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## Article

### Nonacquiescence by Federal Administrative Agencies

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## INTRODUCTION

The selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals—a practice commonly termed agency nonacquiescence—is not new in American law. Over the past sixty years, many agencies have insisted, in varying degrees, on the authority to pursue their policies, despite conflicting court decisions, until the Supreme Court is prepared to issue a nationally binding resolution.<sup>1</sup> For example, the National Labor Relations Board (NLRB) asserted this prerogative as early as the 1940's,<sup>2</sup> and has invoked it intermittently since then.<sup>3</sup> Similarly, since the 1920's, the Internal Revenue Service (IRS) has periodically engaged in nonacquiescence.<sup>4</sup> These practices were sufficiently pervasive to warrant extended unfavorable comment in the 1975 report of the Hruska Commission on Revision of the Federal Court Appellate System.<sup>5</sup> Nonetheless, despite occasional judicial criticism,<sup>6</sup> nonacquiescence persisted without either legitimation or interdiction by Congress or the Supreme Court. The overall response of the legal system was one of tolerance mixed with disquiet.

In the late 1970's, however, the courts of appeals began to express the view that the practice borders on lawlessness and should not be tolerated.<sup>7</sup> The criticism of the Social Security Administration's (SSA's) aggressive nonacquiescence during the first half of the Reagan Administration was particularly scathing.<sup>8</sup> In an effort to reduce the number of recipients of

1. Agencies have accepted, of course, the authority of the lower federal courts to enter rulings that are binding resolutions of the particular dispute between the parties before the court. What is at stake in the nonacquiescence context is the effect such adverse decisions have on the agency's subsequent internal proceedings in other cases.

2. See *Acme Indus. Police*, 58 N.L.R.B. 1342, 1344-45 (1944).

3. See *infra* text accompanying notes 147-52.

4. See, e.g., Carter, *The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879, 881-83 (1986); Dwan, *Administrative Review of Judicial Decisions: Treasury Practice*, 46 COLUM. L. REV. 581, 599 (1946). For a discussion of nonacquiescence by the IRS, see *infra* text accompanying notes 175-85.

5. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 349-61, app. B. (1975) [hereinafter Hruska Commission Report].

6. See, e.g., *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 532 (7th Cir. 1953), *enforcing* 99 N.L.R.B. 1448 (1952), *cert. denied*, 346 U.S. 909 (1953).

7. See, e.g., *Borton, Inc. v. OSHRC*, 734 F.2d 508, 510 (10th Cir. 1984); *Yellow Taxi of Minn. v. NLRB*, 721 F.2d 366, 382-83 (D.C. Cir. 1983); *ITT World Communications v. FCC*, 635 F.2d 32, 43 (2d Cir. 1980); *Ithaca College v. NLRB*, 623 F.2d 224, 227-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979); *Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462, 465 (3d Cir. 1977) (Weis, J., concurring); *May Dep't Stores v. Williamson*, 549 F.2d 1147, 1149-50 (8th Cir. 1977) (Lay, J., concurring).

8. The judicial reaction is summarized *infra* text accompanying notes 97-126. For critical commentary, see Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 *HAMLINE L. REV.* 1, 9-10 (1984); Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 *TUL. L. REV.* 991, 1002 n.32 (1987); Williams, *The Social Security Administration's Policy of Non-Acquiescence*, 12 *N. KY. L. REV.* 253 (1985); Note, *Social Security Nonacquiescence in Crisis: Non-Acquiescence and Social Insecurity*, 52 *BROOKLYN L. REV.* 89 (1986); Note, *Federal Agency Nonacquiescence: Defining and Enforcing Constitutional Limitations on Bad Faith Agency Adjudication*, 38 *ME. L. REV.* 185 (1986); Lewis, *A Profound Contempt*, *N.Y. Times*, May 21, 1984, at A17, col. 5.

Social Security disability benefits in the face of circuit court rulings requiring proof of a change in medical condition before benefits could be terminated, SSA directed its personnel to follow agency policy and disregard contrary directions of the court of appeals.<sup>9</sup> The result was a series of agency-court conflicts that culminated in the Ninth Circuit's entry of a circuit-wide injunction against continued nonacquiescence in the *Lopez v. Heckler*<sup>10</sup> litigation and in Congress's serious consideration of legislation to bar SSA's nonacquiescence practice.<sup>11</sup>

The SSA practice achieved particular notoriety because each of SSA's decisions is normally reviewed, on appeal, in a single identifiable court of appeals—the circuit in which the claimant resides.<sup>12</sup> From the perspective of the reviewing court, SSA's nonacquiescence appears to embody a claim that the agency is entirely free to disregard binding law in the circuit. In contrast, agencies such as the NLRB administer statutes with considerably broader venue provisions;<sup>13</sup> thus, a particular order may be reviewed by a number of courts of appeals. While nonacquiescence by these agencies has been criticized, the indictment is necessarily tempered by the fact that the venue provisions make it difficult for any particular court of appeals to insist on exclusive superintendence over the particular agency order.

The status of agency nonacquiescence in our legal system remains uncertain. Despite considerable writings on the subject, there has been no systematic evaluation of the practice's costs and benefits.<sup>14</sup> Neither has

The agency's nonacquiescence practice was defended, however, by Deputy Solicitor General Paul Bator and Deputy Assistant Attorney Carolyn Kuhl, see Remarks by Deputy Solicitor General Bator, American Law Institute Luncheon (May 18, 1984) (on file with authors); Kuhl, *The Social Security Administration's Nonacquiescence Policy*, 4 DET. C.L. REV. 913 (1984), as well as by some commentators, see Comment, *Social Security Continuing Disability Reviews and the Practice of Nonacquiescence*, 16 CUMB. L. REV. 111 (1985); Note, *Nonacquiescence: Health and Human Services' Refusal to Follow Federal Court Precedent*, 63 WASH. U.L.Q. 737 (1985).

9. See *infra* text accompanying notes 97–113.

10. 725 F.2d 1489 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984).

11. See *infra* text accompanying notes 127–37.

12. See 42 U.S.C. § 405(g) (1982).

13. See, e.g., 29 U.S.C. § 160(e), (f) (1982).

14. Much of the literature is specific to a particular agency. See, e.g., sources cited *supra* note 8 (SSA); *infra* notes 164 (NLRB) & 181 (IRS). The most extensive general treatment of the effects of nonacquiescence is Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 490–99 (1986). Professor Maranville concludes:

The question whether nonacquiescence is legitimate or desirable can be resolved at a theoretical level only by reference to a prior choice between conflicting values. The decisionmaker must choose between the perspective of the agency and that of the courts, between rule of law values and bureaucratic values. That value conflict pervades administrative law. Because the conflict has not been resolved in other contexts, it is unlikely to be resolved generally or permanently in the context of nonacquiescence.

39 VAND. L. REV. at 528–29. Rather than an open-ended choice between conflicting values, the proper treatment of nonacquiescence flows, we believe, from an understanding of the respective functions of agencies and courts in our administrative lawmaking system. For useful student commentary, see Note, *"Respectful Disagreement": Nonacquiescence by Federal Administrative Agencies in United States Court of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463 (1985); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 602–04 (1985); Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in Pursuit of Litigant Equality*, 99 HARV. L. REV. 847, 857–59 (1986).

there been a serious proposal for reducing, in a manner consistent with the respective institutional responsibilities of an agency and its reviewing court, the debilitating tensions between these two institutions that nonacquiescence engenders. Our study principally addresses these issues.

Section I is primarily definitional. First, it establishes that the Supreme Court's refusal to apply nonmutual collateral estoppel against the federal government, in *United States v. Mendoza*,<sup>15</sup> does not, by itself, resolve the legitimacy of nonacquiescence. Section I also categorizes the different types of administrative action that might be included under the rubric of nonacquiescence: (1) intercircuit nonacquiescence, in which the agency refuses to follow the case law of a court of appeals other than the one that will review its decision; (2) intracircuit nonacquiescence, in which the agency refuses to follow the case law of the court of appeals that will review its decision; and (3) nonacquiescence in the face of venue choice, where review may be had either in a court that has rejected the agency's position or in one that has not. Finally, this section describes the possible components of an agency's nonacquiescence policy.

Section II presents detailed case studies of the nonacquiescence practices of SSA and the NLRB, which have been most visible, as well as a brief survey of how other federal agencies have engaged in nonacquiescence. We show that nonacquiescence is pervasive and longstanding, and examine the interaction between an agency's structure and the ways that it deals with adverse court decisions.

Section III considers the constitutionality of intracircuit nonacquiescence, the category that raises the most troubling questions. Even here, we reject the argument, advanced by several courts and commentators, that there is a *per se* constitutional bar against nonacquiescence.<sup>16</sup> We do not find it necessary to consider whether this practice, if left entirely unchecked, might not, under some circumstances, raise constitutional concerns; we believe that any nonacquiescence that might come close to transgressing constitutional norms would also be proscribed by nonconstitutional constraints.

Section IV evaluates the policy considerations implicated by nonacquiescence to determine whether limitations on the practice are desirable. We conclude that intracircuit nonacquiescence can be justified only as an interim measure that allows the agency to maintain a uniform administration of its governing statute at the agency level, and only while federal law on the subject remains in flux and the agency is making reasonable attempts to persuade the courts to validate its position. This limitation is informed, in large part, by the undesirable distributional consequences

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15. 464 U.S. 154 (1984).

16. See *infra* text accompanying notes 97-126 (discussing Social Security litigation); *supra* note 8 (collecting authorities).

that arise when only parties with sufficient resources to pursue an appeal to the courts can benefit from a favorable rule of law.<sup>17</sup> With respect to the other two categories of nonacquiescence, we do not believe that any restrictions are desirable.

Section V sets out the appropriate judicial response to intracircuit nonacquiescence. We conclude that unjustifiable intracircuit nonacquiescence contravenes the rationality review under the Administrative Procedure Act (APA).<sup>18</sup>

Section VI considers the question of venue choice. While we believe that nonacquiescence should not be limited where there is venue choice, we favor the elimination of such choice because it unnecessarily exacerbates agency-court tensions.

## I. DEFINING THE PROBLEM

### A. *The Relationship Between Nonacquiescence and Nonmutual Collateral Estoppel*

Defenders of nonacquiescence argue that the Supreme Court's unanimous decision in *United States v. Mendoza*,<sup>19</sup> holding the doctrine of nonmutual collateral estoppel<sup>20</sup> inapplicable against the federal government, legitimates nonacquiescence.<sup>21</sup> The *Mendoza* Court recognized that the government plays a distinctive role in the national lawmaking process, "both because of the geographic breadth of [its] litigation and also, most importantly, because of the nature of the issues [it] litigates."<sup>22</sup> Applica-

17. See *infra* text accompanying notes 325-26. Of course, Congress can prohibit nonacquiescence in the agency's governing statute if it deems the distributional consequences decisive.

18. 5 U.S.C. §§ 551-59, 701-06 (1982).

19. 464 U.S. 154 (1984).

20.

Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant had previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.

*Id.* at 159 n.4.

21. For example, in its brief in *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986), the Justice Department argued that a "rule of mandatory acquiescence in all cases . . . is nothing more than a rule of mandatory nonmutual collateral estoppel against the government. This rule the Supreme Court unanimously rejected in [*Mendoza*]." Brief for Appellants at 41. More recently, responding to a prior draft of this Article and to a proposed recommendation of the Administrative Conference, see 53 Fed. Reg. 12,444 (1988), the Solicitor General's Office stated:

At bottom, the assertion that a government official, such as the Secretary of Health and Human Services in his administration of the Social Security Act, must follow the reasoning of a court of appeals decision in other circumstances involving other parties is merely an assertion of nonmutual collateral estoppel against the government, which the Supreme Court unanimously rejected even as a nonconstitutional matter in [*Mendoza*].

Letter from Thomas W. Merrill, Deputy Solicitor General, and Edwin S. Kneedler, Assistant to the Solicitor General, to Mary Candace Fowler at 4 (May 9, 1988) [hereinafter Merrill Letter] (public comment on draft ACUS policy).

22. *Mendoza*, 464 U.S. at 159.

tion of nonmutual collateral estoppel, the Court reasoned, would prematurely truncate the process of dialogue and percolation among the circuits. It would require the government to treat an adverse ruling by a court of appeals as a nationally binding resolution of the particular legal question, thereby barring relitigation not only in the circuit that entered the adverse ruling but also in circuits that had not yet addressed the question.<sup>23</sup>

*Mendoza's* rejection of nonmutual collateral estoppel against the government,<sup>24</sup> however, does not compel any particular answer to the nonacquiescence controversy. As a logical matter, the fact that the government may not be precluded in court from relitigating issues that it lost in prior cases does not imply that it may disregard rulings of the courts of appeals in the conduct of its internal proceedings.<sup>25</sup> One can well imagine a legal regime under which the agency must internalize the relevant judicial decisions, but where it can challenge the precedent through a declaratory judgment action.<sup>26</sup> Under such a scenario, once an agency suffers a judicial setback, it must conduct its administrative proceedings in accordance with the adverse ruling until the agency's preferred policy has been upheld in a declaratory judgment action. Nonacquiescence would therefore be prohibited but the government would nonetheless, as a formal matter, remain free to relitigate.

Under current law, however, an agency generally does not have the

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23. Justice Rehnquist observed for the Court:

A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

*Mendoza*, 464 U.S. at 160. Because collateral estoppel cannot be applied to nonparties to the prior proceeding, it would be the first panel ruling *adverse* to the agency that would freeze the law under nonmutual collateral estoppel.

In the companion case of *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984), the Court held that in the presence of mutuality, collateral estoppel against the government is appropriate. In distinguishing this case from *Mendoza*, the Court noted that "[t]he application of an estoppel when the Government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the Government is still free to litigate that issue in the future with some other party." *Mendoza*, 464 U.S. at 164.

24. The Court could have decided *Mendoza* on narrower grounds. Due to a change in the administration, the adverse ruling in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), had not been appealed, and the Court could have said that relitigation was permissible because the law in the Ninth Circuit had yet to be determined by the court of appeals. Or, the Court could have ruled that nonmutual collateral estoppel, whatever its general applicability, was inappropriate in this case because an intervening decision in the Second Circuit in the government's favor, *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), created a basis for seeking reexamination of *68 Filipino War Veterans* in the Ninth Circuit. The *Mendoza* Court opted, instead, for a broader rule, eschewing the application of nonmutual collateral estoppel to the government.

25. Many courts have taken this position in litigation involving SSA. *See infra* text accompanying notes 97-126.

26. Apparently referring to this mechanism, Professor Neuborne notes: "There is, of course, a considerable difference between recognizing that the executive should be free to ask the judiciary to change its mind and permitting the executive to refuse to comply with settled precedent." Neuborne, *supra* note 8, at 1002 n.32.

authority, in the absence of a concrete administrative determination, to return to a court that ruled against it for the purpose of seeking a reconsideration of that ruling.<sup>27</sup> Moreover, a declaratory judgment procedure would raise difficult constitutional and practical questions of its own, would require a revamping of the way agencies make decisions, and would significantly undercut the role of agencies as the primary policy-makers in our administrative lawmaking system.<sup>28</sup>

In *Mendoza*, notably, relitigation did not take the form of a declaratory judgment action. Instead, what precipitated the case was a decision by an administrative official, a naturalization examiner, that was inconsistent with the unappealed ruling of a district court. This nonacquiescence was, therefore, the necessary predicate to the government's ability to relitigate the underlying issue.

More generally, without a declaratory mechanism, limitations on nonacquiescence may block the only readily accessible avenue to relitigation. If so, a rigid insistence that administrative proceedings adhere to a circuit court's rulings may produce some of the same undesirable consequences for the process of national law development that led to the rejection of nonmutual collateral estoppel in *Mendoza*.<sup>29</sup>

Nonetheless, *Mendoza* is not dispositive of the question of the legitimacy of nonacquiescence. As a formal matter, the Court did not consider the propriety of the examiner's conduct and hence did not pass explicitly on the nonacquiescence question. More importantly, agency nonacquiescence raises concerns over distributional equities (because the availability of a more favorable legal rule depends on a party's ability to pursue an appeal to the courts) and over agency-court tensions (because the agency appears to be flouting the judicial mandate). Such concerns are less salient to collateral estoppel, where the issue is strictly one of whether relitigation is precluded once the parties are in court.

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27. See *infra* text accompanying note 312.

28. See *infra* text accompanying notes 314-15.

29. Relitigation is an important tool of the federal government. As Professor Carrington has noted:

The United States does not regard a decision of the United States Court of Appeals as authoritative in the traditional common law sense. It is quite prepared to continue to litigate in other circuits a question that has been resolved in only one; even in the same circuit, the United States may be willing to relitigate an issue if minor factual distinctions can be made between the pending matter and the preceding decision. It appears to be the house rule of the Justice Department that three unanimous Courts of Appeals decisions are sufficient to establish authoritatively that a government position is wrong.

Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 HOUS. L. REV. 1101, 1104 (1974). The government's policy of broad relitigation has been criticized. See, e.g., Levin & Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 133-39 (1984); Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 123, 174-79 (1977).



## B. *Categories of Nonacquiescence*

The term “nonacquiescence” is often used loosely to include three distinct types of agency behavior. To evaluate properly the arguments for and against the practice, we must examine each of these categories separately.

First, an agency engages in *intercircuit* nonacquiescence when it refuses to follow, in its administrative proceedings, the case law of a court of appeals other than the one that will review the agency’s decision. Second, an agency engages in *intracircuit* nonacquiescence when the relevant venue provisions establish that review will be to a particular court of appeals and the agency nonetheless refuses to follow, in its administrative proceedings, the case law of that court.<sup>30</sup>

The third category is defined by reference to venue choice. Here, the agency refuses to follow the case law of a court of appeals that has rejected its position, but review may be had either in that court or in one that has not rejected the agency’s position. Broad venue choice is fairly common, since the Clayton Act’s venue provision, on which many other provisions are based,<sup>31</sup> provides for review in any circuit in which a party aggrieved by agency action “transacts business.”<sup>32</sup> In the case of national actors, practically any one of the regional circuits may be appropriate.

Normally, under conditions of venue choice, the identity of the reviewing court will be uncertain at the time the agency makes its decision.<sup>33</sup> Such uncertainty is not eliminated simply because the agency has a basis for predicting which circuit will hear the case. Only where all uncertainty is removed—for example, because all courts of proper venue have adopted positions contrary to the agency’s policy—does an agency’s continued nonadherence to circuit law become intracircuit nonacquiescence.<sup>34</sup>

None of these three categories is implicated when an agency attempts in good faith, and with reasonable basis in fact and law, to distinguish an adverse decision of a court of appeals. Nonacquiescence arises only where the agency, unable to invoke such a distinction, nevertheless declines to be bound by the adverse circuit rule.

All three categories are agency-centered. They each look to the posture

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30. Of course, in the case of a court of national jurisdiction, or one that reviews agency action pursuant to an exclusive venue provision, the only relevant category will be that of intracircuit nonacquiescence.

31. See *infra* text accompanying notes 378–81.

32. 15 U.S.C. § 22 (1982).

33. For a discussion of the factors contributing to venue uncertainty, see *infra* note 305.

34. Cases on remand are somewhat more difficult to characterize. The “law of the case,” as articulated by the court of appeals, would seem to apply. See *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 532 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 211–12 (2d Cir. 1980). However, unless the first court retained jurisdiction, the agency’s order on remand would be reviewable in accord with the organic statute’s venue provisions and could be reviewed elsewhere (although it is in fact likely that it would ultimately be transferred back to the court that had remanded the case).

of the case at the time of the administrative decision, rather than at the time of the judicial decision. Such a focus is particularly important in the venue choice category. There will be times when the agency's action will be reviewed in a circuit that previously had rejected the agency's position. From the perspective of that court, the case will look like one of intracircuit nonacquiescence, since the court will be reviewing an administrative decision that was inconsistent, even at the time it was made, with circuit law. But when the agency decided the case, by definition, the range of possible venues precluded certain prediction that the case would be reviewed in that court, rather than in a court that had not rejected the agency's position. Because the purpose of our study is to devise standards for agency conduct, only an *ex ante* perspective, specifying what conduct may be realistically expected of the agency at the time of its decision, is appropriate.

### C. *Components of a Nonacquiescence Policy*

In considering whether an agency engages in nonacquiescence, it is a mistake to focus exclusively on the actions of the agency's top decisionmakers. Consider a hypothetical multi-member agency, headed by commissioners, that develops policy primarily through adjudication.<sup>35</sup> While the commissioners' decisions are undoubtedly the most visible, nonacquiescence at other levels of the administrative structure will also affect regulated parties or claimants. Assume that the hypothetical agency is organized as follows. The enforcement staff files complaints citing violations of regulations promulgated pursuant to the governing statute. A cited party that contests such a complaint is accorded a hearing before an administrative law judge (ALJ). The ALJ's decision can be reviewed by the agency's commissioners *sua sponte*, or upon a petition for review filed by the recipient of the citation or the agency's enforcement staff. The commissioners have discretionary jurisdiction and thus can decline petitions for review. The agency's orders are not self-enforcing; the agency must seek enforcement in a court of appeals under a statutory scheme in which proper venue was ascertainable at the time of the administrative proceedings.

This hypothetical agency's acquiescence policy has several components. The first concerns the actions of the agency's commissioners in adjudicating cases. Two additional components are the behavior of the enforcement staff and of the ALJs. The fact that many citations by the enforcement staff will not be contested and that many ALJ decisions will not be ap-

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35. Nonacquiescence typically occurs when the agency makes policy through administrative adjudication. It can also occur, however, with respect to rulemaking and purely prosecutorial decisions, when an agency must go to court to bring an enforcement proceeding in the federal district court. Our Article focuses primarily on the adjudicatory context.

pealed,<sup>36</sup> coupled with the limited decisional capacity of the commissioners, may effectively make the enforcement staff and the ALJs the final decisionmakers for the vast majority of parties to the agency's proceedings. Thus, if there is nonacquiescence on the part of these actors, the agency's policy will be effectively one of nonacquiescence, even though the commissioners would actually acquiesce in the law of the circuit if an appeal were taken to them.

With respect to the enforcement staff and the ALJs, nonacquiescence can take one of three forms. The staff and the ALJs may be instructed to ignore the law of the reviewing circuit in making their respective decisions.<sup>37</sup> Alternatively, they may be given no guidance on the issue, but independently decide to nonacquiesce.<sup>38</sup> Or they may be oblivious to circuit law and nonacquiesce unknowingly.

A fourth component concerns the manner in which the commissioners exercise their discretionary jurisdiction. The commissioners may view lower-level nonacquiescence as a factor pointing strongly toward review; alternatively, however, they may view it as a neutral factor or even as one counseling against review. A related question is whether the commissioners consider nonacquiescence by the lower echelons to be a strong reason for invoking their *sua sponte* jurisdiction.

In setting out the preceding four components, we implicitly assumed that it is easy for each actor within the agency to tell when the agency's policy is inconsistent with the case law of the courts of appeals. If that were the case, the enforcement staff could simply be instructed not to issue citations that would be defective under the rulings of the appropriate court of appeals. But it is extremely inefficient for each of the agency's prosecutors to study the volumes of the *Federal Reporter* and ascertain possible conflicts with the instructions manuals that govern their tasks. As a practical matter, an acquiescence policy requires charging another branch within the agency, which we shall call an acquiescence review board (or perhaps a unit of the General Counsel's office itself), with the function of

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36. Parties may well contest only a small percentage of complaints or appeal only a small percentage of ALJ decisions. For example, at a meeting with representatives of the Solicitor of Labor and of the Occupational Health and Safety Administration (OSHA) on July 17, 1987, we were told that only about three percent of OSHA's citations are contested.

There are a number of reasons for this phenomenon. First, the cited party may not be sufficiently sophisticated to understand that, if it challenged the citation or ALJ decision, it might ultimately obtain relief from the commissioners. Second, the party might know that relief is possible but might not have the resources to mount the necessary legal challenge. Third, the party might decide that the cost of mounting such a challenge could be so high in relation to the expected payoff that compliance with the citation or ALJ decision would prove less onerous. An economically rational party will challenge a citation or appeal an ALJ decision if it estimates that the benefits of prevailing, discounted by the probability of not prevailing, are greater than the costs of mounting the necessary challenge.

37. This is true of SSA in the absence of an explicit instruction by the agency heads to acquiesce in a particular ruling. See *infra* text accompanying notes 92-94.

38. Apparently, this is the case with the Occupational Safety and Health Review Commission (OSHRC). Conversation between Professors Estreicher and Revesz, and Earl Ohman, General Counsel, and Arthur Sapper, Deputy General Counsel, OSHRC (June 18, 1987).

screening the relevant cases decided by the courts of appeals and translating them into instructions for the enforcement staff.

The task of identifying conflicts between legal principles is neither mechanical nor wholly objective. Whether there is a conflict depends on whether distinctions between two cases justify different results. In turn, whether a difference is legally significant must be assessed by reference to the agency's substantive policy. The work of such a board will certainly be affected by such factors as the instructions under which it operates, the resources that it can command, and the status that it enjoys within the agency. Thus, the manner in which an acquiescence review board is constituted, and more generally the method by which the agency ascertains the existence of adverse circuit law and communicates it to the relevant decisionmakers, is a fifth component in an agency's acquiescence policy.

One might question why an agency that is committed to acquiescence at its top level would not instruct its lower-level actors to acquiesce as well. There are several reasons why the commissioners might not wish to extend an acquiescence policy to the entire agency. The agency may view a split policy as a convenient compromise between its desire to enforce a uniform interpretation of the law and a concern with openly challenging the courts of appeals. The actions of the commissioners will receive the most attention, and acquiescence on their part will be widely equated with acquiescence at all levels. At the same time, most parties will be affected primarily by the actions of lower-level agency actors, and, to a large extent, the agency will be able to enforce a uniform policy through lower-level nonacquiescence.<sup>39</sup>

On a less Machiavellian plane, the commissioners might view acquiescence at all levels as a desirable but unnecessary luxury. It might, for example, be onerous to instruct the agency's enforcement staff on the law of the different circuits. The staff might be centrally trained, supervised and evaluated, operate throughout the country under a single set of instructions, and lack the skills to navigate a multi-tiered instructions manual.<sup>40</sup> To bring the law of each circuit to the level at which it can be applied by the agency's typically non-lawyer enforcement personnel could well require the establishment of a special unit within the agency. Moreover, the cost of updating instruction manuals in each circuit would natu-

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39. Of course, an acquiescence policy limited to the agency heads poses serious distributional consequences by having a more favorable body of law—that which results from acquiescence—apply disproportionately to parties with greater litigation resources. As we discuss below, this is the central cost of nonacquiescence at any level. See *infra* text accompanying notes 325–26.

40. Referring to the difficulty of nonuniformity in the initial administrative process, the IRS notes that “[t]he tax return forms and the instruction booklets issued to the more than 100,000,000 taxpayers all contain a uniform instruction. Most computer programs and processing procedures are designed with that uniformity in mind.” Letter from James J. Keightley, Associate Chief Counsel to Mary Candace Fowler at 3 (May 9, 1988) (public comment on draft ACUS policy). The IRS notes that it is far easier for appeals officers at higher levels to consider adverse circuit court law. *Id.*

rally be far higher than that of maintaining nationally uniform instructions.<sup>41</sup>

A split acquiescence policy will be particularly likely in agencies in which the commissioners are committed only to a limited acquiescence practice under which they generally follow adverse circuit law but reserve the right to relitigate issues of particular importance to the agency.<sup>42</sup> It would be impossible for the commissioners to nonacquiesce, and thereby force the relitigation of an issue, if the enforcement staff does not file citations that would be proper under the agency's policy, though defective under the law of the court of appeals. In such circumstances, the agency will never have the opportunity to ask the court to reexamine adverse circuit precedent.<sup>43</sup>

Acquiescence by the ALJs would also make relitigation difficult. It is true that if the ALJs acquiesced but the enforcement staff did not, the enforcement staff could still file a petition for review of the ALJ decision. Under such an arrangement, however, the commissioners would have to grant review to make relitigation possible. In contrast, if the ALJs nonacquiesced, relitigation could follow the denial of discretionary review by the commissioners. Given the commissioners' limited decisional capacity, this difference could be significant. Thus, the simplest way to preserve the commissioners' option to engage in selective nonacquiescence is to require—or tolerate—nonacquiescence on the part of both the enforcement staff and the ALJs.

Some agencies may also be reluctant to decide what position they will take on a question immediately after a court of appeals has issued an adverse decision. The commissioners may prefer to make such determinations in adjudicatory proceedings rather than by issuing prospective instructions. Indeed, some agencies have opted for an administrative structure that confines policymaking by the commissioners to the vehicle of case-by-case adjudication.<sup>44</sup> Thus, the primacy of the commissioners' role as decisionmakers is enhanced by having the agency's lower-level compo-

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41. These problems are exacerbated in agencies with regional offices that do not match the geographic jurisdictions of the courts of appeals. For example, "[t]welve of the [NLRB's] 33 regional offices straddle two different circuits, three more operate within three circuits, and one office, Region 5 in Baltimore, operates within four circuits." Letter from Rosemary Collyer, General Counsel, NLRB to Mary Candace Fowler at 8 (April 29, 1988) [hereinafter Collyer Letter] (public comment on draft ACUS policy).

42. For this reason, SSA adopted a split acquiescence policy under Office of Hearings and Appeals, Interim Circular No. 185 (June 3, 1985) [hereinafter Interim Circular]. See *infra* text accompanying notes 68–94.

43. For example, in those cases in which SSA made its acquiescence policy applicable at all administrative levels, it effectively relinquished the ability to relitigate the issues covered by the policy in the circuits that rendered the adverse rulings. See *infra* text accompanying notes 92–93.

44. See *infra* note 142 (discussing NLRB's resistance to making policy through rulemaking). The Supreme Court has made clear that, absent contrary directives in its organic statute, an agency has unlimited discretion in deciding whether to use adjudication or rulemaking as the vehicle for policymaking. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

nents pursue a somewhat broader nonacquiescence policy than that followed by the commissioners themselves.

