertise might do little to deter review when the Supreme Court perceives a large enough difference, or potential difference, between the courts' views. Such a large difference might permit the issue to be plausibly packaged as implicating questions of institutional power for which the Supreme Court understands itself to have special responsibility.¹¹⁵

Other circumstances can increase the likelihood of a disagreement on which the Supreme Court acts. Such disagreement might be especially likely when there is a "generation gap" between the courts that correlates with ideological differences.¹¹⁶ This seems to have been the case for disagreements between the Supreme Court and the D.C. Circuit in the late 1970s and early 1980s. In the early to mid-

363) (questioning construction of a specific term); *Petition for a Writ of Certiorari*, at i, *Stryker Corp. v. Acumed LLC*, 128 S. Ct. 615 (2007) (No. 07-304) (questioning Federal Circuit vacillation between "irreconcilable claim construction methodologies"); *Petition for a Writ of Certiorari*, at i, *Hakim v. Cannon Avent Group, PLC*, 128 S. Ct. 391 (2007) (No. 07-150) (questioning aspects of the Federal Circuit's claim-construction jurisprudence).

¹¹⁴ *Golden*, *supra* note 2, at 704 (discussing the Court's capacity to review issues with hindsight and fresh sight).

¹¹⁵ See Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 418 ("It may turn out to be relatively easy for the Supreme Court to recast many substantive patent-law disputes as matters of the allocation of power.").

¹¹⁶ See Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 182 (2006) (concluding that empirical evidence "suggests that reversals are governed primarily by ideological disagreement between the Supreme Court and the courts of appeals").

1970s, the Supreme Court obtained four new Justices appointed by Republican Presidents.¹¹⁷ Meanwhile, the D.C. Circuit's membership remained unchanged from 1970 until 1979, when it gained two additional judges appointed by a Democratic President.¹¹⁸ Turnover in both courts during the Republican administrations of the 1980s¹¹⁹ likely reduced ideological divides and thus might explain the ending of the D.C. Circuit's time of high reversal.

Party affiliations aside, the likelihood of disagreement and the possibility of value-adding Supreme Court involvement might be particularly high if a semi-specialized circuit suffers from ailments commonly associated with specialization, such as "interest-group capture, bias in favor of an overly muscular view of the laws under its special care, and an esotericism or tunnel vision that disconnects the circuit from broader social or legal concerns."¹²⁰ I have previously questioned the extent to which apparent failings of the Federal Circuit's patent jurisprudence should be attributed to semi-specialization.¹²¹ But others have disagreed,¹²² and, if they are correct, recent Supreme Court scrutiny might be understood as a response to semi-specialization's ills.

Similarly, the Supreme Court's rebuke of the D.C. Circuit in *Vermont Yankee* might be characterized as a response to a sort of overzealousness often associated with specialization. A 1977 history of the D.C. Circuit acknowledged the environmental movement's loss of vitality in light of "recession, gasoline shortages and the threat of dependence on foreign oil, electricity brownouts, and predictions of general energy shortages."¹²³ At the same time, the history reported,

117 PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1558 (3d ed. 1992) (showing Presidents and years of Justices' appointments).

118 See MORRIS, *supra* note 4, at 280 (observing the static nature of the D.C. Circuit's "regular membership" from 1970 to 1979).

119 See BREST & LEVINSON, *supra* note 117, at 1558 (showing that three appointees of President Reagan joined the Supreme Court during the 1980s); MORRIS, *supra* note 4, at 318 (noting that "[b]etween 1979 and 1987 the [D.C. Circuit's] membership . . . turned over almost completely," with Reagan appointees ultimately forming a majority).

120 Golden, *supra* note 2, at 659 (footnote omitted).

121 *Id.* at 660 (finding "little proof that the Federal Circuit exhibits dire symptoms of specialization").

122 See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 335 (2003) (finding the Federal Circuit to be "pro-patent"); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1110 (2003) (suggesting that the Federal Circuit's semi-specialization has helped produce a "narrowly formalist" jurisprudence).

123 U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, HISTORY OF THE UNITED STATES

the D.C. Circuit remained “straightforward and unrelenting” in championing “environmental values.”¹²⁴ The history wondered whether Congress would act to force a change of course.¹²⁵ As matters turned out, the Supreme Court beat Congress to the punch: *Vermont Yankee* issued in 1978.

Conclusion and Caution

In sum, the Supreme Court’s current critical scrutiny of the Federal Circuit’s patent jurisprudence is not unprecedented for a semi-specialized circuit. Further, the D.C. Circuit’s experience with Supreme Court review suggests that even substantial Supreme Court involvement with substantive patent law does not require that the Federal Circuit lose its role as the principal day-to-day shaper of United States’ patent jurisprudence.

A cautionary note regarding the potential staying power of such Supreme Court involvement is nonetheless appropriate. Factors in cessation of the D.C. Circuit’s time of high reversal appear to have included: (1) eventual regularization of agency and judicial approaches to informal rulemaking;¹²⁶ and (2) mitigation of intercourt differences through turnover in both courts, including the appointment of four D.C. Circuit judges to the Supreme Court.¹²⁷ Unlike the D.C. Circuit, the Federal Circuit has not established itself as a substantial feeder of judges—or even clerks—to the Supreme Court. Further, although patent law is constantly pressured to adapt to technological and economic developments, it lacks a “*Chevron* out” for adaptation through agency action because the United States Patent and Trademark Office lacks substantive rulemaking power.¹²⁸ Consequently, absent congressional action, pressure for adaptation falls on

COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE COUNTRY’S BICENTENNIAL YEAR 92 (1977).

¹²⁴ *Id.* at 93.

¹²⁵ *Id.* at 95 (suggesting the possibility of a congressional backlash).

¹²⁶ *Cf.* Strauss, *supra* note 105, at 1121 (arguing that *Chevron* “can be seen as a device for managing the courts of appeals”).

¹²⁷ Recent empirical work indicates that Supreme Court Justices possess “a clear predisposition . . . to rule in favor of” their prior courts, with one result being “a collective presumption in favor of decisions handed down by the D.C. Circuit.” Epstein et al., *supra* note 46, at 838. On the other hand, elevation of a circuit judge might cut against the circuit’s jurisprudence if the elevated judge was commonly at odds with one or more circuit colleagues. *Cf.* BANKS, *supra* note 6, at 46 (observing that, before D.C. Circuit Judge Burger joined the Supreme Court as its Chief Justice, he was D.C. Circuit “Judge Bazelon’s nemesis”); MORRIS, *supra* note 4, at 203 (describing a thirty-year “duel between Bazelon and Burger”).

¹²⁸ Golden, *supra* note 2, at 665.

the Federal Circuit's jurisprudence. Moreover, the expected centrality of innovation to future national welfare suggests that Supreme Court Justices will regularly think it worthwhile to review the Federal Circuit's response to that pressure. Thus, a true intercourt détente like that of the Federal Circuit's early years might be elusive. In the meantime, we can hope that the Supreme Court combines justified engagement with judicious restraint.