In summary, in addition to the adjudicatory decisions of the commissioners, an agency's acquiescence policy will depend upon the commissioners' case-selection decisions, the actions of both the enforcement staff and the ALJs, and the internal mechanisms for identifying and transmitting adverse circuit court decisions. Clearly, not all agencies are organized like the hypothetical agency that forms the basis of this discussion.<sup>45</sup> But in almost all cases, the extent to which the agency engages in nonacquiescence cannot be determined solely by reference to the actions of the agency's top decisionmakers.

## II. A DESCRIPTION OF AGENCY PRACTICES

We discuss in this section the nonacquiescence practices of SSA under its disability program and of the NLRB—two agencies that have provoked considerable reaction from courts and commentators. These two case studies raise most of the important issues relevant to an analysis of nonacquiescence, and therefore provide a useful background for the remainder of this Article. In addition, to illustrate the pervasiveness of nonacquiescence, we summarize the results of our survey of the practices of over fifty major administrative agencies.

### A. *Social Security Administration*

#### 1. *General Description of the Agency*

Within SSA, nonacquiescence has been most prevalent under the disability program.<sup>46</sup> The administrative structure of this program contains four levels. A claimant seeking disability benefits applies first to a state disability agency.<sup>47</sup> State disability examiners make the initial determination about eligibility based solely on a paper record.<sup>48</sup> These examiners also ascertain whether individuals receiving disability benefits continue to be entitled to such benefits.<sup>49</sup> If benefits are denied or terminated at the initial level, the claimant may request reconsideration by the state disabili-

45. Our focus in this Article is on agencies such as the NLRB, Federal Trade Commission (FTC), and Federal Communications Commission (FCC) that use adjudication as a principal means for setting policy. *See supra* note 35.

46. 42 U.S.C. §§ 401-33 (1982). For excellent discussions of SSA administrative practices, see J. MASHAW, *BUREAUCRATIC JUSTICE* (1983); J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, *SOCIAL SECURITY HEARINGS AND APPEALS* (1978).

47. 42 U.S.C. § 421(a)(1) (1982).

48. 20 C.F.R. § 404.1615(b) (1988).

49. 42 U.S.C. § 425 (1982); 20 C.F.R. §§ 404.1588-99 (1988).

ity agency.<sup>50</sup> Additional paper evidence can be presented at this second level.<sup>51</sup>

A claimant denied benefits at the reconsideration level can seek a hearing before an ALJ employed directly by SSA.<sup>52</sup> At this hearing, the claimant may appear in person, submit new evidence, examine the evidence used in making the decision under review, and present and question witnesses.<sup>53</sup> Claimants can be represented by counsel at the hearing, but SSA is not separately represented.<sup>54</sup> The ALJ both adjudicates and develops the record. Thus, Social Security ALJs play a role somewhat akin to that of judges in civil law inquisitorial systems.<sup>55</sup>

The fourth level of administrative consideration is review of an ALJ's decision by the SSA Appeals Council, either at the claimant's request, which the Appeals Council has the discretion to deny, or on its own motion.<sup>56</sup> When the Appeals Council accepts review of a case, it may consider evidence beyond that which was before the ALJ and may hear oral argument in significant cases.<sup>57</sup> A decision on the merits by the Appeals Council, or the ALJ's decision itself if it is unreviewed, constitutes a final agency decision.

Claimants can challenge such decisions in the district courts. A district court has the power to "affirm[], modify[], or revers[e] the decision of the Secretary, with or without remanding the cause for rehearing."<sup>58</sup> The agency's factual findings are reviewed under the "substantial evidence" standard.<sup>59</sup> Either the Secretary or the claimant can appeal, as of right, to the court of appeals.

There is very little uncertainty of venue concerning petitions for review of SSA decisions. The Act provides for review in the district court for the district "in which the plaintiff resides or has his principal place of busi-

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50. 20 C.F.R. § 404.907 (1988).

51. *Id.* § 404.913(a).

52. *Id.* § 404.929.

53. *Id.* § 404.950.

54. SSA's nonacquiescence may be caused in part because the agency is not separately represented and therefore cannot mold the record in a way that would make the agency more likely to withstand a challenge under the standards of the reviewing court of appeals. For several years, SSA tested a program under which, in certain hearings, SSA would be represented by special personnel known as "SSA Representatives." 47 Fed. Reg. 36,117 (1982). After having been enjoined by the U.S. District Court for the Western District of Virginia and after it became the focus of negative reactions in Congress, the program was terminated on May 7, 1987. *See* 52 Fed. Reg. 17,285 (1987). For an analysis of the program, see Social Security Administration, Office of Hearings and Appeals, SSA Representation Project: Interim Report (June 1986).

55. *See* Richardson v. Perales, 402 U.S. 389, 410 (1971) (rejecting due process challenge to ALJ's "advocate-judge-multiple-hat"). Where the claimant is not represented by counsel, the hearing examiner can be said to wear three hats rather than two, as he must "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts surrounding the alleged right or privilege." *Gold v. Secretary of HEW*, 463 F.2d 38, 43 (2d Cir. 1972) (quoting *Hennig v. Gardner*, 276 F. Supp. 622, 624-25 (N.D. Tex. 1967)).

56. 20 C.F.R. §§ 404.967-70 (1988).

57. 20 C.F.R. § 404.976 (1988).

58. 42 U.S.C. § 405(g) (1982).

59. *Id.*

ness."<sup>60</sup> The vast majority of district court appeals are filed in the district where the plaintiff resides.<sup>61</sup>

## 2. *The Agency's Nonacquiescence Policy*

From the 1960's (and perhaps earlier) until June 1985, SSA's policy was not to acquiesce in decisions of the courts of appeals that differed from the agency's positions. The agency described its intracircuit nonacquiescence policy as follows:

While the ALJs are bound by decisions of the United States Supreme Court, they should also make every reasonable effort to follow the district or circuit court's views regarding procedural or evidentiary matters when handling similar cases in that particular district or circuit.

However, where a district or circuit court's decision contains interpretations of the law, regulations, or rulings which are inconsistent with the Secretary's interpretations, the ALJs should not consider such decisions binding on future cases simply because the case is not appealed. In certain cases SSA will not appeal a court decision it disagrees with, in view of special circumstances of the particular case (e.g., the limited effect of the decision).

When SSA decides to acquiesce in a district court decision, or a circuit court decision, which is inconsistent with our previous interpretation of the law, regulations, or rulings, SSA will take appropriate action to implement changes by means of regulations, rulings, etc. ALJs will be promptly advised of such action.<sup>62</sup>

Similarly, a statement by the Associate Commissioner for Hearings and Appeals, issued to Social Security ALJs in January 1982, advised that "[t]he Federal courts do not run SSA's programs, and [SSA's adjudicators] are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court."<sup>63</sup>

In addition to this general policy, the agency occasionally issued formal nonacquiescence rulings which indicated the agency's explicit disagreement with particular circuit court decisions. A total of ten such rulings were adopted, the first in 1966 and the last in 1982.<sup>64</sup> The purpose of

60. *Id.* If a plaintiff does not reside or have his principal place of business in any district, the action can be brought in the U.S. District Court for the District of Columbia. *Id.*

61. Letter from Donald A. Gonya, Chief Counsel for Social Security, to Professor Revesz at 2 (March 23, 1987) [hereinafter Gonya Letter] (on file with authors). Similarly, the majority of administrative proceedings occur in the claimant's state of residence. *Id.*

62. Office of Hearings and Appeals Handbook § 1-161 (quoted in J. MASHAW, *supra* note 46, at 186-87). It follows, *a fortiori*, that the agency also engaged in intercircuit nonacquiescence.

63. *Quoted in* H.R. REP. NO. 618, 98th Cong., 2d Sess. at 24 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3061 [hereinafter HOUSE REPORT].

64. The following are the cases subject to these rulings with the number of the relevant ruling indicated parenthetically: *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982) (SSR 82-49c); *Campbell v. Secretary of HHS*, 665 F.2d 48 (2d Cir. 1981) (SSR 82-33c); *Finnegan v. Matthews*, 641 F.2d 1340



such rulings was not only to ensure that ALJs disregarded the circuit law that was inconsistent with the agency's policy, but also to indicate formally the agency's disagreement with particularly significant adverse decisions.<sup>65</sup>

SSA defended its pre-1985 nonacquiescence policy principally on the grounds of horizontal equity. For example, in 1984, the Acting Commissioner of Social Security testified before Congress that the agency's

policy of nonacquiescence is essential to ensure that the agency follow its statutory mandate to administer the Social Security program in a uniform and consistent manner. In a program of national scope, it would not be equitable to people to subject their claims to differing standards depending on where they reside.<sup>66</sup>

The policy seeks to further horizontal uniformity (similar treatment at the agency level of all claimants similarly situated), but it does not promote vertical uniformity (similar treatment in the same geographic area of all claimants similarly situated). Because one set of rules obtains in the agency and another in the court of appeals that will review the case, nonacquiescence creates distinctions between claimants who are able to appeal to the circuit courts and who will ultimately prevail against the agency, and those who are unable to appeal and will therefore be denied benefits.<sup>67</sup>

Partly in response to congressional criticism expressed during the consideration of the 1984 amendments to the Social Security Act,<sup>68</sup> SSA departed from its blanket nonacquiescence approach in 1985 through the adoption of Interim Circular No. 185.<sup>69</sup> Under the Circular, the agency

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(9th Cir. 1981) (SSR 82-10c); *Hutcheson v. Califano*, 638 F.2d 96 (9th Cir. 1981) (SSR 81-28c); *Boyland v. Califano*, 633 F.2d 430 (6th Cir. 1980) (SSR 81-1c); *Johnson v. Califano*, 607 F.2d 1178 (6th Cir. 1979) (SSR 80-10c); *Levings v. Califano*, 604 F.2d 591 (8th Cir. 1979) (SSR 80-11c); *Rasmussen v. Gardner*, 374 F.2d 589 (10th Cir. 1967) (SSR 68-48c); *Hodgson v. Celebrezze*, 357 F.2d 750 (3d Cir. 1966) (SSR 67-14c); *Cyrus v. Celebrezze*, 341 F.2d 192 (4th Cir. 1965) and *Massey v. Celebrezze*, 345 F.2d 146 (6th Cir. 1965) (SSR 66-23c). Eight of these ten rulings were in effect in 1984, at the time that Congress considered barring nonacquiescence by SSA. See S. REP. NO. 466, 98th Cong., 2d Sess. 21 (1984) [hereinafter SENATE REPORT].

65. *Social Security Disability Insurance Program: Hearing Before the Senate Comm. on Finance*, 98th Cong., 2d Sess. 115 (1984) [hereinafter *SSA Senate Hearing*] (statement of Carolyn B. Kuhl, Deputy Assistant Attorney General, Civil Division).

66. *Id.* at 105-06 (statement of Commissioner Martha A. McSteen). The Commissioner also made an argument of administrative convenience, noting that "[t]here would be enormous problems with circuit-by-circuit acquiescence since we would need to keep track of applicants as they move through the decisionmaking process, determine which circuit law should apply, and separately handle claims by jurisdiction." *Id.* at 106.

67. See HOUSE REPORT, *supra* note 63, at 24, 1984 U.S. CODE CONG & ADMIN. NEWS at 3061.

68. See *infra* text accompanying notes 126-37.

69. Interim Circular, *supra* note 42.

would prepare Acquiescence Rulings<sup>70</sup> that identified circuit court decisions at variance with established SSA policy.<sup>71</sup>

For cases covered by Acquiescence Rulings, the ALJ would analyze the facts both under the agency's policy and under the adverse circuit court decision. An ALJ prepared to rule unfavorably to the claimant under agency policy, but favorably under circuit law, would enter a recommended decision, rather than an initial decision,<sup>72</sup> favorable to the claimant.<sup>73</sup> If the Appeals Council agreed with the ALJ's recommendation, it would ordinarily enter a favorable decision.<sup>74</sup>

An unfavorable decision would follow only if the agency decided, after several stages of further review, that relitigation in the context of that case was appropriate. The Appeals Council itself would make the initial decision whether to relitigate; this decision would be reviewed by the agency's Special Policy Review Committee and the Office of General Counsel. Before making a final decision, the agency would seek the advice of the Justice Department.<sup>75</sup>

Interim Circular No. 185 applied only to the ALJ and Appeals Council levels; the prior nonacquiescence practice would continue to be followed by state agencies both at the initial and reconsideration levels.<sup>76</sup> Also, it applied only in the circuit that issued the adverse ruling; the agency would continue to apply its policy in other circuits, thereby engaging in *intercircuit* nonacquiescence.<sup>77</sup> Moreover, a necessary condition for acquiescence under Interim Circular No. 185 was the publication of an Acquiescence Ruling. The agency contended that such rulings would issue in all cases of disagreement with adverse circuit court precedent; to the extent

70. Initially, these rulings were referred to as Social Security Rulings (SSRs). Because the agency eventually began to refer to SSRs dealing with acquiescence issues as Acquiescence Rulings, we refer to them in this manner from the outset.

71. To draft these Rulings, the agency established a 12-member Task Force on Acquiescence, composed of staff from the regional and central offices. See *Judicial Review of Agency Action—HHS Policy on Nonacquiescence: Oversight Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 9 (1985) [hereinafter *SSA House Hearing*] (statement of Martha McSteen, Acting Commissioner of Social Security).

72. An initial decision by an ALJ becomes binding if it is not reviewed by the Appeals Council. In contrast, a recommended decision by an ALJ must be reviewed by the Appeals Council.

73. Interim Circular, *supra* note 42, at 3. There are two other relevant categories. First, if the ALJ is prepared to rule favorably for the claimant under SSA policy, the decision need not consider the impact of the circuit law. The ALJ would then issue an initial decision in the usual manner. Second, if the ALJ is prepared to rule unfavorably to the claimant under the agency's policy, he must then consider the circuit law, and if he would rule against the claimant under circuit law as well, he must enter an unfavorable initial decision. *Id.* at 2.

74. *Id.* at 4.

75. *Id.* If the ALJ's initial decision is unfavorable to the claimant and the Appeals Council determines that a favorable decision should have been entered under circuit law, it will treat the case in the manner described above. Ordinarily, it will enter a favorable decision, but it will enter an unfavorable decision where it believes that relitigation is appropriate. *Id.*

76. The agency considered extending its acquiescence policy to the state level, but rejected this option as too cumbersome. See *SSA House Hearing*, *supra* note 71, at 9.

77. Interim Circular, *supra* note 42, at 1.

that they did not, however, the prior nonacquiescence practice would continue.<sup>78</sup>

As a practical matter, Interim Circular No. 185 was never implemented since the agency changed its policy, at least in part as a result of the litigation in *Stieberger v. Heckler*,<sup>79</sup> before it had issued any Acquiescence Rulings. A new policy provided that under certain conditions acquiescence would be extended to all four administrative levels.<sup>80</sup> It contemplated two different types of Acquiescence Rulings: one that would apply only at the ALJ and Appeals Council levels, as had been the case under Interim Circular No. 185, and another that would apply at the state agency levels as well.<sup>81</sup> The procedures with respect to the first type of Ruling were the same as those under the Circular.<sup>82</sup> As to the second type, the agency noted that it was unlikely that cases would reach the ALJs or the Appeals Council because the benefit would have been granted at the state agency level.<sup>83</sup>

Consistent with its new policy, the agency published proposed regulations.<sup>84</sup> They provided that Acquiescence Rulings would apply within the appropriate circuit at all administrative levels if

(1)(a) No prompt relitigation of the relevant policy at issue will be sought in the relevant circuit; *and*

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78. See *infra* text accompanying notes 93–94 (discussing silent nonacquiescence).

79. 615 F. Supp. 1315 (S.D.N.Y. 1985), *prelim. inj. vacated sub nom.* *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986). See *infra* text accompanying notes 114–26.

80. See Memorandum of Acting Commissioner of Social Security to Principal Deputy Undersecretary of HHS (Jan. 15, 1986). The recommendations contained in this memorandum were approved by HHS on January 16, 1986. On that day, HHS also approved the issuance of three Acquiescence Rulings, applicable at all four administrative levels. *Id.* The Memorandum stated the hope that adoption of the new policy would “assist in obtaining a favorable ruling in *Stieberger*.” *Id.* at 3. It ended with the comment: “SSA and the Office of General Counsel strongly urge that the revised policy be approved, or at least the concept of acquiescing in some circuit court decisions at all adjudicative levels. Such a position would strengthen the hand of Justice in the crucial *Stieberger* case.” *Id.* The new policy was later embodied in OHA Staff Guides and Program Digest, Transmittal No. X-7, SGPD Bulletin No. III-2(86) (Aug. 22, 1986) [hereinafter SGPD Bulletin] which formally replaced Interim Circular No. 185.

81. See SGPD Bulletin, *supra* note 80, at 2.

82. *Id.* at 3–5.

83. *Id.* The Bulletin provided that because the U.S. District Court for the Southern District of New York in *Stieberger* had enjoined the practice of limiting the agency’s acquiescence policy to the ALJ and Appeals Council levels, in the case of New York residents, all Acquiescence Rulings would apply to the four administrative levels, unless the injunction in *Stieberger* were modified or vacated. *Id.* at 2 n.2; see *infra* text accompanying notes 114–26.

84. 52 Fed. Reg. 2557 (1987). After this Article was in page proofs, SSA withdrew these proposed regulations and proposed a different set of regulations, under which Acquiescence Rulings would apply at all four administrative levels. See 53 Fed. Reg. 46,628 (1988). These proposed regulations contemplate intracircuit relitigation following the publication of an Acquiescence Ruling only where (1) “occurrence of an activating event . . . raises the question of whether the circuit court would reach the same decision if the issue(s) previously decided were presented to it again,” (2) the General Counsel of the Department of Health and Human Services, after consulting with the Department of Justice, concurs that relitigation is appropriate, and (3) a notice that SSA will begin to apply its own interpretation of the issue that had been the subject of the Acquiescence Ruling is published in the *Federal Register*. See 53 Fed. Reg. 46,629–30 (1988).

(b) Application of the Ruling at all administrative levels would be workable (i.e., would not result in administrative inefficiency) and feasible *and* would not have an unacceptably adverse effect on Social Security programs or disadvantage individuals already on the Social Security benefit rolls; *or*

(2) A regulatory change to conform national policy to a circuit court ruling is being pursued and there is little doubt of its ultimate publication.<sup>85</sup>

If neither condition was met, the Acquiescence Ruling would apply only at the ALJ and Appeals Council levels.<sup>86</sup>

On June 4, 1986, the agency published, in the *Federal Register*,<sup>87</sup> a notice indicating that 14 such Rulings had been issued between January 23 and April 30, 1986.<sup>88</sup> The agency also indicated that future rulings would be published periodically in the same manner,<sup>89</sup> and on August 7, 1987, it published 12 such rulings which had been issued between May 20, 1986 and March 31, 1987.<sup>90</sup> By March 1988, the agency had issued an additional seven rulings which have not yet been published in the *Federal Register*.<sup>91</sup>

85. *Id.* at 2557.

86. *Id.*

87. When Acquiescence Rulings are first issued, they are not published in the *Federal Register*.

88. 51 Fed. Reg. 20,354 (1986). The agency published acquiescence rulings for the following cases: *Summy v. Schweiker*, 688 F.2d 1233 (9th Cir. 1982) (AR 86-1 (9)); *Rosenberg v. Richardson*, 538 F.2d 487 (2d Cir. 1976) and *Capitano v. Secretary of HHS*, 732 F.2d 1066 (2d Cir. 1984) (AR 86-2 (2)); *Martinez v. Heckler*, 735 F.2d 795 (5th Cir. 1984) (AR 86-3(5)); *Paskel v. Heckler*, 768 F.2d 540 (3d Cir. 1985) (AR 86-4 (3)); *Leschniok v. Heckler*, 713 F.2d 520 (9th Cir. 1983) (AR 86-5(9)); *Aubrey v. Richardson*, 462 F.2d 782 (3d Cir. 1972) and *Shelnutt v. Heckler*, 723 F.2d 1131 (3d Cir. 1983) (AR 86-6(3)); *Autrey v. Harris*, 639 F.2d 1233 (5th Cir. 1981) and *Wages v. Schweiker*, 659 F.2d 59 (5th Cir. 1981) (AR 86-7(5)); *Johnson v. Califano*, 607 F.2d 1178 (6th Cir. 1979) (AR 86-8(6)); *Secretary of HEW v. Meza*, 368 F.2d 389 (9th Cir. 1966) and *Gardner v. Wilcox*, 370 F.2d 492 (9th Cir. 1966) (AR 86-9(9)); *Edwards v. Califano*, 619 F.2d 865 (10th Cir. 1980) (AR 86-10(10)); *Autrey v. Harris*, 639 F.2d 1233 (5th Cir. 1981) (AR 86-11(11)); *Hutcheson v. Califano*, 638 F.2d 96 (9th Cir. 1981) (AR 86-12(9)); *McNeal v. Schweiker*, 711 F.2d 18 (3d Cir. 1983) (AR 86-13(3)); *Jones v. Secretary of HEW*, 629 F.2d 334 (4th Cir. 1980) (AR 86-14(4)). Note that this list includes two cases decided as early as in 1966 and three cases decided in the 1970s.

The number of the Acquiescence Ruling is indicated in parenthesis. For example, AR 86-1(9) refers to the first (1) acquiescence ruling issued in 1986 (86), which is applicable only in the Ninth Circuit (9).

89. 51 Fed. Reg. 20,354 (1986).

90. 52 Fed. Reg. 29,441 (1987). The agency published acquiescence rulings for the following cases: *Boyland v. Califano*, 633 F.2d 430 (6th Cir. 1980), *Parker v. Schweiker*, 673 F.2d 160 (6th Cir. 1982), and *Childress v. Secretary of HHS*, 679 F.2d 623 (6th Cir. 1982) (AR 86-15(6)); *Damon v. Secretary of HEW*, 557 F.2d 31 (2d Cir. 1977) (AR 86-16(2)); *Owens v. Schweiker*, 692 F.2d 80 (9th Cir. 1982) (AR 86-17(9)); *Woodson v. Schweiker*, 656 F.2d 1169 (5th Cir. 1981) (AR 86-18(5) and AR 86-19(11)); *Grigg v. Finch*, 418 F.2d 661 (6th Cir. 1969) (AR 86-20(6)); *Adams v. Weinberger*, 521 F. 2d 656 (2d Cir. 1975) (AR 86-21(2)); *Parsons v. Secretary of HHS*, 762 F.2d 1188 (4th Cir. 1985) (AR 86-22(4)); *Doran v. Schweiker*, 681 F.2d 605 (9th Cir. 1982) (AR 86-23(9)); *Hansen v. Heckler*, 783 F.2d 170 (10th Cir. 1986) and *Elliott v. Heckler*, No. 84-2055 (10th Cir. 1986) (AR 86-24(10)); *Fagner v. Heckler*, 779 F.2d 541 (9th Cir. 1985) (AR 86-25(9)); *Webb v. Richardson*, 472 F.2d 529 (6th Cir. 1972) (AR 87-1(6)). Note that this list includes a case decided as early as 1969 and three cases decided in the 1970s.

91. *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986) (AR 87-2(11)); *Hart v. Bowen*, 799 F.2d 567 (9th Cir. 1986) (AR 87-3(9)); *Iamarino v. Heckler*, 795 F.2d 59 (8th Cir. 1986) (AR 87-4(8)); *Velazquez v. Heckler*, 802 F.2d 680 (3d Cir. 1986) (AR 87-5(3)); *Groseclose v. Bowen*, 809

These rulings all apply at all four administrative levels;<sup>92</sup> thus, the agency has not invoked its split policy under which it would acquiesce only at the ALJ and Appeals Council levels. Also, by acquiescing at all four levels, the agency has essentially foreclosed relitigation of questions covered by Acquiescence Rulings in the circuits that rendered the adverse decisions.

It is debatable whether one can assume that SSA is now engaged in a policy of blanket intracircuit acquiescence. It may well be, for example, that SSA is not issuing Acquiescence Rulings for cases in which there are, in fact, irreconcilable inconsistencies between the agency's position and circuit law,<sup>93</sup> and therefore, decisionmakers at all levels are continuing to apply agency policy even though this policy has been rejected by the court of appeals which will review the agency's action.<sup>94</sup>

### 3. *Judicial Reaction to the Agency's Nonacquiescence Policy*

SSA's pre-1985 policy of blanket nonacquiescence has been roundly criticized by the courts. We focus primarily on two such cases—*Lopez v. Heckler*<sup>95</sup> and *Stieberger v. Heckler*<sup>96</sup>—that are representative of the judicial rebuke that intracircuit nonacquiescence by SSA has engendered.

#### a. *Lopez v. Heckler*

This class action was filed in the U.S. District Court for the Central District of California to challenge the procedures used by SSA in terminating disability benefits pursuant to its program of Continuing Disability Investigations.<sup>97</sup> In two earlier cases, the Ninth Circuit had held that disability benefits could not be terminated unless SSA had come forward with evidence of improvement in the recipient's medical condition.<sup>98</sup> The

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F.2d 502 (8th Cir. 1987) (AR 88-2(8)); *McDonald v. Bowen*, 800 F.2d 153 (7th Cir. 1986), *amended on reh'g*, 818 F.2d 559 (7th Cir. 1987) (AR 88-3(7)).

92. See 52 Fed. Reg. 29,441 (1987); 51 Fed. Reg. 20,354 (1986). The HHS General Counsel has indicated that the only Acquiescence Ruling that does not apply at all four levels concerns a case, *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986), that involved only the actions of the Appeals Council; by definition, then, the Ruling could not have applied at lower levels. See Letter from Ronald Robertson to Mary Candace Fowler at 2 (April 21, 1988) [hereinafter Robertson Letter] (public comment on draft ACUS policy).

93. Where the agency studies a potentially adverse decision and decides that there is no conflict, it prepares a document entitled: "Decision That Ruling of Acquiescence Is Not Needed." These statements are not widely disseminated.

94. Attorneys representing claimants believe that such silent nonacquiescence is widespread. See Brief for the City of New York and the *Stieberger* Class as Amici Curiae, No. 87-6244 (2d Cir. 1987). For a discussion of the problem of silent nonacquiescence, see *infra* text accompanying notes 338-39.

95. 725 F.2d 1489 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984).

96. 615 F. Supp. 1315 (S.D.N.Y. 1985), *prelim. inj. vacated sub nom.*, *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986).

97. See 42 U.S.C. § 421(h) (1982).

98. *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981).

agency had published formal notices of nonacquiescence in both of these cases.<sup>99</sup> The *Lopez* plaintiffs attacked the constitutionality of SSA's nonacquiescence policy on separation of powers and due process grounds.<sup>100</sup>

The district court certified a class of Ninth Circuit claimants<sup>101</sup> and granted a preliminary injunction requiring SSA to apply the rulings of the two Ninth Circuit cases to all claimants residing in the circuit.<sup>102</sup> The court noted that "for the Secretary to make the general assertion that a decision of the Court of Appeals is not to be followed because she disagrees with it is to operate outside the law."<sup>103</sup> Its conclusion was grounded on the principle "laid down many years ago by Chief Justice Marshall in the landmark case of *Marbury v. Madison*" that "governmental agencies, like all individuals and other entities, are obliged to follow and apply the law as it is interpreted by the courts."<sup>104</sup>

The court also stressed the vertical disuniformity caused by a policy of nonacquiescence. It noted that if a claimant

has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced [by the Ninth Circuit]. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with respect to the types of individuals here concerned, whose resources, health and prospective longevity are, by definition, relatively limited, such a dual system of law is prejudicial and unfair.<sup>105</sup>

A unanimous panel of the Ninth Circuit denied the Secretary's request for a partial stay of the preliminary injunction, finding "little chance that the Secretary will succeed in her argument that nonacquiescence is a legitimate policy."<sup>106</sup> In a concurrence, Judge Pregerson compared nonacquiescence to the "repudiated pre-Civil War doctrine of nullification" and found that the Secretary's refusal to follow Ninth Circuit law "flouts some very important principles basic to our American system of government—the rule of law, the doctrine of separation of powers imbedded in the constitution, and the tenet of judicial supremacy laid down in *Marbury v. Madison*."<sup>107</sup>

Justice Rehnquist, sitting as Circuit Justice, then granted a partial stay

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99. See *supra* note 64.

100. *Lopez v. Heckler*, 572 F. Supp. 26, 28 (C.D. Cal. 1983).

101. *Id.* at 30-32.

102. *Id.* at 32.

103. *Id.* at 30.

104. *Id.* at 29 (citations omitted). This view is criticized *infra* text accompanying notes 226-62.

105. *Lopez v. Heckler*, 572 F. Supp. at 30.

106. *Lopez v. Heckler*, 713 F.2d 1432, 1438 (9th Cir. 1983).

107. *Id.* at 1441 (Pregerson, J., concurring).

of the preliminary injunction but did not consider the merits of the nonacquiescence question.<sup>108</sup> Subsequently, the full Court denied, on a five-to-four vote, an emergency application to vacate the stay entered by Justice Rehnquist.<sup>109</sup>

The Ninth Circuit affirmed the preliminary injunction, except as applied to benefits denied before the Ninth Circuit had held that medical improvement was a necessary condition for the termination of disability benefits.<sup>110</sup> On the question of nonacquiescence, the court said: "That the Secretary, as a member of the executive, is required to apply federal law as interpreted by the federal courts cannot seriously be doubted."<sup>111</sup> The Supreme Court ultimately vacated and remanded for reconsideration in light of the Social Security Disability Benefits Reform Act of 1984, without reaching the legality of nonacquiescence.<sup>112</sup> Thus, in the *Lopez v. Heckler* litigation, both the district court and the Ninth Circuit concluded that intracircuit nonacquiescence was a per se violation of separation of powers doctrine.<sup>113</sup>

#### b. Stieberger v. Heckler

This case, brought in the U.S. District Court for the Southern District of New York, involved a frontal challenge to SSA's nonacquiescence policy.<sup>114</sup> Plaintiffs argued that SSA had nonacquiesced in many decisions of the Second Circuit. In considering whether to enter a preliminary injunction, however, the court focused only on the Second Circuit's treating physician rule, which concerns the weight to be given to the opinion of the claimant's treating physician.<sup>115</sup>

As a threshold matter, the court rejected the agency's claim that there was no inconsistency between its policy and the Second Circuit's rule.<sup>116</sup> Finding that SSA in fact had not been applying the Second Circuit's rule to claimants residing within its territory, the court turned to the legality of

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108. *Heckler v. Lopez*, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers).

109. *Heckler v. Lopez*, 464 U.S. 879 (1983). Justices Brennan and Marshall dissented, and Justices Blackmun and Stevens dissented in part. Justice Brennan noted that SSA "has not paid due respect to a coordinate branch of Government by expressly refusing to implement the binding decisions of the Ninth Circuit." *Id.* at 887 (Brennan, J., joined by Marshall, J., dissenting).

110. *Lopez v. Heckler*, 725 F.2d 1489, 1510 (9th Cir.), *vacated and remanded*, 469 U.S. 1082 (1984).

111. *Id.* at 1503. Here, too, the court invoked *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to support its conclusion that nonacquiescence is illegal.

112. *Heckler v. Lopez*, 469 U.S. 1082 (1984). On remand, the district court in turn remanded the case to the Secretary, also for reconsideration in light of the statutory amendments. *Lopez v. Heckler*, 106 F.R.D. 268 (C.D. Cal. 1984).

113. See *infra* text accompanying notes 226-62 (criticizing this view).

114. *Stieberger v. Heckler*, 615 F. Supp. 1315, 1321 (S.D.N.Y. 1985), *prelim. inj. vacated sub. nom.*, *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986). The case also involved a challenge to the agency's "Bellmon Review" policy, under which the decisions of ALJs with a high percentage of pro-claimant determinations were subject to agency-initiated review by the Appeals Council. *Id.*

115. *Id.* at 1343 & n.23, 1344-49.

116. *Id.* at 1344-49.

the agency's nonacquiescence policy. Dismissing the contention that non-acquiescence was permissible in light of the status of SSA as part of a coordinate branch of government,<sup>117</sup> Judge Sand concluded that plaintiffs were likely to succeed in showing that the agency's pre-1985 policy "was inconsistent with the constitutionally required separation of powers."<sup>118</sup>

The court also stressed the problem of vertical disuniformity:

The Secretary emphasizes the disuniformity of a rule which would require the SSA to apply one legal standard in Connecticut but another in California. We have just as much, if not more, difficulty with a policy whereby one claimant is governed by one legal standard but his neighbor, lacking in either financial resources, litigational persistence, or physical or mental stamina, is governed by another.<sup>119</sup>

The court found that the problems caused by nonacquiescence persisted even under the split acquiescence policy contemplated by Interim Circular No. 185, which allowed for nonacquiescence by the state agencies, because it created distinctions "between those who appeal adverse state agency determinations and those who do not."<sup>120</sup> The court entered a preliminary injunction, barring intracircuit nonacquiescence.<sup>121</sup>

The Second Circuit vacated the preliminary injunction<sup>122</sup> in light of the injunction that had issued in *Schisler v. Heckler*.<sup>123</sup> Under the *Schisler* injunction, SSA was required to "state in relevant publications . . . that adjudicators at all levels, state and federal, are to apply the treating physician rule of [the Second] [C]ircuit."<sup>124</sup> Even though the *Stieberger* injunction was broader and "was not necessarily erroneous when issued,"<sup>125</sup> the Second Circuit concluded that the Secretary should be given the opportunity "to demonstrate his good-faith compliance with the law of this Circuit."<sup>126</sup>

117. *Id.* at 1357 ("The judiciary's duty and authority, as first established in *Marbury*, 'to say what the law is' would be rendered a virtual nullity if coordinate branches of government could effectively and unilaterally strip its pronouncements of any precedential force.").

118. *Id.* at 1367.

119. *Id.* at 1363.

120. *Id.* at 1370.

121. *Id.* at 1375-76, 1400. Nonetheless, the court recognized that intracircuit nonacquiescence might be less troublesome if, after the adverse decision, the agency's policy had been upheld in other circuits. *Id.* at 1366.

122. *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986).

123. *Schisler v. Heckler*, 787 F.2d 76 (2d Cir. 1986). The court in *Schisler* considered whether the entry of an injunction would be an "unnecessary intrusion into the administrative process." *Id.* at 84. But the court concluded that it would not be an intrusion because the agency was asked only to do what it said it was already doing when it represented to the court that it was following the Second Circuit's case law on the "treating physician" rule. *Id.* Hence, *Schisler* does not squarely address the legality of an openly articulated nonacquiescence determination by SSA.

124. *Stieberger*, 801 F.2d at 37 (quoting *Schisler*, 787 F.2d at 84).

125. *Id.*

126. *Id.* at 38. Nonacquiescence by SSA was also enjoined by the district court in *Hyatt v. Heckler*, 579 F. Supp. 985 (D.N.C. 1984). The Fourth Circuit, however, vacated the injunction. 757 F.2d



#### 4. Congressional Reaction to the Agency's Nonacquiescence Policy

SSA's nonacquiescence policy received close scrutiny from Congress during the consideration of the Social Security Disability Benefits Reform Act of 1984. The House bill would have barred intracircuit nonacquiescence outright. It provided that when a court of appeals interprets the governing statute or regulations,

the Secretary shall acquiesce in the decision and apply the interpretation with respect to all individuals and circumstances covered by the provision in the circuit, until a different result is reached by the Supreme Court of the United States on the issue involved or by a subsequently enacted provision of federal law.<sup>127</sup>

The bill authorized the Secretary to nonacquiesce in decisions of the courts of appeals only during the time allowed for filing a jurisdictional statement or certiorari petition before the Supreme Court.<sup>128</sup>

The report accompanying the House bill gave several reasons for the bar against intracircuit nonacquiescence. Although it noted the importance of the uniform administration of the disability program, it added that SSA's nonacquiescence policy did not "substantially achiev[e] that end," because of "distinctions which exist *within* circuits between policies applied to those claimants who pursue their claims to the appeals court level, and those who cannot."<sup>129</sup> The report also expressed concern over the "increasing number and intensity of confrontations between the agency and the courts as SSA refuses to apply circuit court opinions."<sup>130</sup> It faulted SSA for frequently declining to seek Supreme Court review of circuit court decisions with which it did not agree: "This practice ensures that

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1455 (4th Cir. 1985). It reasoned that Congress had rejected a blanket bar against nonacquiescence during its consideration of the Social Security Disability Benefits Reform Act of 1984. *See infra* text accompanying notes 127-37. The court also relied on *Heckler v. Day*, 467 U.S. 104 (1984), where the Supreme Court vacated an injunction requiring the Secretary to adjudicate claims and pay benefits within specified times, in part because Congress had rejected legislation imposing mandatory deadlines on disability reviews. *Hyatt*, 757 F.2d at 1459. The Supreme Court vacated the court of appeals' ruling for reconsideration in light of *Bowen v. City of New York*, 476 U.S. 467 (1986). *See Hyatt v. Bowen*, 476 U.S. 1167 (1986). Upon reconsideration, the Fourth Circuit noted that "[t]he separation of powers doctrine requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action." *Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 79 (1987). It did not enjoin the agency's nonacquiescence, however, because it determined that the question of the propriety of an injunction had not been embraced within the scope of the Supreme Court's remand. *See id.* at 381. For other nonacquiescence cases in which injunctions were entered, see *Thomas v. Heckler*, 598 F. Supp. 492 (M.D. Ala. 1984); *Holden v. Heckler*, 584 F. Supp. 463 (N.D. Ohio 1984).

127. H.R. 3755, 98th Cong., 2d Sess. § 302(a) (1984).

128. *Id.* § 302(b). If the Supreme Court dismissed the appeal or denied certiorari, the agency would then be required to acquiesce in the adverse decision of the court of appeals. *Id.*

129. HOUSE REPORT, *supra* note 63, at 24, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3061.

130. *Id.* at 24, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3062. According to the report, "[w]hile the issue of the constitutionality of the non-acquiescence policy may be in doubt, the undesirable consequences of escalating hostility between the Federal courts and the agency are clear." *Id.*

the Supreme Court will not have the opportunity to review the issue and render a decision with which the agency would be compelled to comply."<sup>131</sup>

The Senate bill took a different approach. Rather than bar intracircuit nonacquiescence outright, it mandated the use of procedural safeguards when nonacquiescence was invoked. It required the Secretary to publish, in the *Federal Register*, and to send to the Committees on Finance and on Ways and Means a statement of her decision not to acquiesce, and the specific facts and reasons in support of that decision.<sup>132</sup> The Secretary had to comply with these requirements within ninety days of the issuance of the court decision, or the last day for filing an appeal, whichever was later.<sup>133</sup> Treating the constitutionality of nonacquiescence as an open question, the bill stated that "nothing in [the section dealing with nonacquiescence] shall be interpreted as sanctioning any decision of the Secretary not to acquiesce in the decision of a U.S. Court of Appeals."<sup>134</sup>

The relevant provisions of both bills were deleted in conference. The Conference Report nonetheless noted that the decision to eliminate statutory language should not "be interpreted as approval of 'non-acquiescence' by a federal agency to an interpretation of a U.S. Court of Appeals as a general practice."<sup>135</sup> Rather, the conferees urged that "a policy of nonacquiescence be followed only in situations where the Administration has initiated, or has the reasonable expectation and intention of initiating, the steps necessary to receive a review of the issue in the Supreme Court."<sup>136</sup> The report further urged the Secretary to propose remedial legislation to deal with the nonacquiescence problem.<sup>137</sup>

131. *Id.* at 23, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3060.

132. SENATE REPORT, *supra* note 64, at 21. The reporting requirement would apply also to decisions to acquiesce in significant cases. *Id.*

133. *Id.*

134. *Id.*

135. H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3095.

136. *Id.*

137. *Id.* at 38, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3096.

The implications of the Conference Report for the legitimacy of continued intracircuit nonacquiescence by SSA are difficult to assess because the legislators held a range of views. According to Senator Long, one of the Senate conferees, the Conference Report recognized that "it may not always be possible to immediately initiate an appeal" and that a total bar against nonacquiescence would therefore be too harsh on the agency. 130 CONG. REC. S11,458 (Sept. 19, 1984). Nonetheless, he added, the report "urges that the practice of nonacquiescence be used only in conjunction with a continuing good faith effort of the administration to obtain a resolution of the outstanding issue." *Id.* Several Senators complained about the abandonment of the *per se* bar of the House bill. *Id.* at S11,460 (Sen. Sasser), S11,469 (Sen. Bingaman). Senator Sasser noted that if SSA continued to follow a nonacquiescence policy despite the statement of the conferees, he would introduce legislation to require the agency to appeal the decision to the Supreme Court. *Id.* at S11,460.

## B. *National Labor Relations Board*

### 1. *General Description of the Agency*

The NLRB's principal responsibilities are to enforce the unfair labor practice (ULP) provisions of section 8 of the National Labor Relations Act and to hold elections under section 9 to determine whether the employees of an appropriate unit wish to be represented by a collective bargaining agent.<sup>138</sup> The five members of the Board, appointed by the President with the advice and consent of the Senate, sit for five-year terms with statutory protection from discharge without "cause."<sup>139</sup> The General Counsel, also a Presidential appointee, is an independent officer with final, unreviewable authority over the investigation of charges and issuance of ULP complaints.<sup>140</sup>

Representation proceedings are handled administratively at the regional level, with only discretionary review by the Board. A party aggrieved by the agency's determination in a representation case—say, because of objections to the election unit or to the conduct of the election—cannot obtain direct judicial review.<sup>141</sup> Such review may be obtained only by converting the case into an ULP proceeding—in the case of an employer, by refusing to bargain with the union which has been certified as the bargaining representative.

ULP proceedings are triggered by the General Counsel's issuance of a complaint. Absent settlement, there will be a trial-type adjudication before an ALJ in which the General Counsel acts as prosecutor with the assistance of the charging party. The ALJ's proposed report and recommended order, if not excepted to, become the order of the Board. Typically, however, exceptions are filed, which the Board reviews on the basis of the record compiled before the ALJ and the briefs filed by the parties.<sup>142</sup>

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138. 29 U.S.C. §§ 158-59 (1982).

139. The Board exercises virtually exclusive authority over the administration of the Act; there is no private right of action save for secondary boycott violations under § 8(b)(4), 29 U.S.C. § 158(b)(4) (1982). See also 29 U.S.C. § 187(b) (1982). A private action is also available for violations of collective bargaining agreements under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982).

140. See *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413 (1987) (post-complaint, pre-hearing informal settlement by General Counsel held not subject to judicial review).

141. See *AFL v. NLRB*, 308 U.S. 401 (1940) (NLRB certifications in representation proceedings are not reviewable "final orders"). A narrowly confined action in the nature of mandamus, however, may be available in special circumstances. See *Leedom v. Kyne*, 358 U.S. 184 (1958).

142. Although empowered to engage in substantive rulemaking, the Board has opted, with a few limited exceptions, to utilize case-by-case agency adjudication as the vehicle for policy formulation as well as enforcement. For criticism of the Board's reluctance to use rulemaking, see Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 27-42 (1987); Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970). For the first time, the Board has embarked on a substantive rulemaking proceeding on the question of health care industry bargaining units. See 53 Fed. Reg. 33, 900 (1988) (second notice of proposed rulemaking); 52 Fed. Reg. 25,142 (1987) (notice

NLRB orders are not self-enforcing. The Board must convert its orders into judicial decrees either by seeking enforcement in the courts of appeals under section 10(e) or by cross-moving for enforcement in the circuit where an "aggrieved" party has petitioned under section 10(f).<sup>143</sup> Under section 10(e), the Board can petition either in the circuit where the ULP occurred or where the respondent "resides or transacts business," but the Board's general practice is to petition only in the circuit where the ULP occurred.<sup>144</sup> "Aggrieved" persons can petition either in the circuit where the ULP occurred, "wherein such person resides or transacts business," or in the D.C. Circuit.<sup>145</sup> When an NLRB order renders both the union (or employee) and the employer "aggrieved," it is possible for petitions to be filed in three different circuits—setting in motion a "race to the courthouse" that is only partially mitigated by recent legislation.<sup>146</sup>

## 2. *The Agency's Nonacquiescence Policy*

Although it is difficult to pinpoint the precise date, it appears that at least since its *Acme Industrial Police* decision in 1944,<sup>147</sup> the Board has reserved the right to continue its disagreement with circuit court rulings that are contrary to the Board's interpretation of national labor policy, even where it is not prepared to seek Supreme Court review in the particular case. Of course, in many cases the Board does acquiesce in the court of appeals' view of the law, but this agency, more than most, has openly asserted the authority to decline to acquiesce in appropriate cases.<sup>148</sup>

of proposed rulemaking).

143. 29 U.S.C. § 160(e)-(f) (1982).

144. See *Arvin Automotive*, 285 N.L.R.B. No. 102 (Sept. 10, 1987); Remarks of Rosemary M. Collyer before Southwestern Legal Foundation, Oct. 18, 1985, at 9, *reprinted in* Daily Lab. Rep. No. 206, Oct. 24, 1985, at E-1 [hereinafter Remarks of Rosemary M. Collyer]; Comment, *Forum-Shopping in the Review of NLRB Orders*, 28 U. CHI. L. REV. 552, 558 (1961) (only one of 411 Board enforcement actions under § 10(c) from January 1955 through November 1960 was brought outside of circuit where ULP occurred).

145. 29 U.S.C. § 160(f) (1982).

146. On January 8, 1988, President Reagan signed H.R. 1162 into law, amending 28 U.S.C. § 2112 to provide that petitions filed within 10 days after an agency order will be referred to the Judicial Panel on Multidistrict Litigation for random selection of the circuit for review. Pub. L. No. 100-236, 101 Stat. 1731 (1988). The race to the courthouse is only partially mitigated because if petitions are filed after the 10-day period, the first-to-file rule will control.

147. 58 N.L.R.B. 1342 (1944); see Brief for the National Labor Relations Board, *Lone Star Steel Co. v. NLRB*, No. 77-1667, at 30-31 (10th Cir. 1983) (on file with authors) [hereinafter *Lone Star Brief*]. For other early intimations of a nonacquiescence policy, see *Blue Flash Express, Inc.*, 109 N.L.R.B. 591, 593 (1954) (overruling per se rule barring interrogation because of contrary views of "at least" six circuits); *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960); *Morand Bros. Beverage Co.*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

148. When the court of appeals has remanded the case to the Board for further proceedings, the agency will typically treat the circuit's view as the "law of the case," even where it has decided to relitigate the point in other circuits or in other cases even in the same circuit. *Lone Star Brief*, *supra* note 147, at 12 n.6 (citing *R. J. Smith Constr. Co.*, 208 N.L.R.B. 615 (1974)); *Longview Furniture Co.*, 110 N.L.R.B. 1734, 1738 (1954); *Tiidee Prod. Inc.*, 194 N.L.R.B. 1234 (1972), *modified on other grounds*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975)). For a recent example of judicial criticism of the Board's policy of limiting its acquiescence to the treatment of a

The NLRB's policy is well captured in its 1957 decision in *Insurance Agents International Union*,<sup>149</sup> where it issued the following general directive to ALJs:

It has been the Board's consistent policy for *itself* to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a Trial Examiner [now called an ALJ] to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.<sup>150</sup>

Thus, while the Board will occasionally abandon its policy as a result of an adverse circuit court decision, ALJs must nonacquiesce unless the Board has announced that it is prepared to accept the adverse judicial ruling.

The General Counsel, like the Board, will normally not consider adverse circuit law binding in deciding whether to issue a complaint. However, she may suspend action on charges or enforcement proceedings because of adverse circuit precedent in anticipation of developments in other circuits. Her attorneys in the region also will, if possible, shape their presentations in the ALJ hearings to accommodate contrary circuit views. The reasons given for this prosecutorial nonacquiescence include the need to bring cases before the Board so that it (as the delegatee of congressional authority) can decide whether or not to acquiesce, and the uncertainty at the outset of a proceeding as to whether the legal question in dispute will be material to the outcome.<sup>151</sup> Once the Board issues its order, of course,

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particular case on remand, see *NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987).

We have found a few examples of apparent NLRB refusal to accord "law of the case" treatment to a disfavored circuit decision. See *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 966 (3d Cir. 1979); *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100 (2d Cir.), *on remand*, 236 N.L.R.B. 1700 (1979), *enforcement denied*, 632 F.2d 208 (2d Cir. 1980); *Morand Bros. Beverage Co.*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529, 532 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

149. 119 N.L.R.B. 768 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960).

150. 119 N.L.R.B. at 773 (emphasis added); see also *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 616 (1963), *enforced in part*, 331 F.2d 176 (8th Cir. 1964).

151.

[The General Counsel's issuance of complaint on grounds inconsistent with a circuit ruling merely represents a recognition that the Board has not yet determined whether or not it will follow this Court's decision in future cases, and that the determination should be made by the Board, in a decision reviewable by this Court, rather than in an unreviewable administrative action.

Lone Star Brief, *supra* note 147, at 15-16.

the General Counsel—now acting as lawyer for the Board—does take account of circuit law in framing her presentation to the court of appeals. As Rosemary Collyer, the current General Counsel, explained in a 1985 address to the Southwestern Legal Foundation:

The Board, which has had a longstanding practice of filing for enforcement only in the circuit in which the unfair labor practices occurred, does not ordinarily initiate enforcement proceedings in an adverse circuit unless it is prepared to distinguish the prior case on its facts or to ask the circuit for reconsideration of the earlier decision. If the respondent seeks review in an adverse circuit, the Board does not ordinarily seek to reargue the matter but acknowledges the controlling authority of the prior circuit decision and submits to the entry of a judgment against it.<sup>152</sup>

Sometimes, of course, the court of appeals rejects the agency's attempt to distinguish, or declines its invitation to reconsider, established precedent. In these cases, the Board, through the General Counsel, will appear to the court to be asking for enforcement of an order in defiance of the court's prior ruling.

The Board has articulated three principal reasons for its nonacquiescence. First, as the quote from *Insurance Agents* indicates, the Board believes that, pursuant to its congressionally delegated responsibility to ensure a nationally uniform administration of its organic statute, it has the authority to pursue its vision of national labor policy at the administrative level, except where the Supreme Court has announced a different nationally binding rule.<sup>153</sup> Second, the Board notes that it is the primary policymaker under the statute and that the Supreme Court has often sided with it even in the face of adverse circuit court decisions.<sup>154</sup>

152. Remarks of Rosemary M. Collyer, *supra* note 144, at 9 (citing *McElrath Poultry Co. v. NLRB*, 494 F.2d 518 (5th Cir. 1974)). It is noteworthy, however, that in a recent dissent, the then Chairman of the NLRB argued vigorously against the agency's nonacquiescence policy. See *Arvin Automotive*, 285 N.L.R.B. No. 102, at 17 (Sept. 10, 1987) (Dotson, dissenting).

153. NLRB officials whom we interviewed also expressed the concern that mandating agency compliance with differing circuit views on important labor law issues, such as the bargainability of plant closings or the obligations of purchasers of companies, would undermine the statutory design to prevent competition fueled by differing labor standards among different sections of the country. See *infra* text accompanying notes 316-20 (discussing cross-circuit effects).

154. As Elliot Moore, recently retired Deputy Associate General Counsel, has written:

On reflection, it appeared to me that an unstated premise for the concern over the Board's failure to acquiesce in a decision of a court of appeals is that the court of appeals is at least as likely as the Board to be expressing what will ultimately be regarded as national labor policy . . . . During [the last 10 years], the Board prevailed in 20 of 32 cases [before the Supreme Court]; in most of these cases, where a court of appeals was reversed, it was for not giving sufficient deference to the Board's interpretation of the statute . . . . Sixteen of the cases decided during the 10-year period involved conflicts among three or more circuits. In thirteen of those cases, the Court upheld the Board. In so holding, the Court disagreed with decisions of a total of 34 courts of appeals that had disagreed with the Board, either in the case before the Court or in other cases presenting the same issue. In three of the 16 cases, the Court disagreed with the Board. In so holding, the Court agreed with the decisions of only six courts of appeals that had disagreed with the Board.

Letter from Elliot Moore to Professor Estreicher 1-2 (July 27, 1987) (on file with authors).

Third, the Board explains, perhaps most persuasively, that because of the broad venue choice available under section 10(f),<sup>155</sup> it cannot be certain which court of appeals eventually will hear the case. Even though it is the Board's policy to seek enforcement only in the circuit where the ULPs transpired,<sup>156</sup> aggrieved parties often challenge the Board's orders in other circuits.<sup>157</sup> Where petitioners are genuinely aggrieved by such orders,<sup>158</sup> some circuits, while lamenting such forum shopping, hold that they have little latitude—despite the apparent breadth of the transfer stat-

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From 1977 to 1986, the Supreme Court sided with the Board in *NLRB v. Pipefitters*, 429 U.S. 507, 527 n.15 (1977) (four circuits had ruled against Board); *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 299 n.4 (1977) (two circuits); *NLRB v. Local Union No. 103, Iron Workers*, 434 U.S. 335 (1978) (one circuit); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 n.17 (1978) (two circuits); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 219 n.5 (1978) (two circuits); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 489 n.5 (1978) (three circuits); *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 422 n.17 (1978) (one circuit); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 493 n.6 (1979) (three circuits); *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979) (one circuit); *NLRB v. Retail Store Employees Union*, 447 U.S. 607 (1980) (one circuit); *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (one circuit); *NLRB v. Hendricks County Elec. Corp.*, 454 U.S. 170 (1981) (one circuit); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (three circuits); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 652 n.6 (1982) (one circuit); *Shepard v. NLRB*, 459 U.S. 344, 349 (1983) (one circuit); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983) (one circuit); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397 n.3 (1983) (three circuits); *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 825-26 n.4 (1984) (six circuits); *NLRB v. Ironworkers*, 466 U.S. 720 (1984) (one circuit); *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 n.3 (1985) (one circuit); *Pattern Makers League v. NLRB*, 473 U.S. 95, 98 n.4, 100 n.6 (1985) (one circuit).

155. See *supra* text accompanying notes 143-46.

156. See *supra* text accompanying note 144. Apparently, this was not the Board's original practice. J. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* 187 (1974) (quoting Charles Fahy, the Board's first General Counsel); see, e.g., *NLRB v. Indiana & Mich. Elec. Co.*, 124 F.2d 50, 52-53 (6th Cir. 1941), *aff'd*, 318 U.S. 9 (1943) (ULP in 7th Circuit).

157. See, e.g., *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1425 (11th Cir. 1985) (reviewing case which arose in 6th Circuit); *McLean Trucking Co. v. NLRB*, 689 F.2d 605, 607 (6th Cir. 1982) (5th Circuit); *Chevron U.S.A. v. NLRB*, 672 F.2d 359, 360-61 (3d Cir. 1982) (9th Circuit); *Magic Pan, Inc. v. NLRB*, 627 F.2d 105, 106 (7th Cir. 1980) (D.C. Circuit); *Thrift Drug*, 215 N.L.R.B. 259, 260-61 (1974), *enforced*, 521 F.2d 243 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (3d Circuit); *Winn-Dixie Stores, Inc. v. NLRB*, 448 F.2d 8, 10-11 (4th Cir. 1971) (5th Circuit); *New Alaska Dev. Corp. v. NLRB*, 441 F.2d 491, 492 n.3 (7th Cir. 1971) (9th Circuit). One study of 563 NLRB cases decided by the courts of appeals from January 1955 through November 1960 found that 13 of 89 (14.6%) employer appeals and 41 of 63 (65.1%) union appeals were brought in circuits other than where the alleged ULPs occurred. See Comment, *supra* note 144, at 558-59.

158. The courts of appeals will disregard the forum selection of petitioners who are not substantially aggrieved by the agency's order, see, e.g., *J.L. Simmons Co. v. NLRB*, 425 F.2d 52, 54-55 (7th Cir. 1970); *Chatham Mfg. Co. v. NLRB*, 404 F.2d 1116, 1118 (4th Cir. 1968); *Insurance Workers Int'l Union v. NLRB*, 360 F.2d 823, 827 (D.C. Cir. 1966), or whose aggrievement stems solely from the denial of extraordinary relief, see *Liquor Salesmen's Union v. NLRB*, 664 F.2d 1200 (D.C. Cir. 1981). In addition, some courts will require a substantial showing of transaction of business in the forum circuit lest "large corporations . . . be free to roam the entire country in search of venues which might provide them with what, in their opinion, would be a more favorable hearing." *S.L. Indus., Inc. v. NLRB*, 673 F.2d 1, 3 (1st Cir. 1982); *Davlan Eng'g, Inc. v. NLRB*, 718 F.2d 102, 103 (4th Cir. 1983).

ute<sup>159</sup>—to transfer the case to a circuit having more substantial contacts with the underlying controversy.<sup>160</sup>

The Board's venue uncertainty contention requires some qualification. The Board, by stated policy, seeks enforcement only in the circuit where the ULPs transpired.<sup>161</sup> It can be assumed that the respondent will seek out a circuit with venue over the action that has rejected the agency's position. The problem for the Board, however, is that even if it were to engage in such a calculus, and adhere to the law of the circuit to which the respondent is likely to repair, it has to contend with the fact that the charging party will now be "aggrieved" and seek review in some other circuit.<sup>162</sup> Acquiescence in these circumstances also puts the agency in the awkward position of having to defend a position it does not favor.<sup>163</sup>

### 3. *Judicial Reaction to the Agency's Nonacquiescence Policy*

Both courts and commentators have been quite critical of the NLRB's nonacquiescence policy.<sup>164</sup> Indeed, virtually every circuit has issued opin-

159. Under 28 U.S.C. § 2112(a) (1982), the court of appeals of first filing would appear to have fairly broad discretion to transfer the case: "For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such [agency] order to any other court of appeals." A similar transfer authority is contained in the 1988 amendments. *See infra* text accompanying note 386.

160. *Compare* Rikal, Inc. v. NLRB, 721 F.2d 402, 404 (1st Cir. 1983) ("a court of appeals in which venue lies under the statute may not decline jurisdiction simply because it believes that another circuit would be the more appropriate forum") and NLRB v. Indiana & Michigan Elec. Co., 124 F.2d 50, 53 (6th Cir. 1941), *aff'd*, 318 U.S. 9 (1943) (same) with Farah Mfg. Co. v. NLRB, 481 F.2d 1143, 1145 (8th Cir. 1973) (transfer to circuit where ULP arose despite fact petitioner transacted business in forum circuit); *cf.* United States Elec. Motors v. NLRB, 722 F.2d 315, 319 (6th Cir. 1983) (criticizing forum-shopping but accepting stipulation of both parties that petitioner transacted business in forum circuit). *See generally* McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 332-34 & n.152 (1980).

161. *See supra* text accompanying note 144.

162. The Board recently explained its decision to refuse to follow Eleventh Circuit precedent in Arvin Automotive, 285 N.L.R.B. No. 102 (Sep. 10, 1987):

[I]f we were to dismiss the complaint, the individual Charging Party would be free to seek review in the District of Columbia Circuit. Because we are finding the violations, the Respondent Union is the aggrieved party, and its venue choices would include not only those open to the Charging Party but also any circuit in which it is incorporated (i.e., resides) or in which it "transacts business." Although the Respondent Employer did not file exceptions, it should be noted that, had it done so, it would be free to file in the Seventh Circuit, where it is incorporated, and if it transacts business nationwide, all the circuits would be open to it. It is thus apparent that we operate under a statute that simply does not contemplate that the law of a single circuit would exclusively apply in any given case.

*Id.* at 14 (citations omitted).

A consistent Board practice of acquiescence in the law of the circuit where the ULP occurred might, however, induce these other circuits to forego an independent consideration of the applicable law. *See* United Steelworkers v. NLRB, 377 F.2d 140, 141 (D.C. Cir. 1966) ("we certainly cannot hold the Board to have been in error when it decided to follow a decision of a Court of Appeals, especially of the circuit in which the relevant affairs occurred").

163. *See infra* text accompanying note 173.

164. For critical academic commentary, see Hruska Commission Report, *supra* note 5, at 354-58; Ferguson & Bordon, *The NLRB vs. the Courts: The Board's Refusal to Acquiesce in the Law of the Federal Circuit Courts of Appeals*, Proc. of the 35th NYU Annual Conf. on Lab. 125 (1983); Kafker, *Nonacquiescence by the NLRB: Combat Versus Collaboration*, 3 LAB. LAW. 137 (1987); Mattson, *The United States Circuit Courts and the NLRB: "Stare Decisis" Only Applies if the*



ions highly critical of that policy.<sup>165</sup> The earliest judicial reaction appears to be the Seventh Circuit's decision in *Morand Brothers Beverage Co. v. NLRB*,<sup>166</sup> in which the Board on remand declined to follow prior law of that circuit:

[W]e think it not unwise to recall a basic tenet in our federal system of administrative practice and review. The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review, is much akin to a . . . District Court . . . . That is to say, it is the "inferior" tribunal, whose decisions, both substantive and, in some instances, adjective, are subject to review and consequent approval or disapproval by the reviewing body.<sup>167</sup>

This district-court analogy is also the theme struck in more recent opinions. Thus, for example, in *Allegheny General Hospital v. NLRB*,<sup>168</sup> the Third Circuit declared:

[T]he Board is not a court nor is it equal to this court in matters of statutory construction. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect. . . . [I]t is in this court by virtue of its responsi-

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*Agency Wins*, 53 OKLA. B. J. 2561 (1982). For similar views by former members of the Board, see Dotson & Williams, *NLRB v. The Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739 (1987); Zimmerman & Dunn, *Relations Between the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation*, 8 EMPLOYEE REL. J. 4 (1982); see also Estreicher, *The Second Circuit and the NLRB 1980-1981: A Case Study of Judicial Review of Agency Action*, 48 BROOKLYN L. REV. 1063, 1077-78 (1982) (criticizing nonacquiescence in cases on remand). For a defense of the Board's policy, see Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399 (1988).

165. See *NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Beverly Enter. v. NLRB*, 727 F.2d 591, 592-93 (6th Cir. 1984); *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 357 & n.12 (6th Cir. 1983); *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382-83 (D.C. Cir. 1983); *PPG Industries, Inc. v. NLRB*, 671 F.2d 817, 823 & n.9 (4th Cir. 1982); *NLRB v. HMO Int'l*, 678 F.2d 806, 809 (9th Cir. 1982); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), cert. denied, 449 U.S. 975 (1980); *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979); *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1252 (5th Cir. 1978); *Coletti's Furniture, Inc. v. NLRB*, 550 F.2d 1292, 1293 (1st Cir. 1977); *NLRB v. Gibson Prod. Co.*, 494 F.2d 762, 766 (5th Cir. 1974); *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 532 (7th Cir.), cert. denied, 346 U.S. 909 (1953); cf. *Ennerhaul, Inc. v. NLRB*, 710 F.2d 748, 751 (11th Cir. 1983) (awarding attorney's fees under Equal Access to Justice Act (EAJA)).

The only judicial endorsement of sorts is Judge Wright's approving quotation of a Fifth Circuit ruling that "assumed without deciding" that an agency was "free to decline to follow decisions of the courts of appeals with which it disagrees, even in cases arising in those circuits." *Yellow Taxi Co.*, 721 F.2d at 384 (Wright, J., concurring) (quoting *S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1278-79 (5th Cir. 1981)). Judge Bork in the same case observed that "[a]n agency with nationwide jurisdiction is not required to conform to every interpretation given a statute by a court of appeals," but found that the Board "appears less to have been seeking reconsideration of a legal issue than trying to achieve a desired result by a somewhat disingenuous treatment of the facts." *Yellow Taxi Co.*, 721 F.2d at 385 (Bork, J., concurring).

166. 204 F.2d 529 (7th Cir.), cert. denied, 346 U.S. 909 (1953).

167. *Id.* at 532 (citations omitted).

168. 608 F.2d 965 (3d Cir. 1979).

bility as the statutory court of review of NLRB orders that Congress has vested a superior power for the interpretation of the congressional mandate. Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court. . . . For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.<sup>169</sup>

According to critics of nonacquiescence, not only must the Board itself apply the law of the reviewing circuit, but adherence to circuit law is also a duty of the ALJs<sup>170</sup> and other agency decisionmakers.

In general, the reactions of the courts of appeals share certain characteristics. First, the courts are quick to condemn NLRB nonacquiescence as "outside the law" without any attempt to justify this conclusion except by reference to the district-court analogy, which is itself analytically questionable.<sup>171</sup> Second, the courts appear to be operating on the assumption that what is going on is a form of *intracircuit* nonacquiescence. This is true even when there has been no prior remand, or when the reviewing circuit is not the place where the alleged ULPs occurred.<sup>172</sup> Third, the courts appear not to be aware that, because of the range of venue choice open to "aggrieved" parties, no particular circuit exercises exclusive authority over the dispute. Predicting which circuit will ultimately review the case is frequently difficult, and agency acquiescence may create a new aggrieved party, putting the agency in the position of having to defend a circuit court's position, not its own.<sup>173</sup> Fourth, these decisions do not acknowledge that nonacquiescence may be justified in particular circumstances. Finally, although there have been suggestions that continued nonadherence by the NLRB might result in additional sanctions,<sup>174</sup> the courts in these cases have confined their reaction to nonenforcement of the Board's orders.

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169. *Id.* at 970 (citations omitted).

170. *See PPG Industries*, 671 F.2d at 823 & n.9; *Federal-Mogul*, 566 F.2d at 1252.

171. For a criticism of this analogy, see *infra* text accompanying notes 229-37.

172. Some of the cases, however, were on remand from the reviewing circuit, and hence it was virtually certain they would return to that court, whether by initial filing or transfer. *See, e.g., Jamaica Towing, Inc.*, 632 F.2d at 208; *Allegheny Gen. Hosp.*, 608 F.2d at 966; *Gibson Prods.*, 494 F.2d at 763; Estreicher, *supra* note 164, at 1077-78.

173. On the problem of nonacquiescence under conditions of venue choice, see *infra* text accompanying notes 302-07.

174. *See Ashkenazy Property Management Corp.*, 817 F.2d at 75 ("Any future act of 'nonacquiescence' should be dealt with by this court in the specific context in which it occurs so that we may address the agency's particular violation of the rule of law and fashion a remedy that is appropriate in light of all the relevant circumstances."); *Yellow Taxi Co.*, 721 F.2d at 383 ("Should the Board continue to act in defiance of well established decisional law of this and other courts, we may be required to secure adherence to the rule of law by measures more direct than refusing to enforce its orders."); *cf. Enerhaul, Inc.*, 710 F.2d at 751 (attorney's fees under EAJA). The use of EAJA sanctions as a means of curbing agency nonacquiescence is discussed *infra* text accompanying notes 347-48.

### C. *Survey of Other Major Federal Agencies*

The experience of SSA and the NLRB is far from unique. For example, the IRS, which like SSA operates under a scheme that is essentially venue-certain,<sup>175</sup> has frequently engaged in intercourt nonacquiescence. Many of the cases that have reached the Supreme Court since 1976 involved issues which the IRS had lost in one or more circuits and had continued litigating in other circuits.<sup>176</sup> Former Chief Counsel Lester R. Uretz described the IRS's informal policy with respect to intercourt nonacquiescence as follows:

It may be stated as a general rule of thumb, to which exceptions must of necessity be made, that the Service will accept a result reached by two courts of appeals where there are no contrary appellate decisions. However, if the Service has been successful in litigating simultaneously several cases which present the same issue, decisions may result in quick succession from more than two circuits.<sup>177</sup>

Though less frequently, the IRS has also engaged in intracircuit nonacquiescence.<sup>178</sup>

175. Taxpayers who are dissatisfied with an administrative determination may bring suit in one of three trial forums: if they pay the disputed tax, they can file a refund suit in the district court or the Claims Court, 26 U.S.C. § 7422 (1982), and if they withhold payment, they can contest the proposed deficiency in the Tax Court, 26 U.S.C. §§ 7451-65 (1982). Both the Tax Court and the Claims Court are trial courts of nationwide jurisdiction.

Refund suits by individuals may be brought in the district court in which they reside, and in the case of corporations, in the district court in which they maintain their principal place of business or principal office or agency, 28 U.S.C. § 1402(a) (1982), and may be appealed to the court of appeals that embraces the district, 28 U.S.C. § 1294 (1982). The venue provision for appeals from the Tax Court to the courts of appeals corresponds to the venue provision for refund suits in the district courts. 26 U.S.C. § 7482(b) (1982). The decisions of the Claims Court are reviewable only by the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3) (1982).

Since 1970, the Tax Court has been following the case law of the court of appeals that will review its decision whenever the identity of this court is ascertainable. *See Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971); *Geier, The Emasculated Role of Judicial Precedent in the Tax Court and the Internal Revenue Service*, 39 OKLA. L. REV. 427, 438 (1986). Thus, whether a case originates in the district court or the Tax Court, it will be appealed to the same court of appeals and governed by the same legal standard. The only venue uncertainty in the system (other than occasional uncertainty over where a Tax Court decision will be appealed) is caused by the presence of alternative venue in the Claims Court, which accounts for a small number of cases.

176. *See, e.g.*, *Jersey Shore State Bank v. United States*, 107 S. Ct. 782 (1987) (four circuits had ruled against IRS); *Sorenson v. Secretary of the Treasury*, 106 S. Ct. 1600 (1986) (two circuits); *United States v. Boyle*, 469 U.S. 241 (1985) (one circuit); *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985) (one circuit); *Badaracco v. Commissioner*, 464 U.S. 386 (1984) (one circuit); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982) (one circuit); *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981) (one circuit); *United States v. Euge*, 444 U.S. 707 (1980) (two circuits); *United Cal. Bank v. United States*, 439 U.S. 180 (1978) (one circuit); *Commissioner v. Kowalski*, 434 U.S. 77 (1977) (four circuits); *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976) (four circuits); *Beckwith v. United States*, 425 U.S. 341 (1976) (one circuit).

177. Uretz, *The Chief Counsel's Policy Regarding Acquiescence and Nonacquiescence in Tax Court Cases*, 14 TAX COUNS. Q. 129, 144 (1970).

178. *See, e.g.*, *Boyle v. United States*, 710 F.2d 1251 (7th Cir. 1983), *rev'd*, 469 U.S. 241 (1985) (nonacquiescing in *Rohrbaugh v. United States*, 611 F.2d 211 (7th Cir. 1979)); *Portland Cement Co. v. Commissioner*, 614 F.2d 724 (10th Cir. 1980), *rev'd*, 450 U.S. 156 (1981) (nonacquiescing in

In defense of its nonacquiescence, the IRS takes the position that horizontal uniformity among similarly situated taxpayers is particularly important in the administration of the tax laws.<sup>179</sup> Supreme Court review, however, generally cannot be obtained until the agency is able, by continued relitigation, to create a split in the circuits. Although the IRS's practice has been strongly criticized by the Hruska Commission<sup>180</sup> and the secondary literature,<sup>181</sup> we have not found extensive judicial censure. A notable recent example of disquiet is *Keasler v. United States*,<sup>182</sup> where the Eighth Circuit awarded attorney's fees under the Equal Access to Justice Act (EAJA)<sup>183</sup> because the IRS had refused to acquiesce in an earlier Tenth Circuit ruling on the same issue. Given the importance of uniformity in tax cases, the court indicated that it would follow sister circuit rulings unless they are "demonstrably erroneous or there appear cogent reasons for rejecting them,"<sup>184</sup> and that it would seek to deter even *intercircuit* nonacquiescence in the absence of a demonstrated basis for believing that relitigation was "an important step in creating a meaningful conflict between the circuits."<sup>185</sup>

The Occupational Health and Safety Review Commission (OSHRC), an adjudicatory agency which, like the NLRB, operates under venue-uncertain conditions,<sup>186</sup> has also made significant use of nonacquiescence.

United States v. Ideal Basic Indus., 404 F.2d 122 (10th Cir. 1968), *cert. denied*, 395 U.S. 936 (1969); United States v. Oliver, 505 F.2d 301, 305 (7th Cir. 1974) (nonacquiescing in United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969)); Home Constr. Corp. v. United States, 439 F.2d 1165, 1171 (5th Cir. 1971) (nonacquiescing in Davant v. Commissioner 366 F.2d 874 (1966), *cert. denied*, 386 U.S. 1022 (1967)); *see also* Cardwell v. Kurtz, 765 F.2d 776, 781-82 (9th Cir. 1985) (attorney's fees under EAJA).

179. An oft-cited statement of this policy can be found in Uretz, *supra* note 177, at 139; *see also* Hauser, *Litigation Policy of the Chief Counsel in Civil Tax Cases*, 14 TAX EXECUTIVE 218 (1962).

180. Hruska Commission Report, *supra* note 5, at 350-54.

181. *See, e.g.*, Carter, *supra* note 4; Geier, *supra* note 175; Herzberg, *Blueprint of a Fair Tax Administration*, 41 TAXES 161, 163 (1963); Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228, 234 (1975); Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311 (1956); Rodgers, *The Commissioner "Does Not Acquiesce,"* 59 NEB. L. REV. 1001 (1980); Vestal, *supra* note 29, at 124-25; Note, *Treasury Department's Practice of Non-acquiescence to Court Decisions*, 28 ALB. L. REV. 274 (1964); Note, *The Commissioner's Nonacquiescences: Their Effect Upon Tax Planning*, 28 J. TAXATION 57 (1968); Note, *The Commissioner's Nonacquiescence*, 40 S. CAL. L. REV. 550, 566-68 (1967). Prior to the *Golsen* decision, *see supra* note 175, the Tax Court had also been criticized for its nonacquiescence. *See* Comment, *Heresy in the Hierarchy: Tax Court Rejection of Court of Appeals Precedents*, 57 COLUM. L. REV. 717 (1957).

182. 766 F.2d 1227 (8th Cir. 1985); *see also* Divine v. Commissioner, 500 F.2d 1041, 1049 (2d Cir. 1974).

183. 28 U.S.C. § 2412(d) (1982).

184. 766 F.2d at 1233, (quoting North American Life & Casualty Co. v. Commissioner, 533 F.2d 1046, 1051 (8th Cir. 1976)).

185. 766 F.2d at 1237.

186. Any person aggrieved by a final order of OSHRC, including unreviewed ALJ decisions, may obtain review within 60 days in the court of appeals where the violation is alleged to have occurred, where the employer has its "principal office," or in the D.C. Circuit. 29 U.S.C. § 660(a) (1982). The Secretary of Labor can obtain review or enforcement of any final order in the court of appeals where the alleged violation occurred or where the employer has its principal office. *Id.* § 660(b).

The range of venue choice is, however, narrower than under the NLRA. In addition to the circuit where the alleged violations occurred and alternative venue in the D.C. Circuit, the petitioner's remaining option is limited to the circuit where it has its "principal office" rather than the broader

In its 1976 ruling in *Grossman Steel & Aluminum Corp.*,<sup>187</sup> OSHRC embraced a nonacquiescence policy that avowedly mirrored the NLRB's: "Like the National Labor Relations Act, the Occupational Safety and Health Act of 1970 is national in scope, and its orderly administration requires that administrative law judges follow precedents established by the Commission . . . unless reversed by the Supreme Court."<sup>188</sup> In 1980, the Commission explained its policy as primarily the product of venue uncertainty:

While we are aware that the Third Circuit has held that an agency has no discretion to decline to follow a court's view, . . . the Third Circuit has more recently recognized that the application of the law of one circuit by an administrative agency with national jurisdiction may be difficult because venue for judicial review may lie in more than one circuit and the law of one circuit may be inconsistent with that of others.<sup>189</sup>

In the face of criticism,<sup>190</sup> however, OSHRC has qualified its nonacquiescence policy. It will now follow circuit law where there is no dispute as to the identity of the reviewing court.<sup>191</sup>

The experience of the IRS and OSHRC suggest that the more visible nonacquiescence policies of SSA and the NLRB are not aberrational.<sup>192</sup>

"transacts business" formulation of the NLRA. More importantly, there is likely to be only one aggrieved private party: the employer.

187. 4 O.S.H. Cas. (BNA) 1185, 1975-76 O.S.H. Dec. (CCH) ¶ 20,691 (1976).

188. 4 O.S.H. Cas. (BNA) at 1188, 1975-76 O.S.H. Dec. (CCH) at 24,790.

189. Raybestos Friction Materials Co., 9 O.S.H. Cas. (BNA) 1141, 1143 (1980).

190. See *Borton, Inc. v. OSHRC*, 734 F.2d 508, 510 (10th Cir. 1984); *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980); *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1166-68 (3d Cir. 1980). Other courts, however, have declined to take a position on the legality of OSHRC's nonacquiescence. See *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1382 (D.C. Cir. 1985); *S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1278-79 (5th Cir. 1981).

191. See *Davis Metal Stamping, Inc.*, 12 O.S.H. Cas. (BNA) 1259, 1261, *aff'd*, 800 F.2d 1351 (5th Cir. 1986).

Earl R. Ohman, Jr., OSHRC's General Counsel, describes the Commission's current practice as follows:

In the interest of judicial economy and predictability, the Commission will defer to the legal interpretations of a Court of Appeals to which its decision would be appealed. In one case there was a conflict between the precedents of two circuits to which it could be appealed. The Commission applied its own precedent, which was congruent with the precedent of one of those circuits. *Bethlehem Steel Corporation*, [9 O.S.H. Cas. (BNA) 1346, 1349 n.12, 1981 O.S.H. Dec. (CCH) ¶ 25,208, at 30,134 n.12 (1981)]. Similarly, the Commission feels free to apply its own judgment when the circuits to which the case is appealable have not addressed the issue, even if other courts have. *Williams Enterprises of Georgia, Inc.*, [12 O.S.H. Cas. (BNA) 2097, 2101-02, 1986 O.S.H. Dec. (CCH) ¶ 27,692, at 36,152 (1986)], appeal filed, No. 86-8825 (11th Cir. Nov. 10, 1986). *But see* views of Commissioner Wall, [12 O.S.H. Cas. (BNA) 2115, 2117, 1986 O.S.H. Dec. (CCH) ¶ 27,692, at 36,166 (1986)]. In that instance, however, the Commission carefully reexamines its views in light of the rationale of each court that has reviewed the matter.

Letter from Earl R. Ohman, Jr. to Professor Revesz (May 8, 1987) (on file with authors).

192. See Branson, *SEC Nonacquiescence in Judicial Decisionmaking: Target Company Disclosure of Acquisition Negotiations*, 46 Md. L. Rev. 1001, 1001-02 (1987) (discussing nonacquiescence by Securities and Exchange Commission).

To test this proposition, we conducted a general survey of the practices of the other major federal administrative agencies.<sup>193</sup> While this Article is not the place to provide the full results of that survey,<sup>194</sup> some conclusions are appropriate.

First, the agencies generally reported that they had no written or other formal policy or guidelines on how they would deal with adverse circuit decisions, whether in the course of formulating enforcement policy or in the conduct of agency adjudications. None of the agencies indicated that they had procedures in place to inform enforcement staff or ALJs either of the existence of circuit decisions contrary to agency policy or of the role such decisions should play in internal agency proceedings. This tendency to consider acquiescence in court of appeals rulings on an ad hoc basis is consistent with the results of a similar survey conducted by Professors David Currie and Frank Goodman in their 1974 study for the Administrative Conference.<sup>195</sup>

Second, where review of agency action is vested exclusively in a particular court of appeals, the agencies reported that they would conform their internal proceedings to accord with the rulings of that court. Similarly, where alternative venue lies in the D.C. Circuit, the decisions of that court are given special weight. Several agencies also reported that decisions interpreting regulations of national applicability are normally given nationally binding effect.<sup>196</sup>

Third, most agencies reported that in appropriate cases they would engage in intercircuit nonacquiescence or nonacquiescence in the face of

193. During February and March 1987, we wrote to the general counsels of the major federal agencies asking for "any written statements, pronouncements, directives or procedures for determining when your agency will follow, in subsequent administrative proceedings, circuit court decisions that are inconsistent with your agency's policies." We also asked for a list of the factors taken into account in making such determinations in the absence of written or formal policies. We indicated that we were particularly interested in intracircuit nonacquiescence, problems created by venue uncertainty, and the different considerations applied with respect to rulemaking as opposed to adjudication. Follow-up letters were written to agencies that failed to respond. For agencies for which there were reported court decisions involving nonacquiescence practices, we also followed up with more pointed inquiries seeking to elicit justifications for such practices.

194. The responses are collected as an appendix to our final report to ACUS.

195. See Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975). Although their questionnaire sought to elicit information concerning agency acquiescence policies, the study as published did not focus on this issue.

196. See, e.g., Letter from Diane S. Killory, General Counsel, Federal Communications Commission to Professor Estreicher, at 1 (Jun. 8, 1987) (on file with authors) ("The FCC thus generally does not consider a rule or regulation valid in other circuits when one court of appeals has invalidated a rule or regulation of general applicability."); Letter from Robert D. Paul, General Counsel, Federal Trade Commission to Professor Estreicher, at 1 (May 11, 1987) (on file with authors) ("Where a court exercising statutory review authority vacates or sets aside a Commission rule its judgment applies to the operation of the rule in every circuit, not only in the circuit in which vacation of the rule took place.") [hereinafter Paul Letter]. This is true even in the case of SSA. See Gonya Letter, *supra* note 61, at 3 ("Only occasionally is the rulemaking function involved in the Social Security acquiescence process when, for instance, a court requires the Secretary to issue regulations. Unless the court's order is reversed or stayed on appeal, the agency, of course, complies with such a court order." (citations omitted)).

venue choice. The finding that agency nonacquiescence is common under conditions of venue choice is significant because, as we indicate in Section VI, most agencies operate under statutes affording a broad range of such choice.<sup>197</sup>

Only two agencies indicated that they did not engage in either of these forms of nonacquiescence. Diane S. Killory, General Counsel of the Federal Communications Commission (FCC), wrote:

[T]his agency generally does not attempt to cling to policies that the courts specifically have rejected on review. This is so regardless of whether a subsequent agency decision will be reviewed in the same circuit that rendered the adverse decision. You should be aware that a broad range of FCC decisions—those generally having to do with radio licensing—is reviewable only in the District of Columbia Circuit, so that the question of seeking more favorable law in another forum simply does not arise in a great many cases. As to those cases that are reviewable in other circuits, however, this agency has not taken the position that the rulings of a particular circuit are binding only in the territory that circuit serves.<sup>198</sup>

Ms. Killory noted, however, that sometimes the agency is able by rulemaking “to develop a record that would support a policy that has been rejected in review of particular adjudications.”<sup>199</sup>

Similarly, in our discussions with Francis Blake, General Counsel of the Environmental Protection Agency (EPA),<sup>200</sup> we learned that with respect to both rulemaking<sup>201</sup> and enforcement actions,<sup>202</sup> EPA’s general policy is to eschew relitigation of an issue that has been squarely decided against it in any circuit. Enforcement actions are brought in the district courts, however, and EPA will on occasion seek to preserve its position by not appealing an adverse district court decision. Mr. Blake explained that, because of a special need to maintain uniformity in the environmental context, and a relatively responsive Congress, the agency has avoided relitigation as a tool of policy.

Fourth, several agencies reported that they engage in intracircuit nonac-

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197. See *infra* text accompanying notes 378–81.

198. Letter from Diane S. Killory to Professors Estreicher and Revesz, at 1 (Mar. 2, 1987) (on file with authors) [hereinafter Killory Letter]. But see *ITT World Communications, Inc. v. FCC*, 635 F.2d 32, 43 (2d Cir. 1980) (example of nonacquiescence).

199. Killory Letter, *supra* note 198, at 1 (citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (upholding FCC policy statement relegating media format choices to market forces despite prior circuit ruling requiring hearing into possible market failure)).

200. Interview with Francis Blake, General Counsel of EPA (Mar. 6, 1987).

201. For example, in *Chemical Mfrs. Ass’n v. NRDC*, 470 U.S. 116 (1985), EPA amended a regulation to conform to an adverse circuit decision even though this regulation had been upheld in other circuits. See *id.* at 123–25; *id.* at 136 n.2 (Marshall, J., dissenting). But see *NRDC v. EPA*, 703 F.2d 700, 712 (3d Cir. 1983) (EAJA fees awarded for failure to provide notice and opportunity for public comment, as required in *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979)).

202. But see *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984).

quiescence. The Federal Labor Relations Authority (FLRA) will nonacquiesce, even when it can predict venue, out of "a desire for uniform application of Authority decisional precedent in a program that uniquely involves labor-management relations in the federal community, a program that is worldwide in scope."<sup>203</sup> Robert D. Paul, General Counsel for the Federal Trade Commission (FTC), reported that "[i]n rendering adjudicatory decisions, the Commission applies the same law, regardless of the identity or geographic location of the respondent,"<sup>204</sup> although an effort is made to take account of circuit precedent in fashioning remedies.<sup>205</sup> Llewellyn M. Fischer of the Merit Systems Protection Board (MSPB) indicated that in "mixed cases" involving discrimination charges as well as civil service claims, and hence not reviewable solely in the Federal Circuit, the MSPB has abandoned its earlier attempt to follow the diverse circuit positions and will apply agency policy in conformity with Federal Circuit precedent.<sup>206</sup>

### III. THE CONSTITUTIONALITY OF AGENCY NONACQUIESCENCE

Several courts and commentators have concluded, often without detailed elaboration, that an administrative agency's refusal to acquiesce in contrary circuit court rulings is unconstitutional, or, at the very least, comes close to transgressing constitutional limitations.<sup>207</sup> Such critics of nonacquiescence have excoriated the practice in broad strokes, seemingly excluding the possibility of justification in particular circumstances.<sup>208</sup> If this

203. Letter from Ruth E. Peters, Solicitor, Federal Labor Relations Authority, to Professors Esreicher and Revesz, at 2 (Mar. 3, 1987) (on file with authors). On remand, however, the FLRA has in several instances accepted adverse circuit court decisions as the "law of the case." *Id.*

204. Paul Letter, *supra* note 196, at 2.

205. *See id.* (citing *Holiday Magic, Inc.*, 85 F.T.C. 90, 91 (1975) (vacating restitution provision in part because review was sought in Ninth Circuit)).

206. Letter from Llewellyn M. Fischer of the U.S. Merit Systems Protection Board to Professor Revesz, at 2-3 (Apr. 27, 1987) (on file with authors) (citing *Afifi v. Department of the Interior*, DC 531D8610254 (MSPB, Apr. 16, 1987)) (MSPB will apply "substantial evidence" test approved in *Romane v. Defense Contract Audit Agency*, 760 F.2d 1286 (Fed. Cir. 1985), for denials of step increases in pay, despite conflicting views in other circuits, *e.g.*, *Stankis v. EPA*, 713 F.2d 1181 (5th Cir. 1983); *White v. Department of the Army*, 720 F.2d 209 (D.C. Cir. 1983); *Schramm v. HHS*, 682 F.2d 85 (3d Cir. 1982)).

207. *See, e.g.*, *Lopez v. Heckler*, 713 F.2d 1432, 1441 (9th Cir. 1983) (Pregerson, J., concurring) (agency policy of refusing to obey decisional law of circuit is "akin to the repudiated pre-Civil War doctrine of nullification"); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) (for NLRB to predicate order on its disagreement with circuit court's interpretation of statute is "for it to operate outside the law"); *Stieberger v. Heckler*, 615 F. Supp. 1315, 1357 (S.D.N.Y. 1985) (acceptance of nonacquiescence doctrine would render "[t]he judiciary's duty and authority . . . to say what the law is . . . a virtual nullity"), *prelim. inj. vacated sub. nom.* *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986). For commentators, see Neuborne, *supra* note 8, at 1001-02 and other sources cited *supra* note 8.

208. *But see* *Stieberger v. Heckler*, 615 F. Supp. at 1365-66 (intracircuit nonacquiescence may be justified "in certain situations [where] the passage of time will be accompanied by criticism and gradual erosion of a particular legal rule such that it is reasonably certain that reconsideration by the circuit court will soon be forthcoming;" or "where the agency has substantial reason to believe that subsequent consideration of the disputed issue in other forums has created conditions which are likely to lead . . . to reconsideration"); *cf.* *Maranville*, *supra* note 14, at 522 ("The leap from *Marbury* to a



view—the per se unconstitutionality of agency nonacquiescence—is correct, our inquiry should move directly to the question of remediation: how best to ensure that agencies are suitably deterred from straying beyond constitutional limits. On the other hand, if there is no per se bar, and the validity of a nonacquiescence policy depends on what justification an agency can present in a particular case, we should proceed to analyze the competing interests implicated by nonacquiescence.

We reject a blanket constitutional bar against nonacquiescence, finding unpersuasive the separation of powers, due process, and equal protection arguments that have been raised in support of such a bar. Moreover, we do not believe that there is a need to answer the abstract question whether nonacquiescence, if left entirely unchecked, might not in some circumstances raise constitutional concerns. As we explain in Section IV, agency nonacquiescence is subject to fairly significant checks by virtue of rationality review under the APA;<sup>209</sup> therefore, such concerns should be adequately addressed through statutory limitations on agency action, without need for resort to the Constitution.<sup>210</sup>

#### A. *Specifying the Argument*

It is important to define with specificity the contours of our consideration of the constitutional argument. First, we deal explicitly only with intracircuit nonacquiescence—with cases in which the agency, at the time of its administrative proceedings, knows, by virtue of the venue rules, which court of appeals will review its action, and yet proceeds contrary to a ruling of that court. If the per se argument fails here, it follows *a fortiori* that it will also fail for the two other categories of nonacquiescence that we have defined. Indeed, in pursuing a policy of intercircuit nonacquiescence, by definition the agency is not acting inconsistently with the case law of the court of appeals that will review its action, and that court is under no obligation to follow the ruling of the circuit that previously rejected the agency's position.<sup>211</sup> The disregard of judicial authority, which undergirds the charge of unconstitutionality, is therefore less direct, and the claim of obedience less compelling. For the same reason, the claim of unconstitutionality is also stronger in the intracircuit context than where, because of venue choice, the agency does not know with absolute certainty, at the time of its administrative proceedings, whether its action

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conclusion about nonacquiescence . . . is a long one.”).

209. 5 U.S.C. § 706(2)(A) (1982). For our view of the requirements of APA rationality review, see *infra* text accompanying notes 335–62. The organic statute under which the agency operates may give rise to similar limitations. For ease of exposition, we refer explicitly in the text only to the APA.

210. Our position is consistent with the general policy in favor of avoiding unnecessary constitutionalization of administrative law, as embodied in the “clear statement” approach to statutory questions trenching upon constitutional values. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

211. On the absence of intercircuit stare decisis, see *infra* text accompanying notes 274–75.

will be reviewed in a court of appeals that rejected its position rather than in a court that either has not addressed the legality of the agency's position or has upheld that position.

Second, our discussion addresses only cases in which the organic statute under which the agency operates does not, of its own force, command the agency to conform its administrative proceedings to the law of the circuit that will review its action.<sup>212</sup> Where such a bar is present, an agency acts *ultra vires* if it refuses to adhere to circuit law, and the legality of the agency's action can be decisively resolved as a matter of statutory construction. Therefore, the claim of unconstitutionality has independent force and significance only in cases in which nonacquiescence is not prohibited by statute.

Third, we deal only with situations where the grounds for the agency-court disagreement involve interpretations of statutes. As we show below,<sup>213</sup> it is partly because Congress has charged agencies with responsibility for the uniform administration of their enabling statutes that they have institutional competence, in the absence of a contrary congressional indication and within certain limits, to persist in their disagreement with the reviewing circuit.<sup>214</sup>

Fourth, we confine our inquiry to the analysis of the claim that intracircuit nonacquiescence is *per se* unconstitutional. If, instead, the challenge contemplates a case-by-case inquiry, it must rest on the premise that an agency acts unconstitutionally only when it nonacquiesces without sufficient justification and must envision a balancing of the agency's interests in nonacquiescence against the harms of such a practice. An inquiry of this sort, which we perform in Section IV, fits comfortably within the requirement of rationality that the APA imposes on all agency action; nonacquiescence that is not properly justified can (and should) be struck down as "arbitrary and capricious."<sup>215</sup> Absent a *per se* rule, it is difficult to conceive of a situation in which the application of the agency's policy would be held to survive rationality review under the APA and yet violate constitutional norms, since presumably both inquiries would focus on the same factors and balance them in similar ways.<sup>216</sup> Here, too, for the claim

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212. Cf. *supra* text accompanying notes 126-37 (discussing congressional attempts to limit nonacquiescence by SSA).

213. See *infra* text accompanying notes 233-35.

214. The status of nonacquiescence in a constitutional interpretation presents a much more troubling question. Similarly, the legitimacy of nonacquiescence in the interpretation of a statute other than the agency's organic statute cannot be defended by reference to the congressional delegation of policymaking authority to that agency. See *infra* text accompanying notes 233-35.

215. Of course, if Congress were to amend the APA or an agency's organic statute to endorse intracircuit nonacquiescence across the board, or courts were to decline to use the APA as a tool for scrutinizing the justifiability of nonacquiescence in particular circumstances, the validity of the practice would have to be analyzed under the Constitution, and the balancing of competing factors that we present in Section IV might become the basis for a constitutional standard.

216. By analogy to the Supreme Court's tiers of review under the equal protection clause, it is conceivable that courts might conclude that the Constitution demands a more thoroughgoing review of

of unconstitutionality to have any independent force and significance, it must go to the validity *vel non* of the policy.

Fifth, we deal only with situations in which the circuit court ruling to which the agency refuses to acquiesce is not accompanied by an injunction ordering the agency to conform its administrative practices to circuit law, or was not itself the product of a class action lawsuit in which all residing in that circuit who are, and who in the future may be, potentially affected by the agency policy were formally made parties to the judicial proceeding.<sup>217</sup> As to judgments emerging from class actions that include individuals who will come into contact with the agency only in the future,<sup>218</sup> nonacquiescence would be inconsistent with the norm, which is a bedrock of our scheme of separation of powers, that a final decision of an Article III court is binding on all parties before that court, absent reversal on direct appeal. Similarly, it is difficult to take seriously the claim that an administrative agency has the option, under our constitutional scheme, to disregard an injunction entered against it.

That the entry either of an injunction or of certain types of classwide relief makes nonacquiescence unlawful does not mean that such intervention is appropriate whenever a court strikes down agency action. The propriety of such relief must therefore depend on a case-by-case evaluation of

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agency nonacquiescence than the rationality review envisioned by the APA. But we think that it is highly unlikely that, if the *per se* rule is rejected, the levels of scrutiny would in fact diverge. Because review of agency action under the APA is far more substantively demanding than the highly deferential "rationality review" accorded to legislative or administrative classifications in equal protection analysis, there would be no need to create an intermediate level of review, as there has been in the gender area, simply to ensure meaningful judicial oversight. Moreover, the "strict scrutiny"—strict in theory, fatal in fact—prong of equal protection jurisprudence is merely a mild variant of a rule of *per se* invalidity, with the courts simply leaving some room for the possibility of an extraordinary, overriding justification in what would otherwise be plainly impermissible action. We believe that a rejection of "strict scrutiny" review of nonacquiescence is fairly subsumed in our rejection of the *per se* argument of unconstitutionality.

217. For example, in the *Lopez v. Heckler* litigation, the district court certified a circuit-wide class consisting of all persons in the circuit "whose rights and benefits are, have been, or will be denied by defendants' express refusal to follow [the Ninth Circuit's] precedent" and issued an injunction directing the Secretary of Health and Human Services and her agents to "apply the standards set forth" in previous Ninth Circuit rulings. 572 F. Supp. 26, 30, 32 (C.D. Cal. 1983). See *supra* text accompanying notes 106-13 (discussing subsequent history).

218. Although we recognize that in other contexts class actions including future members have been certified under Federal Rule of Civil Procedure 23, see Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397 (1985), we believe that since declarations of invalidity in the context of such class action suits will be the functional equivalent of an injunction that effectively bars nonacquiescence, any final determination to include future members within the reach of the court's judgment should be subject to the same standards that govern the issuance of such injunctive relief. Procedural devices like class actions cannot be employed to accomplish goals foreclosed by the substantive law. See 28 U.S.C. § 2072 (1982); Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1027-35, 1106-31 (1982).

Admittedly, future litigants were included in class action certifications sustained in *Califano v. Yamasaki*, 442 U.S. 682, 688-89 (1979). But the Court in that case limited its focus to the permissibility of a nationwide class action, and did not consider the validity of agency nonacquiescence. *Yamasaki* cannot plausibly be read to have resolved that question *sub silentio* in the course of construing Rule 23.

the costs and benefits of nonacquiescence, a matter that we take up in Section IV.

With these five specifications in mind, we turn to consider whether the Constitution bars an administrative agency from *ever* pursuing a policy of intracircuit nonacquiescence, even though the organic statute does not itself erect such a prohibition, the agency can justify the particular application of its policy sufficiently to withstand APA-style rationality review, and no court has explicitly insisted on generalized compliance either by issuing an injunction directly restraining the agency or entering certain forms of classwide relief.

Although the judicial pronouncements and secondary writings on the subject have not always carefully defined which constitutional provisions are implicated by nonacquiescence, we see essentially three lines of argument. The first claim, which is by far the most central, is premised on principles of separation of powers. By analogy to the Supreme Court's articulation of its role in *Marbury v. Madison*<sup>219</sup> and *Cooper v. Aaron*,<sup>220</sup> courts and commentators have argued that just as a Supreme Court ruling has coercive force beyond the parties to the immediate dispute, so must a ruling of a court of appeals command obedience by all within its jurisdiction.<sup>221</sup> A second position flows from due process jurisprudence and holds that agency action works a deprivation of property or liberty without due process when it is inconsistent with the applicable law announced by the court of appeals that will review that action.<sup>222</sup> Another due process objection is constructed from the test in *Mathews v. Eldridge*<sup>223</sup> and balances the agency's interest in nonacquiescence against the interest of participants in the administrative process in having the agency follow the ruling of the relevant court of appeals.<sup>224</sup> Finally, a claim based on both due process and equal protection principles maintains that intracircuit nonacquiescence produces discrimination based on wealth or litigation resources by limiting the benefits of favorable circuit law to those litigants who are able to seek judicial review of the agency's action.<sup>225</sup> We examine each of these arguments in turn.

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219. 5 U.S. (1 Cranch) 137 (1803).

220. 358 U.S. 1 (1958).

221. See *supra* text accompanying notes 95-126 (discussing judicial treatment of SSA); Note, *Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity*, 52 BROOKLYN L. REV. 89, 103-10 (1986); Note, *Executive Nonacquiescence: Problems of Statutory Interpretation and Separation of Powers*, 60 S. CAL. L. REV. 1143, 1158-71 (1987); Note, *Denying the Precedential Effect of Federal Circuit Court Decisions: Nonacquiescence by Administrative Agencies*, 32 WAYNE L. REV. 151, 186 (1985).

222. See Note, *Social Security Administration in Crisis*, *supra* note 221, at 122 ("SSA instructions to its adjudicators to ignore judicially mandated legal rules favorable to claimants operates to effectively deny many claimants their right to a meaningful hearing.") (footnotes omitted).

223. 424 U.S. 319 (1976).

224. See Note, *Federal Agency Nonacquiescence*, *supra* note 8, at 252-60.

225. See, e.g., *supra* text accompanying note 105 (discussing *Lopez v. Heckler*), note 119 (discussing *Stieberger v. Heckler*); Note, *Collateral Estoppel and Nonacquiescence*, *supra* note 14, at

### B. *The Separation of Powers Objection*

Attorney General Meese's October 1986 address at Tulane University<sup>226</sup> sparked intense debate over whether the Supreme Court's rulings are indeed owed the generalized acquiescence envisioned by the nine Justices who each signed the *Cooper v. Aaron* opinion, in an effort to stem the resistance of several southern governors to the desegregation mandate of *Brown v. Board of Education*.<sup>227</sup> We do not intend in this study to question the premises of *Cooper v. Aaron*. Our approach assumes that the Supreme Court's pronouncements on federal law must be obeyed not only by the particular parties to the dispute, but also by all within the regulatory reach of federal law. This obligation of obedience entails the internalization of the Supreme Court's rules in the conduct of primary behavior. For example, the Court's *Miranda v. Arizona*<sup>228</sup> rule applies to all police departments in this country and requires that the internal operations of those departments be conducted in compliance with that rule; hence, the Constitution is violated when *Miranda* warnings are not given in the course of interrogating suspects held in custody even if indictments or convictions flowing from such questioning are later overturned. The question here is whether our constitutional system requires that federal administrative agencies acting within the jurisdictional reach of a court of appeals must accord the same measure of obedience to a ruling of that court.

In addressing this question, we first reject two competing views of the relationship between an administrative agency and its reviewing courts, conceptions that have figured prominently in the judicial and secondary writings on the subject: first, that the status of an agency, particularly that of an adjudicatory agency, is analogous to that of a district court in the circuit,<sup>229</sup> and, second, that an agency is part of a co-equal branch of government with independent responsibility for the interpretation of federal law.<sup>230</sup>

The first characterization argues strongly against intracircuit nonacquiescence, for a district court is bound in all instances to follow the rulings of its supervising court of appeals. This view, however, fails to account for the congressional delegation of substantive policymaking authority to the administrative agencies and the resulting constraints on the review role of

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226. Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Meese, *The Tulane Speech: What I Meant*, Wash. Post, Nov. 13, 1986, at A-21, col. 4.

227. 347 U.S. 483 (1954). For a collection of responses to the Meese speech, see *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977, 991-1095 (1987).

228. 384 U.S. 436 (1966).

229. See, e.g., *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.) ("as must a district court, an agency is bound to follow the law of the Circuit"), *cert. denied*, 449 U.S. 975 (1980).

230. See Meese, *The Law of the Constitution*, *supra* note 226, at 985-86. If this latter analogy is at all helpful, it is more applicable to agencies that are clearly within the Executive Branch, the top officials of which serve at the pleasure of the President, than to independent agencies, whose heads are insulated from direct presidential control by "for cause" removal provisions.

the federal courts under basic administrative law principles as articulated in *SEC v. Chenery Corp.*<sup>231</sup> Administrative agencies, unlike district courts, are responsible for a nationally uniform administration of the statutes entrusted to them,<sup>232</sup> and are typically the principal decisionmakers under these statutes. The court's role is the reactive one of checking for abuse of discretion or other transgressions of statutory limitations. Indeed, even on questions of statutory interpretation, a strong rule of deference to agency views operates in lieu of the *de novo* review characteristic of appellate consideration of trial court determinations of questions of law.

The differences between an agency's interpretation of law and that of the reviewing court were recently reaffirmed by the Supreme Court in *Chevron, U.S.A. v. NRDC*<sup>233</sup> and *INS v. Cardoza-Fonseca*,<sup>234</sup> where the Court made clear that the federal courts must uphold an agency's interpretation of the statute it administers if that interpretation is reasonable and is not inconsistent with the clear intent of Congress.<sup>235</sup> That a federal court, in the first instance, might have interpreted the statute differently is irrelevant, for Congress delegated the policymaking role to the agency, and not to the federal judiciary.<sup>236</sup> The district court analogy also fails to take account of the tension between the national responsibilities of admin-

231. 318 U.S. 80 (1943) (*Chenery I*); 332 U.S. 194 (1947) (*Chenery II*). In *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), the Court stated:

This was not a mandate from court to court but from a court to an administrative agency. . . . A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. *The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.*

*Id.* at 141 (emphasis added).

232. See *United States v. Estate of Donnelly*, 397 U.S. 286, 294-95 (1970).

233. 467 U.S. 837 (1984).

234. 107 S. Ct. 1207 (1987).

235. To the extent the disagreement does not involve the agency's organic statute, agency nonacquiescence in a circuit ruling must be justified, if at all, on other grounds. This question, like the question of nonacquiescence in constitutional rulings, see *supra* note 214, is beyond the scope of this Article.

236. See *Chevron*, 467 U.S. at 843 & n.11. We do not believe that the constitutional analysis changes when Congress separates enforcement and policymaking from adjudications, as it has done for internal revenue and occupational safety, by conferring adjudicatory responsibility on bodies independent of the enforcement/policymaking agency (the Tax Court and OSHRC, respectively). The enforcement/policymaking agency's duty to acquiesce in the rulings of the adjudicatory agency is solely a question of congressional design. As to the latter agency, unless its role is limited to factfinding without any substantive policymaking prerogative, and, hence, it may properly be viewed as an adjunct to the court of appeals, its obligations to adhere to the rulings of the circuit that will review its orders is no different from that of an agency that combines enforcement/policymaking and adjudicatory functions. Presently, however, both the Tax Court and OSHRC have opted for a policy of intracircuit acquiescence. See *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971); *Davis Metal Stamping, Inc.*, 12 O.S.H. Cas. (BNA) 1259, 1261 (1985), *aff'd*, 800 F.2d 1351 (5th Cir. 1986).

istrative agencies and the limited geographic reach of the regional circuits, a matter we discuss below.<sup>237</sup>

Unlike the district court analogy, the co-equal branch analogy, at least in its strong form, argues sweepingly for the constitutionality of nonacquiescence because it does not recognize for any federal court a superior role in the interpretation of federal statutory law to that exercised by administrative agencies, except with respect to the adjudication of the rights of the parties before the court. The co-equal branch analogy significantly overstates the autonomy of administrative agencies. Like the district court analogy, the co-equal branch analogy is inconsistent with our constitutional scheme. It cannot coexist with the holding of the Supreme Court in *Cooper v. Aaron* and would justify nonacquiescence even in the face of a pronouncement by the Supreme Court.<sup>238</sup>

A more useful starting place is to ask whether the Supreme Court and the courts of appeals occupy positions in our legal system sufficiently different to place in question the applicability of *Cooper v. Aaron* to intracircuit nonacquiescence. We focus initially on the regional courts of appeals and on statutory schemes that do not provide for exclusive venue to a single court of appeals with nationwide jurisdiction. It is here that the differences are most salient.

In thinking about whether the courts of appeals should be treated like the Supreme Court, it is important to bear in mind that the *Cooper v. Aaron* principle assumes that the law forming the basis for the obligation to acquiesce is no longer in flux. The southern governors were embarking on a fundamentally illegitimate campaign of resistance precisely because the Supreme Court in *Brown* and its progeny made clear that all public schools had to desegregate. The desegregation principle was established and reaffirmed by the Court at a level of generality that precluded any effort at common law modification or narrowing through the drawing of factual or legal distinctions. The duty of generalized compliance in the *Cooper v. Aaron* sense emerges, however, only when the process of federal law development has been completed in this manner.<sup>239</sup> Any continued resistance to a ruling of the Supreme Court after that point must be

237. See *infra* text accompanying notes 241–46.

238. See Meese, *The Law of the Constitution*, *supra* note 226, at 985 (“[constitutional] decisions do not necessarily determine future public policy[;] . . . constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government”).

239. See Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) (Supreme Court’s decisions are not statutes “calling for obedience by all within the purview of the rule that is declared,” but once rule is settled and reaffirmed, “its acceptance is demanded”). There will be occasions, however, where previously well-established precedent has either fallen into desuetude or been substantially eroded by changes in the legal landscape. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling “separate but equal” doctrine); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (denying previously asserted existence of “general” federal common law). In such circumstances, nonacquiescence may be a legitimate strategy.

confined to the arena of public opinion and, ultimately, to the Article V amendment process.<sup>240</sup>

The rulings of the courts of appeals, by contrast, are in a sense only intermediate points of decision in this process of federal law development. This conclusion follows most directly from the absence of intercircuit stare decisis and from other features of the federal system's commitment to the process of intercircuit percolation. The fact that the circuits are free to disagree with each other,<sup>241</sup> that the government is insulated under *United States v. Mendoza*<sup>242</sup> from the constraints of nonmutual collateral estoppel in order to ensure the possibility of multiple circuit consideration of a rule of law, and that the Supreme Court itself relies on intercircuit conflicts as an important signaling device for case selection and as a source of doctrinal materials for decisionmaking,<sup>243</sup> makes clear that the law remains in a state of flux even well after a particular court of appeals has announced its rule on a subject.

It might be argued, of course, that even if the law is in flux nationally, the process of legal development has ended in the particular circuit, hence rendering illegitimate an agency's policy of intracircuit nonacquiescence. A court of appeals, however, does not enjoy sovereign responsibility over its territory akin to that enjoyed by a state court on questions of state law; it is still engaged in the process of interpreting a *unitary* national law<sup>244</sup> and remains a part of that process even after it has ruled on the subject.<sup>245</sup>

240. *But cf.* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (constitutional change may come about through extraconstitutional upheaval in public values).

241. *See infra* notes 274-75.

242. 464 U.S. 154 (1984).

243. *See* S. ESTREICHER & J. SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* 48 (1986).

244. Even where the federal court acquires authority over the case by interdistrict transfer, it "has an obligation to engage independently [of the views of the transferor court] in reasoned analysis." Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit. *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (transfer under 28 U.S.C. § 1407). Hence the rule of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), which requires federal courts in diversity cases to apply the law of the transferor court, does not apply to federal question cases. *See generally* Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 721 (1984); Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 662-706 (1987).

245. We recognize that for purposes of assessing whether state officials have acted in violation of "clearly established" constitutional rights, and hence are shorn of official immunity from liability in damages under 42 U.S.C. § 1983, some courts have held that rights can be "clearly established" by circuit law even in the absence of a Supreme Court ruling on the subject. *See, e.g.*, *Weber v. Dell*, 804 F.2d 796, 803-04 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3263 (1987); *McCann v. Coughlin*, 698 F.2d 112 (2d Cir. 1983).

Two distinctions are relevant. First, nonacquiescence by federal administrative agencies normally arises over statutory questions, and as to such questions administrative agencies play the special role that was underscored by the Supreme Court in *Chevron*. Second, federal administrative agencies have statutory responsibilities outside of the jurisdiction of a regional court of appeals and have a responsibility for the uniform administration of their governing statute. As a result, the fact that an agency's policy is inconsistent with the ruling of a court of appeals is itself a relevant consideration in ascertaining whether the rule articulated by the court of appeals is "clearly established," for the contrary agency position detracts from the clarity of the rule.

At some point, however, the law will no longer be in flux, even if the Supreme Court has not ruled.



Thus, a court of appeals is expected to be open to reconsidering prior rulings in the light of developments in other circuits; the role of the circuits in harmonizing federal law in this manner is an important adjunct to the Supreme Court's role as conflict-resolver.<sup>246</sup>

This is not to say that the legal system or the courts of appeals themselves should view with indifference widespread, unjustified disregard of circuit law by administrative agencies (or other actors). For example, even in the absence of Supreme Court review, at some point the law in a particular circuit and across circuits will no longer be in flux. As developed below, the means are available under APA-style rationality review, possibly the EAJA,<sup>247</sup> and, in egregious cases, the courts' own injunctive powers to prevent nonacquiescence that is not adequately justified. The modifiable, intermediate status of a circuit ruling does suggest, however, substantial differences from the *Cooper v. Aaron* paradigm.

These arguments are less persuasive for courts of appeals of national jurisdiction, such as the Federal Circuit in patent cases, and for the regional circuits themselves where they have been given nationally exclusive responsibility over particular subject matter, such as the D.C. Circuit has over various types of administrative appeals.<sup>248</sup> In those cases, of course, the law is much more resistant to change because, at least for certain issues, there will be no intercircuit dialogue and percolation.<sup>249</sup> But it would nonetheless be a mistake, in considering the per se constitutionality of nonacquiescence, mechanically to equate these courts with the Supreme Court.

The fact that circuit law is typically made by panels of three judges (some of whom may not be active members of the court of appeals) renders a single decision on a particular issue more open to reexamination by a subsequent panel than is true of the Supreme Court's pronouncements. This result is reinforced by the fact that a court of appeals generally acts on the basis of mandatory jurisdiction, and therefore almost certainly considers a particular issue more frequently and in more diverse factual contexts than does the Supreme Court, with its largely discretionary docket.

We do not mean to place too much emphasis, however, on the panel/en

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Then, a court might be able to enjoin nonacquiescence or sanction the agency, for example, by making it pay attorney's fees under the EAJA. See *infra* text accompanying notes 347-48.

246. See S. ESTREICHER & J. SEXTON, *supra* note 243, at 48-52, 53-59.

247. 28 U.S.C. § 2412 (1982); see *infra* text accompanying notes 347-48; see also 5 U.S.C. § 504 (1982) (award of fees in connection with administrative adjudications).

248. See *infra* text accompanying notes 394-96 (discussing exclusive venue provisions).

249. However, for issues common to different administrative schemes, particularly procedural questions, a court with exclusive venue will be engaged in dialogue with the regional circuits. It will enjoy a monopoly of the decisionmaking authority at the circuit court level only over pure questions of statutory interpretation; even as to those questions, it will be affected by the developing jurisprudence of statutory construction in the regional circuits. There will thus be circumstances in which the relevant legal landscape remains unsettled. But as to these questions—statutory interpretations not involving the agency's organic statute—the legitimacy of nonacquiescence will be weaker. See *supra* text accompanying notes 213-14, 233-35.

banc distinction. Indeed, to the extent that the courts of appeals have provided, as most have, that a decision of a panel is binding on all subsequent panels and can be overruled only by the en banc court,<sup>250</sup> the distinction cannot be made to carry too much weight. At the same time, however, in part because of the practical barriers to frequent resort to en banc consideration, a subsequent panel, without formally overruling a decision, might be receptive to finding ways of distinguishing a prior precedent of a different panel.<sup>251</sup> Whether a particular litigation posture constitutes nonacquiescence must depend on whether legally plausible arguments can be made to distinguish the agency's policy from the ruling of the court of appeals. Thus, aggressive positions that would be considered nonacquiescence in the face of a Supreme Court decision, or of an en banc decision by a court of appeals, might not be considered nonacquiescence when they follow an initial panel decision on the subject.

It is questionable whether, for the purposes of the rule laid down in *Cooper v. Aaron*, these differences between a court of appeals of national jurisdiction and the Supreme Court should count.<sup>252</sup> We do not find it necessary to resolve this point definitively, however, because, as we explain in Section IV, nonacquiescence in decisions of courts of appeals of national jurisdiction, or of the regional courts of appeals over matters in which they have been given exclusive venue, should not ordinarily withstand rationality review under the APA.

The foregoing would suggest that, to the extent that intracircuit nonacquiescence has a claim to legitimacy, this claim flows from the *intermediate* and *nonuniform* character of the ruling of the regional circuit court. The relevant question, therefore, is how an agency with national jurisdiction over a particular problem must react to the rulings of a court of limited geographic jurisdiction, which can render neither final nor nationally uniform rules of decision.<sup>253</sup>

In considering whether (and how) the Constitution speaks to this ques-

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250. For the Second Circuit rule, see *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229, 3230 (1987); *In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2d Cir. 1980).

251. For example, in *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), the court stated: "The plaintiff correctly argues that this legal conclusion is inconsistent with our decision in *United States v. Ianniello*. However, the defendants correctly respond that the result reached by the district court—dismissal—is entirely consistent with our decisions in cases such as *Beck v. Manufacturers Hanover Trust Co.*" *Field v. Trump*, 850 F.2d at 950 (citations omitted).

252. Of course, one difference is that the Supreme Court is at a different level in our judicial hierarchy. This difference is particularly relevant to the question whether, following an adverse decision by a court of appeals of national jurisdiction, an agency may nonacquiesce while it litigates the case before the Supreme Court. In the event of such an adverse circuit decision, however, it seems likely that either the court of appeals or the Supreme Court will enter a stay and that the nonacquiescence question would therefore not arise.

253. Of course, the question is presented only where Congress has not provided a precise answer in the organic statute, and where the court of appeals itself has not insisted, or cannot insist (because of limitations in the statute or in the substantive standard we advance in this Article), upon *Cooper v. Aaron* obedience through the issuance of an injunction.

tion, it is useful to ask whether the following hypothetical statute would be unconstitutional. Assume that Congress passes a generic cross-agency statute akin to the APA, providing that, in the absence of contrary direction in the agency's organic statute, the following rules apply: (1) any decision by a regional court of appeals in an appeal from agency action will be binding on the parties (unless overturned by the Supreme Court); (2) agencies are not subject to nonmutual collateral estoppel; (3) the ruling of a court of appeals will be given the usual *stare decisis* effect in its own circuit; (4) courts are free to sanction an agency for continued unjustified nonacquiescence through the EAJA, injunctive process, or other legally available means; and (5) absent an injunction, the agency need not conform its internal proceedings to the rulings of a regional court of appeals, if it can invoke justification, sufficient under APA standards, for such nonacquiescence.

The first four elements of this hypothetical statute reflect the status quo; the fifth authorizes nonacquiescence subject to review for justification. We believe that this hypothetical statute reflects Congress's implicit understanding in constructing our administrative lawmaking system and that it is consistent with principles of separation of powers.

Two serious objections can be raised to our reliance on this hypothetical statute. The first is that Congress has not explicitly enacted such a statute, but at best has been silent on the subject of intracircuit nonacquiescence. This objection fails to account, however, for the fact that agencies act pursuant to broad delegations of authority and normally do not have to demonstrate explicit authorization.<sup>254</sup> Moreover, an implicit authorization of nonacquiescence is embedded in the congressional choice in favor of administrative government. One of the goals that Congress sought to promote was uniformity in the administration of federal law.<sup>255</sup> At first glance, uniformity appears to fit uncomfortably with percolation and with the lack of intercircuit *stare decisis*. After all, if the different regional circuits were precluded from taking different approaches, uniformity would be achieved far more easily and without the need to tolerate agency/court conflict. But there is no reason why our federal system cannot express a preference for the uniform administration of federal law at the agency level, and still desire a scheme of judicial review that improves the quality of legal rules through dialogue and percolation. Intracircuit nonacquiescence permits an agency to preserve uniform administration while the state of the law in the circuits is still in flux.<sup>256</sup> We believe that this dual

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254. Except where there are "clear statement" barriers. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980); *Kent v. Dulles*, 357 U.S. 116 (1958); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

255. See *supra* text accompanying note 232.

256. See discussion in Section IV of the difference between horizontal and vertical uniformity. The prevalence of broad venue provisions permits many agencies to pursue uniform policies at the

objective is the best account of the congressional objectives in enacting statutes providing for administrative policymaking and enforcement subject to judicial review. Thus, for the purposes of assessing the constitutionality of nonacquiescence, we are prepared to treat the current administrative landscape as if the hypothetical statute permitting nonacquiescence by the courts of appeals had in fact been enacted.

The second objection is that such a statute, if enacted, would contravene constitutional limits. We do not believe this to be the case, however, because of the wide-ranging power that Congress enjoys over the jurisdiction of the lower federal courts. To reach this conclusion, we focus on two distinct arguments.

First, unlike the Supreme Court, the lower federal courts are creatures of Congress. The Constitution merely authorizes Congress to establish them; it does not mandate their establishment.<sup>257</sup> As a result, it is certainly not inconceivable that Congress might have the constitutional authority to make administrative action reviewable only by the Supreme Court on writ of certiorari.<sup>258</sup> If Congress need not establish the lower federal courts, it can entrust them with jurisdiction over certain subject matters but not others. We may feel uneasy, it is true, about limiting Article III review in this manner, given the Supreme Court's inability to review more than a small percentage of the cases on its certiorari docket, but it is far from clear whether this problem is one of constitutional significance.<sup>259</sup> If Congress can pursue uniformity at the administrative level to the extent of abolishing circuit court review of agency action altogether, then in what sense can it be said to be acting unconstitutionally by taking the less extreme step of providing for review in the courts of appeals while authorizing intracircuit nonacquiescence, subject to court review and, where appropriate, sanctions and injunctions?

This line of argument might be criticized on the grounds that the

administrative level without being subject to accusations of intracircuit nonacquiescence. If Congress were to eliminate venue choice, as we propose in Section VI below, a *Cooper v. Aaron* rule of obedience would entail considerable costs in terms of the agency's ability to administer a coherent, uniform set of policies under its organic statute.

257. See U.S. CONST. art. III, § 1, cl. 1 ("The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

258. It also remains an open question whether Congress need provide for any Article III review at all, except perhaps for constitutional questions. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) ("Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts."). Compare *United States v. Erika, Inc.*, 456 U.S. 201, 206 (1982) (no review of Medicare reimbursements, but without reaching Article III question) with *Johnson v. Robison*, 415 U.S. 361 (1974) (statutory preclusion of Veterans Administration determinations does not extend to constitutional claims). For academic discussions, see Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

259. But see Eisenberg, *Congressional Authority to Restrict Lower Federal Jurisdiction*, 83 YALE L.J. 498 (1974) (limits of Supreme Court resources require reconceptualization of traditional congressional power under Article III).

“greater” power of eliminating circuit court review altogether does not necessarily carry with it the “lesser” power of preserving circuit court superintendence yet authorizing intracircuit nonacquiescence. There are many instances in our legal system in which the government makes itself subject to constitutional limitations by undertaking activities that it is under no constitutional obligation to undertake. For example, if the government creates a public park system it may not discriminatorily deny access to speakers of disfavored views; more to the point, the fact that a right to an intermediate appeal is not constitutionally mandated does not mean that litigants can be denied due process rights on appeal.

But in many other contexts, “greater includes the lesser” arguments, as they might be called, are a perfectly acceptable mode of legal analysis.<sup>260</sup> It is quite possible that such an argument holds for our hypothetical statute as well. But while the existence of a plausible “greater with the lesser” argument informs the constitutional inquiry, we do not rely exclusively on such an argument, because we believe that the “lesser” power can stand on its own, and thus that its legitimacy does not depend on Congress’s authority to eliminate judicial review of administrative action by the lower federal courts.

Thus, our second argument is that—without regard to the “greater” power, and even if it is assumed that circuit court review is required for questions of law and to police agency factfinding for substantial evidence—Congress would nonetheless have fairly broad authority to define the respective roles of agency and reviewing court. And in this process of structural definition, Congress could opt for arrangements that authorize administrative agencies to pursue the goal of uniform administration even in the face of contrary rules in particular circuits, until the Supreme Court has spoken. It is essential to our conclusion, however, that the formal authority of the court of appeals remains unimpaired under our hypothetical statute; in no sense would Congress be providing for judicial review without permitting the court to function as a full-fledged Article III tribunal. The court, for example, retains the authority it otherwise would have had to generalize compliance through issuance of an injunction or certification of an inclusive class action.<sup>261</sup>

The conclusion that our hypothetical statute is consistent with principles of separation of powers does not require acceptance of similar arguments that might be made for legislation authorizing agency nonacquies-

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260. See Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304-14 (1984).

261. Indeed, those claiming intracircuit nonacquiescence is per se unconstitutional would automatically transform every case into a class action and every remedy into an injunction. With respect to the latter, they would do so without requiring the court to engage in the cost-benefit calculus normally required of such extraordinary relief in equity. Such outcomes are acceptable only where nonacquiescence is always improper, as might be the case with agency disagreements over constitutional rulings. See *supra* note 214.

cence in decisions of the Supreme Court—that is, an attempt by Congress to overrule *Cooper v. Aaron*. Even with respect to statutory issues, Congress's power to overrule courts by amending statutes does not extend to authorizing agencies to disregard final, definitive rulings of the Supreme Court. We come back to the differences between the Supreme Court, on the one hand, and the courts of appeals of regional jurisdiction, on the other. When the state of the law has been settled at the top of the federal judicial system, continued agency disagreement is shorn of all justification, and presents a far greater affront to judicial authority than when only intermediate actors have spoken.

It is also relevant that Congress has great leeway in structuring the courts of appeals. It can create new circuits, consolidate others, redefine the geographic jurisdictions of the existing circuits, replace review in the generalist courts with review in specialized courts, and change venue rules.<sup>262</sup> In contrast, Congress is far more constrained in its dealings with the Supreme Court, and cannot compromise the Court's responsibility as the final expositor of a uniform federal law.

In summary, because the hypothetical statute outlined above survives constitutional scrutiny, the *Cooper v. Aaron* objection fails, at least in the context of courts of appeals that do not have exclusive nationwide jurisdiction over a particular statutory scheme.

### C. *The Due Process and Equal Protection Objections*

Similarly, due process and equal protection doctrines do not erect a *per se* bar against nonacquiescence. The argument premised on due process principles that conceivably could yield such a bar is that an administrative agency works a deprivation of protected interests in property or liberty when it conducts its administrative processes in disregard of applicable law.<sup>263</sup> This merely restates the *Cooper v. Aaron* objection. If the agency has an absolute constitutional or statutory obligation to internalize, in its administrative proceedings, the rulings of the court of appeals that will review its action, then, of course, it acts in disregard of applicable law when it nonacquiesces. If, however, nonacquiescence is justified in certain circumstances, disagreement with the reviewing court of appeals cannot be equated with disregard of the applicable law, and therefore does not give rise to a due process violation.<sup>264</sup>

A second due process argument would balance, by analogy to *Mathews*

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262. For example, in 1981 Congress split the Fifth Circuit, creating the Eleventh Circuit. It also created the Federal Circuit, removing patent jurisdiction from all of the regional circuits, and transferring other jurisdiction from the D.C. Circuit. Each of these actions can affect the applicable legal rules, as the lack of intercircuit *stare decisis* leaves courts at the same level in the judicial hierarchy free to fashion their own case law.

263. See *supra* text accompanying note 222.

264. Thus, the separation of powers objection is both a necessary and sufficient condition for this due process objection; the latter objection is subsumed in the former.

*v. Eldridge*, the agency's interest in nonacquiescence against the interests of regulated parties or claimants in having the agency follow the rulings of the relevant court of appeals.<sup>265</sup> What is envisioned here is a context-specific weighing of a particular agency's interests under its organic statute as against the interests of those aggrieved by the agency action. It is questionable, however, whether the *Mathews* calculus, which seeks by procedural redesign to minimize the occurrence of agency errors, can be used to alter substantive arrangements.<sup>266</sup> Even if it is assumed, *arguendo*, that this procedural due process framework can be applied to nonacquiescence, it is not likely to generate a rule of per se invalidity. Because the relative magnitudes of the interests of the agency and of its opponents will depend on the particular statutory scheme and administrative decision at stake, this type of "as applied" challenge should be taken up, in the first instance, in the course of APA rationality review. As previously stated, we think it unlikely that an agency's nonacquiescence policy would survive APA review and yet violate constitutional norms.<sup>267</sup>

A third argument stresses the differential resources of litigants, maintaining that the government violates due process and perhaps equal protection as well when it applies one set of legal rules to those who can afford to press their case on appeal, and therefore can benefit from a favorable court of appeals decision, and a different set of rules for litigants who lack the resources for an appeal, and must therefore accept an unfavorable agency decision.

This litigant equality argument, in its strong form, would doom not only intracircuit nonacquiescence but also other features of our legal system where differential access to litigation resources may spell different outcomes. It would certainly extend to agency nonacquiescence under uncertain venue conditions and would challenge the *Mendoza* ruling immunizing government from the operation of nonmutual collateral estoppel.<sup>268</sup>

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265. See *supra* text accompanying notes 223–24. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court stated:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

266. The third prong of the *Mathews* test—the risk of erroneous deprivation—would seem inapposite to the nonacquiescence context, for once it has been determined that an agency may legitimately pursue its position despite a prior reversal in the reviewing circuit, it is difficult to understand why a litigant's inability to secure review in that circuit should necessarily count as an incidence of error in the system.

267. We do concede, however, that a *Mathews v. Eldridge* balancing test might require provision of additional procedures that a court, laboring under the restrictions of *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), would lack authority to fashion as an APA requirement.

268. See Note, *Collateral Estoppel and Nonacquiescence*, *supra* note 14, at 859.

This claim would also lead to transferring to the civil administrative context the procedural safeguards—such as appointment of counsel and review for ineffective assistance of counsel—that the Constitution has been held to require in criminal proceedings.

The Supreme Court has yet to mandate a general rule of litigant equality. It has exempted *indigent* litigants from some generally applicable arrangements, though it has fallen far short of transferring criminal law precedents to administrative proceedings.<sup>269</sup> The Court has addressed the question whether lack of resources can deprive a litigant of the benefit of a more favorable legal regime in *Boddie v. Connecticut*<sup>270</sup> and *United States v. Kras*.<sup>271</sup> *Boddie* involved a challenge to state procedures that imposed access fees for the commencement of divorce actions. The Court held that “due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.”<sup>272</sup> In *Kras*, an indigent petitioner in bankruptcy challenged the fees imposed as a condition to a discharge in voluntary bankruptcy. By a five-to-four vote, the Court upheld such fees against due process and equal protection challenges.

Petitioners securing a divorce or a discharge in bankruptcy obtain the benefit of legal rules that they consider more favorable. In the case of bankruptcy, these rules provide a shield from creditors; in the case of divorce, they significantly modify obligations imposed by family law. In this way, the issues in *Boddie* and *Kras* are somewhat analogous to those raised by nonacquiescence, where the more favorable legal rule is available only to those parties with sufficient resources to pursue an appeal.

The issues raised by nonacquiescence are also akin to those in *Ortwein v. Schwab*,<sup>273</sup> where the Court sustained, by a five-to-four vote, the constitutionality of filing fees for judicial review of administrative welfare determinations. Unlike the situation in *Ortwein*, however, nonacquiescence im-

269. For example, indigence has prompted recognition of a right to appointed counsel in criminal proceedings. See *Douglas v. California*, 372 U.S. 353 (1963) (appeals as of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (criminal trials). But *Goldberg v. Kelly*, 397 U.S. 254 (1970), did not require provision of counsel to aid welfare recipients facing termination of benefits. Even in the context of parole revocation hearings, which involve substantial liberty interests, the Court has declined to adopt “a new inflexible constitutional rule with respect to the requirement of counsel.” *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

270. 401 U.S. 371 (1971).

271. 409 U.S. 434 (1973).

272. *Boddie*, 401 U.S. at 374. Writing separately, Justice Brennan viewed the case as implicating both due process and equal protection principles. *Id.* at 388 (Brennan, J., concurring). *Boddie* may have more to do, however, with the right of personal privacy than equality of access to legal proceedings. As Justice Harlan noted for the majority:

We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed [by due process, for] . . . in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter.

*Id.* at 382-83; see *Zablocki v. Redhail*, 434 U.S. 374 (1978).

273. 410 U.S. 656 (1973) (per curiam).



plicates not only the cost of pursuing judicial remedies, but also a scheme in which different rules of law are used by the administrative and judicial actors. What is at stake, therefore, is not simply a decision by a different adjudicator, but also a decision under a different legal standard.

For our purposes, however, it is not necessary to reconcile the somewhat contradictory signals of *Boddie*, *Kras*, and *Ortwein*. Even if nonacquiescence were treated like the claim in *Boddie* (and unlike the claims in *Kras* and *Ortwein*), what would emerge would not be a per se rule against nonacquiescence extending throughout the administrative landscape. A *Boddie*-based challenge would, in all likelihood, require a showing of indigence, and would in any event entail a weighing of the administrative action at stake (including the strength of the agency's justification) as against the resources of the litigants. A balancing of interests responsive to these concerns would take place in the course of APA rationality review. The applicable Supreme Court precedents do not, however, support a rule of per se invalidity premised on litigant inequality considerations.

We do not mean to imply that litigant inequality is unimportant. In Section IV, we identify it as one of the central costs of intracircuit nonacquiescence; it is certainly an important factor in assessing the rationality of agency action under the APA. It does not, however, form the basis for a per se constitutional proscription.

In summary, we do not believe that the Constitution erects an absolute bar against intracircuit nonacquiescence. Moreover, the APA requirement of rationality review makes unnecessary the inquiry whether the Constitution itself restrains nonacquiescence in cases in which the agency cannot advance a satisfactory justification for its failure to follow a ruling of the court of appeals that will review the administrative determination.

#### IV. AN EVALUATION OF THE COSTS AND BENEFITS OF NONACQUIESCENCE

In this section, we evaluate the policy considerations implicated by the three different categories of nonacquiescence. We conclude that intracircuit nonacquiescence can be justified only as an interim measure that allows the agency to maintain a uniform administration of its governing statute following an adverse decision by a court of appeals while the agency reasonably seeks in the courts a national validation of its position. For the other two categories, we do not believe that limitations would advance the proper functioning of the administrative lawmaking system.

##### A. *Intercircuit Nonacquiescence*

Given the lack of intercircuit stare decisis, and the reasons underlying our system of intercircuit dialogue, an agency's ability to engage in in-

tercircuit nonacquiescence should not be constrained.<sup>274</sup> The costs and benefits of intercircuit nonacquiescence must be evaluated in light of our legal system's rejection of intercircuit stare decisis,<sup>275</sup> which, in turn, can be justified only by reference to the benefits of intercircuit dialogue.<sup>276</sup> Indeed, if such dialogue were not desirable, the uncertainty that results when different circuits independently examine a legal issue would clearly suggest making binding on all courts of appeals the ruling of the first court of appeals to consider a particular issue.<sup>277</sup>

The benefits of dialogue can be grouped into four categories.<sup>278</sup> First, doctrinal dialogue takes place when one court of appeals addresses the legal reasoning of another and reaches a different conclusion. Such dialogue is likely to result in better decisions, as it will produce a more careful and focused consideration of the issues.<sup>279</sup>

Second, experiential dialogue occurs when courts of appeals are able to observe and compare the consequences of different legal rules. This empirical evidence is relevant both to circuits that have not yet considered an issue as well as to ones that may wish to reconsider their position.<sup>280</sup>

Third, the conflicts produced by intercircuit dialogue play a useful role

274. Although the Supreme Court has declined to hold that a nationwide class action may never be certified, it has urged that care be taken to ensure "that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Such class certification, in our view, should be avoided where it would have the effect of precluding intercircuit nonacquiescence, or restricting intracircuit nonacquiescence that satisfies rationality review as set forth in Section V below.

275. The absence of intercircuit stare decisis, and the concomitant "law of the circuit" rule, may be largely an accident of history. See Friendly, *The "Law of the Circuit" and All That*, 46 *ST. JOHN'S L. REV.* 406 (1972); Vestal, *supra* note 29, at 136-66. The point of departure is the Act of Mar. 3, 1891, ch. 517, 26 Stat. 826, the so-called Evarts Act, which created the circuit courts of appeals. Although § 6 of the Evarts Act provided that "the judgments or decrees of the circuit courts of appeals shall be final in all cases," 26 Stat. 828, and Congressman Breckenridge of Kentucky feared for "the preservation of homogeneous jurisprudence," 21 *CONG. REC.* 3407 (1890), this requirement of finality could have readily co-existed with a rule of intercircuit stare decisis. Indeed, some early decisions deferred to rulings of other circuits unless they were clearly wrong, *see, e.g.*, *Beach v. Hobbs*, 92 F. 146 (1st Cir. 1899), *aff'd*, 180 U.S. 383 (1901); *United States v. Flannery*, 106 F.2d 315 (4th Cir. 1939). Other courts, however, began to assert a duty of "independent judgment in cases of first impression in our own court," *Haberle Crystal Springs Brewing Co. v. Clarke*, 30 F.2d 219, 222 (2d Cir. 1929), *rev'd on other grounds*, 280 U.S. 384 (1930); *see Heckendorn v. United States*, 162 F. 141, 143 (7th Cir. 1908), *cert. denied*, 214 U.S. 514 (1909). For the arguments in favor of intercircuit stare decisis, see Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 87 *YALE L.J.* 1219, 1240-46 (1978). Despite its adventitious beginnings, however, the absence of intercircuit stare decisis is now firmly embedded in the legal landscape. See S. ESTREICHER & J. SEXTON, *supra* note 243, at 48.

276. See, *e.g.*, S. ESTREICHER & J. SEXTON, *supra* note 243, at 48, 50-52, 73-74; R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 163 (1985).

277. In fact, under some statutory schemes, Congress has made a judgment that a quick and authoritative resolution is more important than the benefits that might result from intercircuit dialogue. Thus, for example, challenges to many environmental regulations can be brought only in the D.C. Circuit. See *infra* text accompanying notes 394-95 (discussing exclusive venue provisions).

278. The discussion of these four categories is a summary of a more comprehensive inquiry in R. Revesz, *Specialized Article III Courts and the Administrative Lawmaking System* 30-40 (1987) (unpublished manuscript on file with authors).

279. *Id.* at 7; see Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 *CALIF. L. REV.* 913, 929 (1983).

280. See R. Revesz, *supra* note 278, at 33.

in signalling to the Supreme Court the difficulty of particular legal issues, and thereby help the Court make better case selection decisions. Difficult issues are likely to have been decided incorrectly in the first instance and are also likely to result in intercircuit conflicts.<sup>281</sup> Under a regime of intercircuit stare decisis, the Supreme Court is hampered in two ways: (1) without the signalling role of intercircuit conflicts, the Court has to expend more of its resources to identify difficult issues that may have been resolved incorrectly by the first court of appeals to address them, and (2) to the extent that the Court fails to identify such cases, it may let stand erroneous decisions below.<sup>282</sup>

Fourth, doctrinal and experiential dialogue on the part of the circuits aids the Supreme Court in deciding cases on the merits. Doctrinal dialogue isolates the issues on which the courts of appeals are divided and presents the competing positions on those issues, probably stated in their most compelling terms. As to experiential dialogue, the Supreme Court, like the circuits, benefits from the existence of a store of accumulated experience.<sup>283</sup>

If an agency must conform its policy nationwide to an adverse ruling by a court of appeals, it becomes exceedingly difficult, if not impossible, for either the agency or a private litigant to bring before another court of appeals the question whether the agency's original policy was permissible under the statute.<sup>284</sup> Consider, for example, the question whether EPA can use independent contractors in enforcement proceedings under the Clean Air Act—the question at stake in *United States v. Stauffer Chemical Co.*<sup>285</sup> If the first court of appeals to face this question determined that EPA could not use independent contractors, a bar against intercircuit non-acquiescence would prevent the agency from using such contractors anywhere in the country. In addition, it is unlikely that any private party would have standing to argue that the agency should be given the option of using such contractors. Thus, no subsequent court would have the op-

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281. As Judge Posner noted:

An issue that provokes a conflict among the circuits that is not immediately eliminated by one circuit receding from its previous position is likely to involve a difficult legal question; and a difficult legal question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases than if it is answered finally by the first panel to consider it.

R. POSNER, *supra* note 276, at 163.

282. See R. Revesz, *supra* note 278, at 33–35.

283. See *id.* at 34–35. Percolation is not without costs, however. If what matters is not a correct answer, but instead a uniform rule, intercircuit stare decisis is preferable because it yields a uniform rule without the need for Supreme Court intervention. As one of us has argued elsewhere, it is unlikely that this consideration should or will be decisive in those cases where outcome really does matter. See *id.* at 39.

284. There will be some cases in which the agency's administrative proceedings will have been completed before the first adverse ruling. Those cases might give another court of appeals the opportunity to uphold the agency's initial policy. But there would be no such opportunity for cases in which the administrative proceedings take place after the first adverse ruling.

285. 464 U.S. 165 (1984).

portunity to decide whether independent contractors are part of the permissible arsenal of enforcement options.<sup>286</sup> As a practical matter, and contrary to the systemic judgment underlying the Supreme Court's ruling in *Mendoza*, the adverse ruling of the court of appeals would therefore become binding and no further dialogue among the circuits would be possible.

It is true that even in this scenario, the Supreme Court could grant certiorari, or Congress could amend the governing statute to explicitly authorize the use of independent contractors. But both the Supreme Court and Congress would be deprived of the benefits of intercircuit dialogue.<sup>287</sup> Moreover, from a managerial perspective, there are important costs attached to involving either of these institutions, which have limited decisional resources, in problems that could be resolved by the circuits themselves.<sup>288</sup> More fundamentally, although our legal system generally assumes that Congress will be able to correct judicial errors, the combined influence of inertial forces and unwillingness to open up what may have been a controversial legislative compromise to reexamination may severely limit the occasions for congressional intervention of this type. Such an understanding of the legislative process not only explains why the Court occasionally is willing to overrule prior erroneous statutory construction, but also undergirds the decision to assign policymaking under federal statutes to the reversible discretion of administrative agencies.<sup>289</sup> Allowance of agency intercircuit nonacquiescence is, therefore, implicit in the system's commitment to avoiding premature finalization of federal law.<sup>290</sup>

A bar against intercircuit nonacquiescence, in its strongest form, would force an agency to conform nationwide to an adverse ruling by a court of appeals even if, prior to that adverse ruling, the agency's position had been upheld in other courts of appeals. For example, if the first two circuits to consider the question had found it permissible for EPA to use independent contractors, but the next circuit had disagreed, the agency would have to abandon the use of independent contractors everywhere in the country, even in the two circuits that upheld their use. There would be no mechanism, absent intervention by Congress or the Supreme Court, that would permit the agency to use independent contractors ever again.

Thus, not only would adverse decisions truncate further dialogue, but they would also dominate decisions that are favorable to the agency. The

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286. As we explain below, a declaratory judgment mechanism does not provide an adequate alternative. See *infra* text accompanying notes 311-13.

287. Of course, intercircuit disagreement helps signal difficult legal issues not only for the Supreme Court, but for Congress as well.

288. See S. ESTREICHER & J. SEXTON, *supra* note 243, at 51-52, 118-19, 132-35.

289. See, e.g., Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 166-68 (1985); Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 64-67, 71.

290. See S. ESTREICHER & J. SEXTON, *supra* note 243, at 48.

result would be a one-way ratchet in which the authoritative voice would be that of the first court of appeals to rule *against* the agency. We have already discussed how one central premise of our post-New Deal administrative law system, recognized by the Supreme Court as early as *SEC v. Chenery Corp.*,<sup>291</sup> and more recently in *Chevron, USA v. NRDC*,<sup>292</sup> is that the administrative agency as the delegatee of congressional authority, rather than the Article III courts, is the primary policymaker under the statute. A system in which the decision of the first court of appeals to rule against the agency—even in the presence of several decisions favorable to the agency—becomes binding law nationwide is inconsistent with this governing premise.<sup>293</sup>

Even if administrative law had developed differently, and courts rather than agencies had been designated as the primary policymakers,<sup>294</sup> it would nonetheless be perverse to accord greater stature to the decision of the first court to rule against the agency than to favorable decisions rendered by other courts at the same level. It is difficult to imagine a justification for such a system, other than perhaps hostility to the decisions of administrative agencies—regardless of the substance of those decisions.<sup>295</sup>

The results generated by our independent contractor example, which involves an issue of internal agency procedure, can be generalized over a fairly broad spectrum of administrative action. Consider, instead, a regulatory agency's interpretation of a substantive statutory question, say, an NLRB policy determination that particular conduct in a union representation election constitutes an unfair labor practice. Assume that the agency's General Counsel issues a complaint applying the Board's policy, and the Board finds a violation, but enforcement is denied by a court of appeals on the ground that the Board's definition of an unfair labor prac-

291. 318 U.S. 80, 88 (1943) (*Chenery I*); 332 U.S. 194, 202, 209 (1947) (*Chenery II*).

292. 467 U.S. 837, 842-44 (1984).

293. In a system that eschews intercourt stare decisis, there is no reason to assume that the adverse circuit rule correctly identifies a statutory limitation on agency discretion, and indeed there is every reason to believe that such a determination cannot be conclusively made in advance of an intercourt dialogue on the point.

294. Such a designation may have occurred under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). See, e.g., *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

295. These problems would not be cured even if the bar against intercourt nonacquiescence were stated in a weaker form, so that an agency would have to comply with an adverse court of appeals ruling in all circuits except those that had upheld the agency's position. Here, too, an adverse circuit court decision would be given an unwarranted one-way ratchet effect—binding force in those circuits which have not yet ruled—whereas a favorable decision in one circuit would not have binding force in other circuits.

Moreover, such a rule would create a conflict in the circuits which, without intervention by the Supreme Court or Congress, could be harmonized only by rejecting the agency's position. Because the issue could not be relitigated in circuits in which the agency's position had been rejected, or where the agency was prevented from asserting its position as a result of the bar against intercourt nonacquiescence, harmony would result only if the circuits that originally had upheld the agency's position ruled against the agency upon reconsideration. Thus, even under the weaker formulation of the bar against intercourt nonacquiescence, there remains an asymmetry that is inconsistent with the position of administrative agencies in our legal system.

tice in this context exceeds its statutory authority. If the General Counsel acquiesces in cases arising in other circuits, and consequently issues complaints only in cases that meet the more stringent standard of the adverse circuit rule, no other circuit will have the opportunity to consider the Board's original policy, since the General Counsel's decision not to issue a complaint is unreviewable.<sup>296</sup> This result obtains for almost all statutory schemes because, as the Supreme Court made clear in *Heckler v. Chaney*,<sup>297</sup> a regulatory agency's decision not to bring enforcement proceedings is almost always unreviewable.

Admittedly, there are other forms of administrative action in which a bar against intercircuit nonacquiescence does not completely foreclose relitigation in other circuits. For example, under the statutory scheme at issue in *Dunlop v. Bachowski*,<sup>298</sup> where the Supreme Court held that the Secretary of Labor's decision not to bring an enforcement action was reviewable,<sup>299</sup> relitigation in another circuit could result from a challenge by a party aggrieved by such a decision.<sup>300</sup>

But even in such cases there are asymmetries. In order to have its original position vindicated in circuits that had not yet rejected it, the agency would have to depend entirely on the actions of private parties. In some statutory schemes, there may be no private parties with standing to seek review of agency inaction; even where present, such parties might not have the resources or a sufficient stake in the controversy to litigate. Moreover, in defending its decision not to bring an enforcement action, the agency would find itself in the uncomfortable position of arguing against a position that it actually favors. Judicial deference might thus attach to the position that the agency actually opposes. Such situations would, in any event, breed confusion and undermine conventional understandings of the respective roles of agency and reviewing court.

In summary, the acceptance of intercircuit nonacquiescence should properly be seen as a corollary to the rejection of intercircuit stare decisis.<sup>301</sup> To make the ruling of the first court of appeals that considers an

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296. See *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413, 420 (1987); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

297. 470 U.S. 821, 837-38 (1985).

298. 421 U.S. 560, 566 (1975).

299. *Dunlop v. Bachowski* involved alleged violations of § 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Distinguishing this case in *Heckler v. Chaney*, the Court stated that the LMRDA "presents an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability," 470 U.S. at 833, which normally would attach to an agency's decision not to commence enforcement proceedings.

300. Similarly, it is possible that in cases in which an agency distributes benefits, a procedure could be established that permitted such relitigation without intercircuit nonacquiescence. For example, if there were statutory authorization, which may not be present in the statute as currently written, the Social Security Administration could pay disability benefits under protest rather than engage in intercircuit nonacquiescence, and then bring an action to recover the benefits. *But see infra* text accompanying notes 311-13 (discussing problems with such a procedure).

301. As we noted at the outset, *see supra* text accompanying notes 24-29, the Court's rejection in *Mendoza* of nonmutual collateral estoppel against the government does not logically require any par-

issue directly binding on all other courts of appeals through the operation of stare decisis is undesirable because it eliminates the possibility of intercircuit dialogue. For the same reason, it is undesirable to make the ruling of the first court of appeals rejecting an agency's policy indirectly binding on other courts by insisting on compliance with that ruling in the agency's internal proceedings, a requirement which would have the practical effect of precluding the agency from litigating the issue again in other courts of appeals.

A bar against intercircuit nonacquiescence would be worse than the adoption of intercircuit stare decisis. If the ruling of one court of appeals effectively binds others, it makes little sense to create a system in which the binding rule is always the one adverse to the agency. Such an asymmetry would bespeak a hostility to the administrative state fundamentally at odds with the doctrine of deference to agency action that is a cornerstone of modern administrative law.<sup>302</sup>

### B. *Nonacquiescence in the Face of Venue Choice*

As we have indicated, nonacquiescence in the presence of venue choice arises where an agency refuses, in its administrative proceedings, to follow a ruling of a court of appeals, where the other courts to which an appeal may lie either have upheld the agency's position or have not yet addressed the legality of that position. For the most part, this category raises the same issues as intercircuit nonacquiescence.

Consider an example in which, because of the breadth of the venue provisions, the agency's proceedings could be reviewed in any of the regional circuits.<sup>303</sup> If the agency is to avoid nonacquiescence, it will have to conform its administrative proceeding to the ruling of the circuit that had previously rejected its position. Such a practice has the same negative asymmetries as a bar against intercircuit nonacquiescence.

Moreover, these problems do not disappear in cases in which venue, while broad, does not include all of the regional courts of appeals. Assume that review of a particular administrative proceeding is available in the First, Second, and Third Circuits, and that of these courts, only the Second Circuit has rejected the agency's position. If the agency does not con-

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ticular conclusion on the legitimacy of nonacquiescence. It would be theoretically possible to permit relitigation, but only in those circumstances where the agency can do so while adhering to adverse circuit law in its internal proceedings. However, given the problems with a declaratory judgment approach, *see infra* text accompanying notes 311-13, relitigation would, as a practical matter, be precluded in circumstances in which the agency acted as anything other than a prosecutor bringing actions in federal court.

302. Intercircuit nonacquiescence is not entirely without costs, as it produces short-term disuniformity. But these costs are no different than those that inhere in the rejection of intercircuit stare decisis.

303. The NLRB faces this situation when it adjudicates cases involving employers with nationwide operations. Its actions can then be challenged in any circuit in which such an employer "transacts business," in addition to the D.C. Circuit. *See* 29 U.S.C. § 160(f) (1982).

form its proceedings to the ruling of the Second Circuit, it will be engaging in nonacquiescence, as we have defined it, regardless of whether its administrative proceedings are ultimately reviewed in one of the other two circuits.<sup>304</sup>

Nonacquiescence in the presence of venue uncertainty, however, is different from intercircuit nonacquiescence in some important respects. Returning to our last hypothetical, assume that the agency refuses to follow the ruling of the Second Circuit and that its proceedings are ultimately reviewed in that circuit. From our perspective, what is relevant is the conduct of the agency at the time of the administrative proceedings, not the posture in which the agency finds itself when it gets to court. In the hypothetical, the agency's order is reviewable in three different circuits, and it cannot determine with complete certainty whether its action will be reviewed in the Second Circuit, rather than in the First or Third Circuit.<sup>305</sup>

But when the agency finds itself litigating in the Second Circuit, from the perspective of that court, the agency's behavior looks like intracircuit nonacquiescence. In fact, courts have severely criticized administrative agencies in precisely these circumstances, apparently without considering the differences between pure intracircuit nonacquiescence and nonacquiescence in the face of venue choice.<sup>306</sup> The resulting friction between agency and reviewing court is a cost not encountered with intercircuit nonacquiescence.<sup>307</sup>

In summary, a bar against nonacquiescence under conditions of venue choice is undesirable for the same reasons as is a bar against intercircuit nonacquiescence. Moreover, venue choice makes it exceedingly difficult, in some situations practically impossible, for an agency to continue to press its preferred policy in circuits that have not rejected it, without thereby

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304. Assume, moreover, that the Ninth Circuit, in which review of this hypothetical administrative proceeding is not available, had also rejected the agency's policy. Whether the agency must follow the ruling of the Ninth Circuit implicates solely the question of intercircuit nonacquiescence.

305. In our hypothetical, it is true that the agency will have a basis for predicting that a losing party will seek review in the Second Circuit. However, there might be other parties to the administrative proceeding who will be aggrieved by an agency order issued in conformity with the Second Circuit's position. The agency itself may seek enforcement of its order in a circuit of proper venue that has not yet ruled against the agency, even if the agency would normally go to the circuit where the alleged violations occurred. Depending on the luck of the draw, if petitions are filed within the first 10 days after an agency order under Pub. L. No. 100-236, 101 Stat. 1731 (1988) (to be codified at 28 U.S.C. § 2112(a)), or are filed after that period under the rule of first-filing, the case might end up in the Second Circuit. But such a fortuity does not transform a situation of venue uncertainty into one of intracircuit nonacquiescence.

306. Where venue is certain, an agency can engage in intercircuit nonacquiescence without thereby having also to engage in intracircuit nonacquiescence. That is, if the Second Circuit is the only circuit to have rejected an agency's policy, the agency can acquiesce in that circuit but continue to press its preferred policy elsewhere. But where venue is uncertain, the agency may find itself litigating before a court that has previously rejected its position, unless the agency complies with the unfavorable ruling nationwide. Even though the agency might concede error, as the NLRB often does in this posture, there are costs attached to administrative behavior that, at first glance, looks to the reviewing court a great deal like intracircuit nonacquiescence.

307. A more complete understanding of the respective roles of agency and court may alleviate some of this tension.



having that policy repeatedly challenged in circuits that have previously rejected it. To remove the friction between agency and court that is thereby caused, we recommend the elimination, or at least the substantial reduction, of venue choice. Under our proposal, an agency would know, at the time of its administrative proceedings, where its action will be reviewed. We consider this issue further in Section VI.

### C. *Intracircuit Nonacquiescence*

Given our conclusion that, even though a court of appeals has rejected an agency's policy, the agency should be allowed to continue to press that policy in other circuits, what rules should apply to cases that are reviewable only in the circuit that has rejected the agency's policy? Consistent with the proper role of agencies and courts in our legal system, we believe that there should not be an absolute bar against intracircuit nonacquiescence. However, such nonacquiescence can be justified only as an interim measure that allows the agency to maintain a uniform administration of its governing statute while it makes reasonable attempts to persuade the courts to validate its position.<sup>308</sup>

#### 1. *Intercircuit Dialogue*

It is true that even if an agency must conform its administrative proceedings to the case law of the court of appeals to which review would lie, where this case law is inconsistent with the agency's policy, the agency can continue to press that policy in other circuits if it chooses to do so. Thus, a bar against intracircuit nonacquiescence would not truncate the development of the law. Other circuits would have the opportunity to uphold the agency's position. If the Supreme Court eventually grants certiorari to resolve the conflict among the circuits, it will benefit from being able to observe the effects of the different legal regimes.

Nonetheless, an inflexible bar against intracircuit nonacquiescence constrains the dialogue among the circuits. Returning to the example of EPA's use of independent contractors, consider a scenario in which that question comes first before the Second Circuit, which strikes down the use of such contractors, and then before the Seventh and Ninth Circuits, which uphold it. It would be desirable for the agency to be able to go back before the Second Circuit and reargue its position in light of its subsequent victories. The Second Circuit might be persuaded by the arguments of the two other circuits, and the conflicting positions might be harmonized without the need for review by the Supreme Court.

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308. At present, because of broad venue choice under most statutes providing for judicial review of agency action, intracircuit nonacquiescence arises in only a few statutory schemes, notably the Social Security Act. See *infra* text accompanying notes 378-81. It is likely to become much more significant, however, if our proposal for eliminating venue choice, advanced in Section VI, is adopted.

But the Second Circuit will be unable to reconsider this issue unless EPA can use independent contractors in cases subject to review in that circuit.<sup>309</sup> To do so, however, entails acting contrary to the case law of the court of appeals to which review lies—that is, engaging in intracircuit nonacquiescence. Similarly, intracircuit nonacquiescence is a prerequisite to judicial reconsideration of a regulatory agency's substantive policy under schemes in which the agency's failure to bring enforcement actions is unreviewable.<sup>310</sup> Thus, a total bar against intracircuit nonacquiescence would make it impossible for a circuit that at one time ruled against the agency to continue a dialogue with circuits that subsequently ruled for the agency. Resolution of the conflict among the circuits would require Supreme Court intervention, thereby adding unnecessarily to the Court's workload. Moreover, the resulting asymmetry again fits uncomfortably with the concept of administrative deference. If intracircuit nonacquiescence is barred, only the circuit that ruled for the agency would be open to possible reconsideration of its position; rulings against the agency would be immune to such reconsideration. Here, too, the one-way ratchet moves exclusively in the direction of disapproval of the agency's action.

A bar against intracircuit nonacquiescence also delays the harmonization of federal law. Were such a bar in place, conflicts could be harmonized without intervention by the Supreme Court only if the courts of appeals that ruled *for* the agency reconsidered their position. The courts that ruled against it would ordinarily not have an occasion to reexamine their prior rulings, even where they might have found persuasive the views of the other circuits.

It is true, of course, that the Supreme Court and Congress can always intervene. But, as we have explained, both of these institutions have limited decisional capacity, and Congress may be unwilling for other reasons to reopen consideration of the statute in question. Moreover, the Supreme Court may be reluctant to intervene every time a conflict arises. Either because of perceived benefits of further intercircuit dialogue, or in order to avoid committing its docket excessively to the administrative law area, the Court may wish to defer its intervention until it is clear that the circuits that ruled against the agency will not depart from that position, particularly where the adverse rulings preceded those supporting the agency's views. It is quite likely, therefore, that the conflict may persist for a longer period of time than if the circuits that ruled against the agency had been able to take a new look at the agency's policy following its acceptance in other circuits.

Critics of nonacquiescence urge that agencies have the means to prod intercircuit dialogue without disregarding the law of the reviewing court

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309. See *infra* text accompanying notes 311–13 (discussing problems with declaratory judgments).

310. See *supra* text accompanying notes 296–99.

of appeals. For example, our colleague, Burt Neuborne, has suggested that, while agencies would have to conform their internal administrative proceedings to circuit law, they might seek a declaratory judgment when they were ready to seek reconsideration of the adverse circuit rule.<sup>311</sup>

There are at least four serious problems with this suggestion. The first, fatal from a practical standpoint, is the likely unavailability of such a procedure under current law for many agencies. The typical statute requires the agency to have made some concrete decision, whether the promulgation of a rule or regulation, or the issuance of an order affecting particular parties, before judicial review may be had.<sup>312</sup> Second, if current law were revised to authorize such a procedure, there are serious questions whether Article III courts could be employed to rule on abstract questions of statutory interpretation in the absence of concrete controversies.<sup>313</sup> Third, even

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311. See Neuborne, *supra* note 8, at 1002 n.32; *supra* text accompanying note 26.

312. For the two agencies most often involved in nonacquiescence disputes, the NLRB and SSA, a declaratory judgment procedure is plainly not available. Under § 10(e)-(f) of the NLRA, review in the courts of appeals may be had only of an "order, an adjudicatory decision after hearing, as set forth in section 10(c)." 29 U.S.C. § 160(c), (e)-(f) (1982). The case law is clear that other determinations of the Board, such as decisions in representation cases, see *AFL v. NLRB*, 308 U.S. 401 (1940), or the General Counsel's exercise of her prosecutorial discretion, see *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413 (1987), are not such orders. See *supra* text accompanying note 296. While SSA does not have the authority to bring a declaratory proceeding under the judicial review provisions of its statute, see 42 U.S.C. § 405(g) (1982) ("Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action."), the agency may seek recoupment of overpayments except from a "person who is without fault if such adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience." 42 U.S.C. § 404(b) (1982). See also 20 C.F.R. § 404.501 *et seq.* (1988). There are some difficulties with this approach as well. First, it is unclear whether the "without fault" limitation on the agency's recoupment authority would permit recovery from claimants who were presumably entitled to the benefits under the then-prevailing circuit law. Second, the mode of recoupment primarily contemplated appears to be adjustments by the agency to payments subsequently due the claimant, see 20 C.F.R. § 404.502 (1988). Cf. *Califano v. Yamasaki*, 442 U.S. 682 (1979) (due process challenge to recoupment adjustment procedure). Undoubtedly this method is used because of the difficulty of obtaining repayment through civil actions. Cf. *Thomas v. Bowen*, 791 F.2d 730 (9th Cir. 1986) (unilateral withdrawal of payments erroneously made by electronic funds transfer to claimant's account).

Agencies do have the authority under the APA, "with like effect as in the case of other orders, and in its sound discretion, [to] issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (1982). Although seldom litigated, this provision appears to contemplate some concrete controversy or at least an actual request by a private party for a declaratory determination. Cf. *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447 (10th Cir. 1983) (discussing factors informing the agency's exercise of discretion to issue declaratory orders).

An agency interested in exploring the declaratory judgment option might go to a federal district court under the authority of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1982), premising subject matter jurisdiction on 28 U.S.C. §§ 1331, 1337 (1982). Aside from Article III problems with this route, it is unclear whether such "nonstatutory review" may be had in circumvention of the judicial review provisions of the agency's organic statute, particularly in light of the Supreme Court's recent rulings curtailing the presumption of reviewability. See *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985).

313. Article III courts are barred from deciding "abstract, hypothetical or contingent questions." *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945); see *United States v. Evans*, 213 U.S. 297, 300-01 (1909). This problem would be present in the case of regulatory as opposed to benefits agencies. For the NLRB or the FTC to go to Court for an abstract determination whether a particular fact pattern states a statutory violation would be no different from the advisory opinions historically eschewed under Article III. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). For agencies that disburse benefits, however, there would be no Article III barrier to a procedure enabling the

if these constitutional doubts were overcome, the envisioned procedure would only address one of the reasons for allowing interim nonacquiescence—the generation of case vehicles for seeking reconsideration of disfavored circuit precedent. The other costs of compelling agencies to revamp their policies and procedures while the law is in flux would remain. Fourth, a declaratory judgment procedure would require some alteration of fundamental premises of our administrative lawmaking system, which presently assigns to agencies the principal policymaking role and to courts a reactive, monitoring function. For courts to intervene, and law to be made, in a manner divorced from the agency's exercise of discretion would reverse this allocation of responsibility. It is questionable whether concern over nonacquiescence should drive such a radical change in institutional arrangements.

Neither are we persuaded by approaches that would authorize intracircuit nonacquiescence only after at least one circuit has ruled in the agency's favor, or only in a small number of "test" cases.<sup>314</sup> Reconsideration may be appropriate not only when a conflict has arisen, but also when the court's rule may have undesirable consequences not fully considered by the first panel which, if brought to the circuit's attention in another case, might lead to a suitable narrowing or, in some cases, abandonment of the rule. Thus, if an agency's enforcement branch does not issue a complaint under a theory rejected by the court to which an appeal would lie until another court of appeals has accepted that theory, it will take a longer time before the issue can be reconsidered. In contrast, if intracircuit nonacquiescence continued after the adverse decision, relitigation in the adverse circuit could follow almost immediately. And, as we discuss below,<sup>315</sup> substantial costs are involved in changing to a new policy in the circuit in response to the first adverse decision, changing back to the original policy after a favorable decision in another circuit, and administering the statute in a differential manner in the interim.

Nonacquiescence only in "test" cases also presents problems. At the time that the enforcement branch issues a complaint, it may be clear that a practice is illegal under the agency's policy but not clear whether it is also illegal under the standards of the reviewing court. That question might be resolved only in the course of administrative adjudication. Moreover, the "test" parties against whom the agency issues complaints may not be inclined to pursue their remedies to the level of a court of appeals. The vast majority of administrative cases do not get to that level—principally because it may well be less costly to comply than to

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agency to make payments under protest and, in essence, bring a recoupment action, since the party against whom recoupment is sought would have a concrete stake in the outcome of the case.

314. This approach has been suggested by Alan Morrison, a prominent Washington, D.C., practitioner.

315. See *infra* Section IV(C)(3).

litigate. Thus, the agency would have to pick a relatively large number of cases to be reasonably certain that an appropriate test case would be generated for review by the court of appeals. Finally, the disparate treatment of "test" and "non-test" cases is troublesome because it subjects the agency to charges of favoritism and unequal treatment of parties otherwise similarly situated.

## 2. *Uniform Outcomes*

We have shown that a bar against intracircuit nonacquiescence, even where it contemplates limited exceptions, may delay the development of uniform rules. In addition, it undermines important goals of uniformity that underlie the administrative law system. The problems of disuniformity can be divided into three major categories: externalities, interstate competition, and fairness.

Externalities—in the sense of cross-circuit effects—are present when economic activity that takes place in one region produces adverse effects in another region. Air pollution, for example, can travel long distances and will not respect the geographic boundaries of states or of the regional courts of appeals. Under the Clean Air Act, EPA regulates air quality by means of ambient standards, which limit the permissible concentrations of particular pollutants in the air. In order to achieve these ambient standards, the agency also regulates the emissions from new sources—sources constructed after the promulgation of the applicable regulations. The emission standards are uniform nationwide and are set by reference to categories of polluters (for example, coal-fired electric plants).<sup>316</sup> If one circuit were to strike down regulations limiting the permissible emissions of a particular pollutant, the effects would be felt not only in that circuit, but in downwind circuits as well.<sup>317</sup> For the ambient standards to be met in those circuits, the agency would have to define more stringent circuit-specific emission standards for those downwind states.<sup>318</sup> Thus, the actions of the court of appeals that struck down the administrative policy will have important effects even outside the geographic jurisdiction of that circuit, forcing the agency to take suboptimal measures in the downwind circuits to counteract the impact of the court's action.<sup>319</sup>

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316. 42 U.S.C. § 7411 (1982).

317. Since this Article is concerned primarily with adjudicatory decisions, *see supra* note 35, this regulatory example should be viewed as an illustration of the benefits of uniformity rather than as a conclusion that the nonacquiescence standards that apply in adjudication would necessarily apply in rulemaking as well.

318. There will, in turn, be an effect on regional competition for industry.

319. If the agency had thought that this mix of pollution control measures was optimal, it would probably have adopted them in the first place. Partly to avoid these problems of regional competition, Congress provided that ambient standards and emissions standards for new sources would be reviewable in a single court of appeals—the D.C. Circuit. 42 U.S.C. § 7607(b)(1) (1982). Thus, the situation described in the hypothetical example in the text would not arise. For examples of interstate externalities under the Clean Air Act, *see, e.g., Air Pollution Central District v. EPA*, 739 F.2d 1071

Another central goal of federal regulation is to prevent regions from competing for industry by offering a more favorable economic climate at the expense of other societal goals. For example, federal regulation in the labor field can be justified, in part, as an attempt to prevent interstate competition for industry at the expense of worker protection.<sup>320</sup> If one circuit takes a more restrictive view than does the NLRB of what constitutes a mandatory subject for collective bargaining, employers in that circuit have more entrepreneurial flexibility, and perhaps lower labor costs, than their counterparts in other circuits, creating incentives for new industry to establish itself in that circuit and for existing industry to move there from other circuits. As long as the conflict among the circuits persists, there will be undesirable regional competition.

Finally, uniformity promotes some fairness values. Whether the agency acts as regulator of private sector activity or administers a benefit program, Congress intended, by enacting federal law to promote horizontal uniformity—equal treatment of regulatees or claimants regardless of where in this country the dispute or claim arose. To the extent the agency is required to alter its policy to conform to adverse circuit rulings, the federal interest in horizontal uniformity is undermined.

### 3. *Differential Administration*

If an agency cannot engage in intracircuit nonacquiescence, it will have to administer its statute differently in various parts of the country, if, after its policy is rejected in one circuit, it wants to continue pressing that policy in other circuits. Differential administration can impose significant costs on an agency. To evaluate these costs properly, it is helpful to analyze the separate components of an agency's nonacquiescence policy. The example we use is a multi-member agency that develops policy primarily through adjudication.

For the commissioners themselves, it might not be particularly burdensome to apply different rules in different cases. Presumably, whatever their acquiescence policy, the commissioners will be made aware of decisions by the courts of appeals that affect their agency and will understand the extent to which the agency's policy is inconsistent with these decisions.

But fashioning an acquiescence policy that applies at all levels within an agency is far more cumbersome than applying such a policy only at the level of the commissioners. For example, enforcement staff, often non-lawyers who are normally responsible for large caseloads, may find it difficult to become familiar not only with the agency's own policy but also

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(6th Cir. 1984); *Connecticut v. EPA*, 696 F.2d 147 (2d Cir. 1982).

320. See, e.g., Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1317 (1954); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I*, 59 COLUM. L. REV. 6, 21 (1959).

with adverse court of appeals decisions. Such personnel are typically informed of their agency's policies by means of instructions manuals prepared by the agency's General Counsel. If such officials are to follow a policy of acquiescence, they will have to be separately instructed on the case law of the relevant circuits. And whenever the agency loses a case in a court of appeals, these documents will have to be updated.<sup>321</sup> More importantly, if officials in different parts of the country must operate under different legal regimes, it will be difficult for the agency to use a single training system for all such officials or to evaluate them pursuant to uniform standards.<sup>322</sup> A portion of the economies of scale that attach to centralized administration will thereby be lost.<sup>323</sup>

The costs of differential administration are a cognizable cost of requiring intracircuit acquiescence.<sup>324</sup> Just as it is not desirable directly to force the agency to conform nationwide to the first adverse decision by a court of appeals, it is similarly not desirable to do so indirectly by imposing overly burdensome costs upon it. Ultimately, the agency should fashion a uniform policy, but it should be permitted to litigate its position in several circuits before making a final decision as to what that policy should be. Perhaps after losing in one circuit and then winning in two, the agency will convince the first circuit to reconsider its holding, the Supreme Court to grant certiorari, or Congress to amend the statute. It would be undesirable if the high costs of differential administration prematurely foreclosed this outcome.

#### 4. *Distributional Effects*

As we have suggested in Section III, intracircuit nonacquiescence produces undesirable distributional consequences. A litigant's ability to obtain the benefit of the case law of the reviewing court of appeals will depend on whether he has sufficient resources to pursue an appeal to the federal courts.<sup>325</sup> The result is analogous to one in which a litigant before a court

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321. See *supra* notes 40-41 and accompanying text.

322. *Id.*

323. These problems are magnified for agencies which are responsible for administering high-volume programs. As Ronald E. Robertson, General Counsel of HHS, observed:

Each year some 15,000 State agency adjudicators make some two million disability decisions.

Following these decisions, for claimants who appeal, Social Security Administration adjudicators at the Office of Hearings and Appeals (over 650 Administrative Law Judges) customarily enter over 200,000 decisions a year. In addition to the disability programs, Social Security Administration employees must adjudicate over three million retirement and survivors claims annually, as well as over 150,000 Supplemental Security Income non-disability claims.

Robertson Letter, *supra* note 92, at 3-4. For a similar view of the IRS, see *supra* note 40.

324. An additional cost of differential administration involves the less tangible impact on *esprit de corps* and ideological commitment in compelling agency personnel—trained to believe they are responsible for a unitary, internally coherent set of policies—to administer the statute differently in different parts of the country.

325. See *supra* text accompanying notes 269-73 (discussing distributional concerns). Other litigants who will not pursue their remedies into the courts are those who are too unsophisticated to know that this course of action is available and those whose stake in the controversy is insufficient to

is told that he can purchase the rule of law which will govern the disposition of his case and that more favorable rules of law are progressively more expensive. This distributional unfairness is the central cost of intracircuit nonacquiescence.

A by-product of these distributional effects is the lack of uniformity in the output of the administrative lawmaking system. When lack of resources prevents a litigant's challenge to the agency's nonacquiescence in court, the result will be vertical disuniformity—disuniformity in outcome between those who pursue their case into the courts and those who do not. Like horizontal disuniformity, which is present when different circuits adjudicate under different legal standards, vertical disuniformity also undermines the goals of uniform administration of federal law.<sup>326</sup> Vertical disuniformity is especially troublesome because the negative impact of the differential policy will probably fall disproportionately on those parties least able to bear it.

##### 5. *Workload of the Federal Courts*

Nonacquiescence is likely to increase the volume of cases reaching the federal courts. Indeed, it is logical to expect that, when the relevant court of appeals has rejected the policy underlying agency action, a relatively large number of litigants would seek review.

In the case of intracircuit nonacquiescence, the link is quite direct. Because a litigant will probably prevail simply through the application of stare decisis, there will be a strong incentive to seek review, since, in balancing the costs and benefits of challenging the agency action, the discount for the risk of not prevailing before the court will be very small. In contrast, if the agency had acquiesced, the litigant would have been satisfied with the agency's decision and the case would never have entered the federal courts.<sup>327</sup>

The explosion in the workload of the federal courts has been well documented.<sup>328</sup> Strong arguments have also been made about how the problem cannot be addressed simply by appointing more judges because, at some point, an increase in the number of judges would lead to a deterioration in the quality of the courts.<sup>329</sup> The contribution that nonacquiescence makes to burgeoning federal caseloads is a cost that must be considered.<sup>330</sup>

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justify the expense of resorting to the courts. See *supra* note 36.

326. See *supra* text accompanying notes 105, 119.

327. Even if the court of appeals to which review lies has not previously addressed the issue, a decision adverse to the agency in another circuit will signal to the litigant the existence of a reasonably persuasive position in his favor. Thus, even intercircuit nonacquiescence is likely to generate additional challenges to agency action.

328. See R. POSNER, *supra* note 276, at 59-93; Estreicher, *Conserving the Federal Judiciary for a Conservative Agenda?* (Book Review), 84 MICH. L. REV. 569, 570-77 (1986).

329. See R. POSNER, *supra* note 276, at 96-102.

330. The ensuing friction between agency and reviewing court is a conceivable additional cost.



## 6. *Assessing the Competing Factors*

The presence of weighty factors on both sides of the scale suggests that either a per se prohibition or an unqualified endorsement of intracircuit nonacquiescence would be undesirable, and that striking a proper balance between the competing values will be exceedingly difficult. It is a useful starting point to consider situations at the extreme where continued intracircuit nonacquiescence should not be tolerated.

One such situation is where all of the circuits have ruled against the agency and the Supreme Court has repeatedly declined to grant certiorari. Continued nonacquiescence under such a scenario would raise the specter of unconstitutionality. In this setting, our reasons for concluding that the *Cooper v. Aaron* principle does not carry over to the circuit courts would lose much of their force: Federal law would not be in flux, and the judicial rejection of the agency's position could not be attributed to the isolated decision of a single circuit panel.

Neither could nonacquiescence under these circumstances be defended by a cost-benefit calculus. The relevant comparison is between the effects of two uniform policies: the agency's original policy as against a new policy that would be consistent with the rulings of the courts of appeals. From the perspective of the goal of uniformity, the latter outcome is clearly preferable since the former produces vertical disuniformity. Similarly, from the perspective of distributional effects, the latter outcome is also clearly preferable, as the governing rule of law will not depend on access to litigation resources. Moreover, neither outcome introduces costs of differential administration, as they both contemplate that the agency would be implementing a uniform policy.

The only argument that the agency could muster in favor of maintaining its original policy would be based on the cost of the change to a new policy. But that argument would simply be a restatement of the co-equal branch analogy: that the agency's responsibility for the interpretation of federal law is of equal stature in the legal hierarchy as that of the courts. We thus reject intracircuit nonacquiescence under these circumstances.

A second scenario would have the agency continuing to engage in intracircuit nonacquiescence after all of the courts of appeals have addressed the validity of the agency's policy and have split on that question, the circuits have had an opportunity, which they have declined, to reconsider their original rulings, and neither the Supreme Court nor Congress has been willing to resolve the conflict. We think it highly unlikely that both the Supreme Court and Congress would let stand persisting conflict

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Much of this friction is due, however, to the uncertain legal status of agency nonacquiescence, and might recede, at least in part, with clarification of the proper scope of such practices. See *supra* text accompanying notes 306-07 (discussing friction under venue choice).

among the circuits on issues of any real importance.<sup>331</sup> The Court's repeated refusal to intervene in the face of an intercircuit conflict therefore might be read as a signal to the agency to fashion a policy that is consistent with the rulings of the circuits.<sup>332</sup>

The critical factor here, too, is that the law is no longer in flux: The circuits have proven unwilling to reconcile their views, and Congress and the Court, by their inaction, have chosen to tolerate horizontal disuniformity in the administration of the particular statute. In such circumstances, intracircuit nonacquiescence is undesirable on policy grounds because it produces distributional unfairness without the compensating benefits of prodding intercircuit harmonization or Supreme Court intervention.<sup>333</sup>

We turn next to a situation in which the law at the circuit court level is in flux—it is still conceivable that some courts will reconsider their original decisions adverse to the agency and that the agency's policy will ultimately be uniformly validated. Assume, for example, that the agency loses before one circuit and then wins before the next two considering its policy. Certainly, at that point one would not say that a uniform outcome in the agency's favor is foreclosed, or even improbable. In such circumstances, nonacquiescence may lead to a quicker resolution of intercircuit conflicts, with consequent benefits in terms of the goals of uniform administration. Moreover, there are cost savings from obviating the need for differential administration during the period in which the agency has a reasonable basis to believe that its policy might yet prevail. On the other side of the equation are the distributional concerns. While sympathetic to such concerns, we believe that they should not be an automatic trump, except where Congress has spoken on the question in the governing statute.

In light of the preceding discussion, we conclude that intracircuit nonacquiescence is justified only where it is an adjunct to litigation designed to yield a uniform rule in favor of the agency's preferred policy. It follows, as a corollary, that once it becomes unlikely that relitigation will lead to judicial acceptance of the agency's policy, intracircuit nonacquiescence loses its justification; the agency must then fashion an approach consistent with the law of the circuit, even though it remains free to continue to

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331. Recent studies suggest that the Court has sufficient decisional capacity to address such conflicts and has rarely failed to intervene in such circumstances. See S. ESTREICHER & J. SEXTON, *supra* note 243, at 6; Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610, 615 (1987).

332. See Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1278-91 (1979); Revesz & Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1100-04 (1988). The agency might either attempt to fashion a uniform policy, or it might apply different policies in different circuits.

333. Similarly, in statutory schemes providing for nationally exclusive review in a particular court of appeals, agency nonacquiescence would ordinarily be unjustified. See *supra* text accompanying notes 248-49.

press its preferred policy in circuits that have not yet rejected it. In Section V, we translate this general principle into judicially manageable standards.

We recognize the tension between the values of percolation, on the one hand, and uniformity of federal law, on the other. Similarly, there is a tension between the view of administrative agencies as the primary policy-makers and the role of the courts as the final arbiters of the legality of agency policy. In our view, a qualified acceptance of intracircuit nonacquiescence better accounts for the competing goals of the administrative lawmaking system than would a blanket rule either accepting or proscribing such nonacquiescence.

## V. CONSTRAINING INTRACIRCUIT NONACQUIESCENCE

We have shown that intracircuit nonacquiescence is justifiable only when it is employed as an interim measure that allows the agency to maintain a uniform administration of its governing statute while it makes reasonable attempts to persuade the courts to validate its preferred policy. The question, then, is how to constrain unjustifiable nonacquiescence. We believe that existing administrative law doctrines provide appropriate tools for constraining intracircuit nonacquiescence within its proper limits.

### A. *The Substantive Standard*

Consistent with our discussion in Section IV(C), we believe that the following substantive standard best accounts for the role of the administrative agency in the national lawmaking process, the checking function of reviewing courts of appeals, and other structural features of the system, such as the absence of intercircuit stare decisis, the rejection of nonmutual collateral estoppel against the government, and the Supreme Court's commitment to multicircuit percolation of issues of federal law. Under this standard, agencies should not engage in intracircuit nonacquiescence unless (1) the agency has responsibility for securing a nationally uniform policy with respect to the question that was the subject of the adverse judicial decision; (2) there is a justifiable basis for belief that the agency's position falls within the scope of its delegated discretion; and (3) the agency is reasonably seeking the vindication of its position both in the courts of appeals and before the Supreme Court. While a court that had previously ruled against the agency could continue to set aside agency action inconsistent with the previous rule, it could not enjoin the agency from engaging in intracircuit nonacquiescence in accordance with this standard (or accomplish the same end by certifying a circuit-wide class action including future litigants).

Of course, this standard is a prescription for dealing with congressional

silence about nonacquiescence.<sup>334</sup> Where Congress has provided in an agency's governing statute that nonacquiescence should be treated in a particular manner, that determination must control.<sup>335</sup>

The first prong of the standard requires that the agency have national policymaking authority over the point in dispute. We recognize that agency-court disagreements sometimes involve questions over the extent to which other laws (such as the Freedom of Information Act or Privacy Act) or constitutional principles limit agency authority under its enabling statute. In these latter instances, the agency stands in a position not too different from that of any other litigant complaining of a misapplication of legal principles that interferes with its freedom to maneuver; the agency enjoys no special claim to conduct its proceedings independent of circuit precedent.<sup>336</sup> The conflict that lies at the heart of this Article, and informs the legitimacy of intracircuit nonacquiescence, occurs only where the dispute is between an agency's view that it enjoys discretion over the question under its organic statute and a judicial ruling that the agency's position is barred by the statute. Only in such circumstances can Congress be said to have endowed the agency with authority to pursue national uniformity, for a time, even in the face of adverse circuit precedent.

In a sense, Congress has created a situation of shared responsibility. It has conferred on the agency a mandate to secure a nationally uniform administration of its organic statute, and an authority, reflected in the Supreme Court's doctrine of *Chevron* deference, to elaborate upon the bare commands of the statutory text. Yet, at the same time, Congress has provided that agency decisions will be reviewed for conformity with law by appellate courts which are free to disagree with each other until the Supreme Court or Congress forecloses further dialogue. It is only in this setting that the agency has institutional competence to press its policies while the law remains in flux.

The second prong requires a "justifiable basis" for belief that the agency's position falls within its policymaking discretion. Only where such grounds for agency-court disagreement are present can the agency be said to be legitimately advancing its responsibility under its enabling statute. The court must assess the validity of agency action on two levels: review of the agency's decision on the merits and review of the rationality of the nonacquiescence policy. An agency does not lack a justifiable basis simply because its position was previously rejected by the court of appeals; a previous rejection can be a sufficient condition for setting aside the agency's action, but it is not a sufficient condition for enjoining nonacquiescence. A justifiable basis is lacking only where the court concludes that the agency's

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334. See *supra* text accompanying notes 254-56.

335. For example, Congress considered taking such action in 1984 with respect to nonacquiescence by the Social Security Administration. See *supra* Section II(A)(4).

336. See *supra* notes 214, 235.

position is so bereft of support in available legal materials that it is unlikely to be accepted by any other court of appeals.

Although the task of considering the rationality of the agency's position on these two different levels will be difficult, there is no reason to believe that a court would equate a losing argument, sufficient to set aside the agency's action, with an argument devoid of a justifiable basis, which is the proper predicate for an injunction against nonacquiescence. In the context of passing on sanctions for legally insubstantial positions under Rule 11 of the Federal Rules of Civil Procedure and the EAJA, the courts have shown that they are capable of distinguishing claims that are merely unsuccessful from those that are actually unsupported.<sup>337</sup>

The need for these two levels of review is not obviated by heightening the deference that is accorded to the administrative decision. Even with the substantial dose of deference to agency views required by the Supreme Court's *Chevron* doctrine (or any other level of deference), there will be an area of bona fide dispute over whether statutory limits on agency discretion in fact apply. Where this is the case, the agency, as the delegatee of congressional authority, may continue, for a time, to advance its view despite some setbacks in the intermediate appellate courts.

The final prong of our standard requires that the agency be reasonably seeking to vindicate its position in the courts of appeals and before the Supreme Court.<sup>338</sup> Even though we do not propose to describe the operation of this requirement—which provides the key brake on nonacquiescence practices—with mathematical precision, it is possible to provide some structure for the judicial inquiry.

First, there is a requirement of candor. The agency must openly state the grounds of its disagreement with circuit precedent because only by doing so does it make possible intercircuit dialogue, which is a principal justification for nonacquiescence. Where the agency disguises its disagreement by means of a disingenuous distinction of adverse circuit precedent,<sup>339</sup> it effectively precludes that court from reexamining its ruling, and, therefore, from participating in the intercircuit dialogue. It also sends misleading signals to other courts of appeals, which may pay closer scrutiny to the adverse ruling if the agency openly acknowledges its disagreement.

Second, a reviewing court should look at how the agency's position has

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337. See *infra* notes 347–48 and accompanying text (discussing EAJA).

338. Another commentator has suggested several reasons why an agency should sometimes refuse to acquiesce in a single adverse court of appeals ruling. See Note, *Administrative Nonacquiescence in Judicial Decisions*, 53 GEO. WASH. L. REV. 147, 163 (1984–85).

339. It is not clear how the courts should treat such an agency. The conventional response to an erroneous agency ruling which might be sustainable on grounds not articulated by the agency is a *Chenery* remand. See Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199. The *Chenery* doctrine, however, depends on a presumption of regularity that may be critically undermined where nonacquiescence is surreptitious.

fared in the various courts of appeals. Other things—principally, the persuasiveness of the agency's legal position—being equal, the likelihood that an agency will obtain a nationwide validation of its policy decreases with increasing ratios of losses to wins. We are aware that there are cases in which an agency had lost in almost all of the circuits, then won in one circuit, thereby creating a conflict, and finally prevailed in the Supreme Court.<sup>340</sup> While an agency's ability to press its views in circuits that have not yet ruled on that policy should not be constrained—we reject any limitations on *intercircuit* nonacquiescence—we do not think that the agency can necessarily continue to engage in *intracircuit* nonacquiescence merely because one or two circuits have yet to rule. What we are considering is a balancing of competing factors, and after unsuccessful litigation in a certain number of circuits, that balance will start pointing against continued *intracircuit* nonacquiescence.

Third, an agency genuinely interested in securing *intercircuit* acceptance of its position should actively press its views in the courts of appeals. For example, in the context of agency action reviewable initially in the district courts, an agency that persistently declines to seek appellate review in circuits that have not yet ruled on the legality of its position is not reasonably seeking to vindicate that position in the courts of appeals.<sup>341</sup>

Fourth, a reviewing court should ascertain whether the agency is making sufficient efforts to obtain Supreme Court review of its policy. An agency should, as a general matter, be petitioning for certiorari from adverse decisions of the courts of appeals. Certainly, some flexibility is required; it might be reasonable for the agency not to seek review in advance of an *intercircuit* conflict. But a general failure to seek certiorari should weigh heavily against the validity of the agency's *intracircuit* nonacquiescence. Similarly, the reviewing court should ask whether the agency is opposing certiorari petitions from circuits in which its policy has been upheld. If the agency is genuinely interested in the validation of a uniform policy—rather than in the protection of a favorable judgment—it should not oppose, and indeed should support, its opponents' certiorari petitions.

Of course, agencies generally cannot directly petition the Supreme Court but must obtain the clearance of the Solicitor General,<sup>342</sup> who, in order to preserve his capital with the Court, may often resist agency de-

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340. See *supra* note 154.

341. We define *intracircuit* nonacquiescence as disregard of a decision of a court of appeals. That does not mean, however, that an agency can avoid the nonacquiescence label merely by failing to appeal adverse district court decisions.

342. See 28 U.S.C. § 518 (1982); 28 C.F.R. § 0.20(a) (1988). But see 28 U.S.C. §§ 2341, 2348 (1982) (granting certain agencies more independence from control by Justice Department). For a general discussion of the relationship between the Solicitor General and administrative agencies, see Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442 (1969).

mands for review. We do not mean to authorize judicial review of the delicate negotiations and deliberative processes that inform the Solicitor General's decision whether or not to petition for certiorari. Nevertheless, the government cannot defend continued nonacquiescence without seeking Supreme Court intervention merely because it has chosen to divide petitioning authority in this way.

We have considered the question whether the active pursuit of a legislative solution should suffice even if Supreme Court review is not sought.<sup>343</sup> There is something to this view, as there is no reason to prefer judicial to legislative intervention. Nevertheless, because of the practical difficulties that plague the evaluation of what constitutes an active pursuit of legislation—flowing from the relative ease with which a bill may be introduced into the legislative hopper—we do not believe that an agency can justify prolonged nonacquiescence in this manner.

Fifth, it is relevant whether the statutory scheme or the Supreme Court's due process and equal protection jurisprudence evinces a particularly strong concern over distributional effects. Of course, if the agency's governing statute bars nonacquiescence altogether, there is no room for further discussion. But Congress may have intended that the agency pay particular attention to distributional effects without stipulating a per se rule against intracircuit nonacquiescence. If a heightened concern about such effects is statutorily authorized or constitutionally prescribed, intracircuit nonacquiescence could be truncated more quickly than it would otherwise be.<sup>344</sup>

Without specific congressional direction, however, such distributional concerns should not be elevated to the point of creating a rule of presumptive invalidity.<sup>345</sup> It is the central thesis of this Article that nonacquiescence, even intracircuit nonacquiescence, is a legitimate feature of the administrative landscape; agencies must be permitted the option of pursuing uniform policies at the administrative level as an adjunct to a reasonable litigation policy designed to secure nationwide judicial validation of the point in dispute.<sup>346</sup>

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343. The draft recommendations of the Administrative Conference of the United States take the position that "the active pursuit of legislative change" could substitute for a litigation campaign. See 53 Fed. Reg. 12,445 (1988).

344. See *Lopez v. Heckler*, 572 F. Supp. 26, 30 (C.D. Cal. 1983), *aff'd in pertinent part*, 725 F.2d 1489, 1497-98 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984); Letter from Nancy Morawetz, Matthew Diller, Burt Neuborne, and David Udell to Mary Candace Fowler, at 3-4 (May 6, 1988) (public comment to ACUS policy) [hereinafter Letter from *Stieberger* Plaintiffs].

345. Similarly, without a congressional mandate, such concerns do not require interim compliance with adverse circuit precedent until the agency can demonstrate some overriding justification. See *supra* text accompanying note 314-15.

346. We do not believe that for purposes of assessing the legitimacy of nonacquiescence practices, a distinction should be drawn between agencies that dispense benefits, such as SSA or the Veterans' Administration (VA) and agencies that exercise regulatory authority, such as the NLRB or EPA. The argument for such a distinction holds that agencies in the former category, because they are in a sense dispensing "their" money, have a tendency to "cheat"—to favor legal rules and factfinding processes

By applying our proposed standard, a court should be able to determine when intracircuit nonacquiescence is unjustifiable. This determination is central to the remedial inquiry. It is only in the cases of unjustifiable nonacquiescence that a court should enter injunctions mandating that the agency internalize the case law of the circuit in its administrative proceedings (or should certify class actions that include future members). In the administrative context, as in other areas of the law, it is simply improper to turn each case into an injunctive proceeding; an injunction is warranted only when an agency has exceeded the bounds of a rational nonacquiescence policy.

This same standard need not necessarily apply to the award of attorney's fees against the government. For example, distributional concerns posed by nonacquiescence could be mitigated by requiring the government to pay the attorney's fees of prevailing parties against whom it had nonacquiesced. We doubt, however, that the EAJA,<sup>347</sup> as presently drafted, can be construed in this manner.<sup>348</sup>

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that limit the number of claimants and the size of their claims, regardless of contrary signals in their enabling statutes. If so, such agencies should not be entitled to a presumption of regularity, a presumption that supports the allowance of intracircuit nonacquiescence.

There are a number of difficulties with this argument. First, it depends on an empirical premise—that such agencies administer programs in which the claims of qualified beneficiaries exceed the resources that Congress has budgeted and that these resources are unlikely to be supplemented upon a showing of need. Second, the argument relies on a psychological judgment that officials of such agencies view the public funds entrusted to their care as personal resources to be expended in accordance with personal predilection, rather than statutory directives. Finally, the argument requires stripping these agencies not only of the presumption of regularity but also of *Chevron* deference to their interpretation of the statute, and of “substantial evidence” deference to their factfinding. In short, such an argument casts agencies in a radically different role at variance with congressional design.

347. 28 U.S.C. § 2412(d) (1982).

348. The EAJA authorizes attorney's fees against the government whenever its position on the merits either at the agency level or in the courts is not “substantially justified.” 28 U.S.C. § 2412(d)(1)(A), (d)(2)(D) (1982); see *Herron v. Bowen*, 788 F.2d 1127, 1128–30 (5th Cir. 1986). The statute clearly contemplates that the standard for awarding fees is not the same as the standard for determining whether the agency's position should be sustained on the merits. The Supreme Court held in *Pierce v. Underwood*, 108 S. Ct. 2541 (1988), that “substantially justified” means “justified to a degree that could satisfy a reasonable person,” *id.* at 2550, and added that “a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.” *Id.* at 2550 n.2.

The EAJA decisions to date do not provide a clear answer to the question of whether fee awards may be assessed even in circumstances where an agency's nonacquiescence policy should not be enjoined. *Underwood* itself involved a situation where the agency settled the litigation after having successfully obtained a writ of certiorari from the Supreme Court. *Id.* at 2545. In sustaining the trial court's fee award, the Court engaged in deferential, “clearly erroneous” review of the district court's determination, noting that the grant of certiorari was counterbalanced by the fact that every court to hear the merits (nine district courts and two courts of appeals) rejected the government's position. *Id.* at 2552. Because the Supreme Court did not look at the issue *de novo*, it provided little guidance on the proper interpretation of the EAJA.

For pre-*Underwood* case law, compare *Enerhaul, Inc. v. NLRB*, 710 F.2d 748, 751 (11th Cir. 1983) (Congress did not intend to approve agency's “reliance on a legal theory that has been clearly and repeatedly rejected by this Court”) with *Wyandotte Savings Bank v. NLRB*, 682 F.2d 119, 120 (6th Cir. 1982) (although agency's position had been rejected by circuit, it enjoyed support in dissenting opinions and rulings of other circuits). Fees also have been awarded for intercircuit nonacquies-



## B. *The Role of the APA*

We believe that the APA<sup>349</sup> provides courts with the legal authority to enjoin nonacquiescence that does not comport with the standard described in the previous section. Under the APA's "arbitrary and capricious" standard,<sup>350</sup> a court must set aside administrative action if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>351</sup>

As Judge Breyer and Professor Stewart have noted, the "arbitrary and capricious" standard has both a "hard look" or "adequate consideration" component, which focuses on the process of the agency's decision, and a "substantive" component, which assesses the rationality of the agency's action.<sup>352</sup>

We have identified four principal factors relevant to the analysis of intracircuit nonacquiescence: intercircuit dialogue, uniform outcomes, differential administration, and distributional effects. We believe that an inquiry based on these factors is encompassed within the APA's "arbitrary and capricious" standard.<sup>353</sup> Thus, intracircuit nonacquiescence in conformity with our proposed standard can be viewed as satisfying the APA's requirement of "reasoned decisionmaking."<sup>354</sup> Intracircuit nonacquiescence inconsistent with this standard cannot survive APA scrutiny.

The typical framework for APA rationality review is provided by the agency's organic statute; the rationality of an agency's policy is evaluated in terms of the specific goals and constraints of its implementing statute.<sup>355</sup> The factors that govern the validity of intracircuit nonacquiescence,

cence that could not be justified in terms of a plan to create a meaningful conflict among the circuits. See *Keasler v. United States*, 766 F.2d 1227, 1234-38 (8th Cir. 1985).

349. 5 U.S.C. §§ 551-59, 701-06 (1982).

350. See 5 U.S.C. § 706(2)(A) (1982) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .").

351. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

352. See S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 341-42 (1985).

353. We maintain that such an inquiry is presently authorized by the APA and is consistent with the strictures against extrastatutory judicial innovation set forth in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). We recognize, however, that there may be reasonable dispute on this point, and that legislation may be required to assuage concerns over the legitimacy of intracircuit nonacquiescence or over a court's authority under the APA to scrutinize the reasonableness of a nonacquiescence policy.

354. See *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 104 (1983).

355. See, e.g., *id.* at 97 ("[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute") (quoting *Vermont Yankee*, 435 U.S. at 558).

by contrast, derive from the structural underpinning of the administrative lawmaking system, principally from the position of the administrative agencies as the primary policymakers under their organic statutes, the value of uniformity in the administration of federal law, and the lack of intercourt stare decisis. There is no reason to believe, however, that the APA's "arbitrary and capricious" standard is confined to statute-specific norms, and cannot give effect to general principles of administrative law and to the background norms against which the relationship between agency and reviewing court is formed. "Hard look" judicial review,<sup>356</sup> for example, is not so much an elaboration of specific statutory commands as it is an implementation of a broader conception of the court's checking function in the administrative process.

We also rely on the well-established canon that, wherever possible, courts should construe statutes to avoid constitutional problems.<sup>357</sup> The factors that make *Cooper v. Aaron* not wholly apposite to routine instances of intracircuit nonacquiescence lose most of their force when such nonacquiescence is carried too far and becomes a tool for defiance of judicial review instead of a reasonable quest for the uniform validation of the agency's preferred policy. Thus, a rule against unjustifiable nonacquiescence may be necessary to avoid collision with constitutional principles.<sup>358</sup>

In commenting on our proposed substantive standard and an earlier draft of this Article, representatives of the Office of the Solicitor General and the Civil Division of the Justice Department have argued that any judicial review of an agency's nonacquiescence practice is inappropriate and invites the courts to embark on "a new category of litigation about the very conduct of litigation itself."<sup>359</sup> The Justice Department's position is, at the core, based on a view of the relationship between agency and court inconsistent with *Cooper v. Aaron*—that judicial decisions bind only the parties to the case.<sup>360</sup> There are sound reasons for qualifying the *Cooper v. Aaron* principle in the context of intermediate, regional appellate courts.<sup>361</sup> But it is nevertheless not true that under current legal princi-

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356. The term was apparently coined by the late Harold Leventhal of the D.C. Circuit. *See, e.g.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *see generally* Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 903-07 (1980) (discussing "hard look" doctrine of judicial review).

357. *See, e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (citing Chief Justice Marshall's opinion in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

358. The Court in *Vermont Yankee*, while eschewing judicial imposition of procedures not required by the organic statute or the APA, took care to note the absence of constitutional constraints. 435 U.S. at 542 & n.16.

359. Merrill Letter, *supra* note 21, at 14; Letter from John R. Bolton to Marshall J. Breger (May 6, 1988) [hereinafter Bolton Letter] (commenting on earlier draft of this Article and on draft ACUS policy).

360. *See* Bolton Letter, *supra* note 359, at 11-14.

361. *See supra* text accompanying notes 239-47.

ples—notably the pervasive requirement of rational agency action under the APA—that agencies have a completely free hand to disregard the precedent of courts of appeals that will review their action.

It is also not the case that our proposal will generate a new form of litigation. That litigation is there—witness the Ninth Circuit's circuit-wide injunction in the *Lopez v. Heckler* litigation and the Second Circuit's comparable *Stieberger* litigation<sup>362</sup>—but it is presently conducted on a plane of warring absolutism, which deflects careful consideration of the respective roles of agency and reviewing court. Our proposal seeks to make nonacquiescence regular and legitimate—to encourage agencies to be more self-conscious about these practices and courts to understand that their role is not simply one of policing wayward subordinate actors.

### C. *Procedural Safeguards*

In addition to the substantive standard that we have discussed, we believe that particular procedural safeguards should accompany an intracircuit nonacquiescence policy. Some of these procedures may be judicially imposed, in our view, pursuant to APA rationality review. Even if the APA is held not to provide authorization for requiring such procedures, however, agencies intending to pursue a nonacquiescence policy should be encouraged to adopt them. First, a decision to nonacquiesce should be approved by the agency head or some specially designated delegatee such as an acquiescence review board. Second, the agency should publish in the *Federal Register*, or otherwise widely disseminate, a notice of its decision to nonacquiesce including a brief statement of reasons for that decision. Third, in the case of agencies that cannot file a petition for certiorari in the Supreme Court absent approval by the Solicitor General, efforts should be made to consult with the Solicitor General prior to embarking on a nonacquiescence policy.

Under our analysis, intracircuit nonacquiescence is justifiable only where it is an adjunct to nationwide litigation reasonably seeking validation of the agency's preferred policy. If the agency is not prepared to defend that policy in other circuits, nonacquiescence should simply be impermissible. Decisions about intracircuit nonacquiescence, therefore, should not be made in a decentralized fashion in the agency's regional offices; they should rest with the agency head or commissioners.<sup>363</sup> Given the potential for friction between the agency and the federal courts, we believe that approval by the agency head or specially designated delegatee

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362. See *supra* text accompanying notes 97–126.

363. For those agencies which use adjudication as the exclusive vehicle for policymaking, the agency's declaration of nonacquiescence or acquiescence may be deferred until an appropriate case is presented to the agency head or commissioners. We are not requiring interim compliance with the circuit ruling at these levels for reasons articulated in Section III(C) above.

will enhance the likelihood that a decision to nonacquiesce reflects a considered determination by the agency.

The legal basis for the requirement of approval of intracircuit nonacquiescence by the agency head rests in the same structural concerns that underlie the Supreme Court's decision in *Hampton v. Mow Sun Wong*.<sup>364</sup> That case involved a challenge to a regulation imposed by the Civil Service Commission that barred the employment of aliens in the federal government. The regulation was defended, *inter alia*, on the grounds that it gave the President an expendable bargaining chip in negotiating treaties with foreign countries and that it provided aliens with an incentive to become naturalized.<sup>365</sup> The Court assumed that the bar could be justified on the basis of such goals.<sup>366</sup> It found, however, that these were not goals of direct concern to the Commission.<sup>367</sup> Therefore, the Court was "not willing to presume" that the Commission "was deliberately fostering an interest so far removed from [its] normal responsibilities."<sup>368</sup> As a consequence, the Court struck down the regulations. On remand, an official with direct responsibility over the goals in question—the President himself—issued an order disqualifying aliens from the Civil Service,<sup>369</sup> and that order was sustained by the courts.<sup>370</sup>

In the case of intracircuit nonacquiescence, as in *Hampton v. Mow Sun Wong*, the agency decision is justifiable if undertaken as a means of promoting certain goals—the agency's interest in maintaining a uniform interpretation of its statute while it makes reasonable efforts to obtain a nationwide validation of this position—but not otherwise.<sup>371</sup> Therefore, intracircuit nonacquiescence should be upheld only if it is approved by the officials who have a direct interest and control over those goals—in this case, the agency head or commissioners or their delegates.

A second procedural safeguard we proffer is that the decision to nonacquiesce be published and explained. Intracircuit nonacquiescence is never justifiable when it happens by default; it is only permissible as an adjunct to a considered policy of nationwide litigation. Thus, it is important that the agency evaluate the impact of the adverse court of appeals ruling, and

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364. 426 U.S. 88 (1976).

365. *Id.* at 104-05.

366. *Id.* at 105.

367. *Id.* at 114.

368. *Id.* at 105.

369. Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (1976).

370. *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978).

371. Although *Hampton v. Mow Sun Wong* involved a constitutional challenge, nothing in the Court's opinion suggests that the structural result would have been different if the applicable limitations on agency action had derived from a statutory source. Thus, if an administrative practice is valid only if undertaken pursuant to particular statutory goals, the practice cannot stand if approved by an official for whom fostering those goals is "far removed from his normal responsibilities." *Hampton v. Mow Sun Wong*, 426 U.S. at 105. Moreover, intracircuit nonacquiescence may well raise constitutional concerns, if pursued without adequate justification. *See supra* text accompanying notes 210, 246-47.

that it explain, albeit briefly, its reasons for pressing its position in the face of this ruling.

The issues raised in this connection are analogous to those that arise when an agency chooses to abandon an established policy. The Supreme Court has made clear that "an agency changing its course . . . is obligated to supply a reasoned analysis for the change."<sup>372</sup> As the D.C. Circuit stated in *CBS v. FCC*:<sup>373</sup>

[A]n administrative agency . . . is not bound to rigid adherence to its prior rulings. Lodged deep within the bureaucratic heart of administrative procedure, however, is the equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard *is being changed and not ignored*.<sup>374</sup>

So, too, for the reasons that we have discussed, an agency is not always required to acquiesce in the rulings of the court of appeals that will review its actions. But it cannot simply ignore such rulings. Just as an agency cannot "silently depart from previous policies,"<sup>375</sup> it cannot silently act contrary to a prior ruling of its reviewing court.<sup>376</sup>

A third procedural safeguard is consultation with the Solicitor General. One of the relevant considerations in assessing the rationality of intracircuit nonacquiescence will be whether the agency is actively seeking Supreme Court review on the disputed legal question. With limited exceptions, agencies cannot petition for certiorari without the approval of the Solicitor General. Therefore, we would urge agencies, before engaging in nonacquiescence, to consult with the Solicitor General and seek some preliminary indications as to whether the agency's position will be supported by the Solicitor General.<sup>377</sup> We do not believe, however, that it is appro-

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372. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

373. 454 F.2d 1018 (D.C. Cir. 1971).

374. *Id.* at 1026 (emphasis added) (footnotes omitted). Or, as Judge Leventhal stressed, the agency must indicate "that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

In recent years, the D.C. Circuit has set aside administrative actions in many cases in which the agency had not properly acknowledged or explained its change in policy. *See, e.g.*, *Robbins v. Reagan*, 780 F.2d 37, 48-49 (D.C. Cir. 1985) (per curiam); *National Black Media Coalition v. FCC*, 775 F.2d 342, 355-56 (D.C. Cir. 1985).

375. *Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984).

376. The requirements of notice and explanation also mitigate somewhat the distributional effects by alerting at least some potential litigants that recourse to the courts may well be successful, thereby increasing the probability that the agency's action will in fact be challenged.

377. Advance consultation would not impose an unreasonable burden on the Solicitor General. Pursuant to regulation, the Solicitor General already must approve appeals from the district courts to the courts of appeals. *See* 28 C.F.R. § 0.20(b) (1988). Because it is unlikely that intracircuit nonacquiescence would be a routine practice, this responsibility should not overwhelm the Solicitor General's other duties. In any event, the Justice Department will, in general, be involved in the litigation when the agency's underlying policy and nonacquiescence practice are challenged in the courts. *See* 28 U.S.C. § 516 (1982).

appropriate for courts to police the relationship between an agency and its lawyer—the Justice Department in general and the Solicitor General in particular. Thus, while it is desirable that agencies voluntarily adopt a consultation requirement, judicial enforcement of this requirement is inappropriate.

## VI. ELIMINATING VENUE CHOICE

At present, intracircuit nonacquiescence is relatively rare because most statutes provide for review of agency decisions in a number of courts of appeals; the agency, therefore, cannot predict with certainty the identity of the reviewing circuit.<sup>378</sup> The NLRB, as we have discussed, is often in this position because the broad venue provisions of its enabling statute lodge review in the court of appeals where the petitioner resides or “transacts business,” where the unfair labor practice occurred, or in the D.C. Circuit.<sup>379</sup> Provisions of this type—a common feature of enactments of the New Deal era—were patterned in part after the Clayton and Federal Trade Commission Acts,<sup>380</sup> but differed from these antecedents in enabling private petitioners to seek alternative venue in the D.C. Circuit.<sup>381</sup>

As we concluded in Section IV(C), when an agency decision is subject to review in a number of different courts of appeals, limits on nonacquiescence are undesirable for the same reasons as are limits on intercourt nonacquiescence. To compel an agency to follow the adverse ruling of a particular court of appeals would be to give that court undue influence in the intercourt dialogue by diminishing the opportunity for other courts of proper venue to consider, and possibly sustain, the agency’s position.

Even though we would not restrict nonacquiescence in the face of venue choice, we favor predictable venue rules. While our conclusion is motivated primarily by our analysis of the nonacquiescence question, we also identify independent reasons why venue choice is undesirable.<sup>382</sup>

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We realize that to the extent that an agency sets its nonacquiescence policy in the context of a formal adjudication (or of a formal rulemaking), advance consultation with the Solicitor General may be an inappropriate *ex parte* communication (a subject on which we do not take a position).

378. See, e.g., *supra* text accompanying notes 143–46 (discussing NLRB); *supra* note 186 (discussing OSHRC); 15 U.S.C. § 45(c) (1982) (Federal Trade Commission); 7 U.S.C. § 13a-1 (1982) (Consumer Futures Trading Commission); 5 U.S.C. § 7123 (1982) (Federal Labor Relations Authority).

379. See *supra* text accompanying notes 143–46.

380. See Clayton Act, 15 U.S.C. § 21(a) (1982); Federal Trade Commission Act, 15 U.S.C. § 45(b) (1982). The legislative history of the National Labor Relations Act of 1935, 49 Stat. 449, now codified as amended, 29 U.S.C. §§ 141–87 (1982), where § 10(e)–(f) originated, 29 U.S.C. § 160(e)–(f) (1982), states that “[p]rovisions for similar enforcement of orders of administrative bodies made upon like procedures may be found in the Federal Trade Commission Act . . . [and] the Clayton Act.” 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1361 (1985).

381. See 29 U.S.C. § 160(f) (1982).

382. Of course, if venue choice is eliminated, more cases will come under the constraints that apply to intracircuit nonacquiescence, and agencies will be limited in their ability to maintain a uniform policy at the administrative level in the face of conflicting circuit court decisions. See *supra* text

First, venue choice has negative effects from the perspective of an agency's relitigation policy. Such choice makes it difficult for an agency to continue advocating its preferred policy in circuits which have not rejected it, without having to face challenges to that policy, again and again, in circuits which have already rejected it. Where venue is fixed, however, an agency can largely confine the impact of an adverse circuit decision to the geographic reach of that court. It can choose to engage in intercircuit non-acquiescence without concern that its opponents will race to a circuit that previously ruled against it. But where venue is uncertain, petitioners aggrieved by the agency action will typically repair to the circuit which previously ruled against the agency, and that court will view the agency's behavior to be quite akin to intracircuit nonacquiescence.

Except when all circuits with venue over the agency action have taken congruent positions opposed to the agency, venue choice will exacerbate the agency-court tensions caused by the pursuit of national uniformity by channeling a disproportionate number of cases to circuits that have ruled against the agency. The corollary, of course, is that such circuits will have a disproportionate role in determining the agency's decisions. As we have already explained, this bias is undesirable.<sup>383</sup>

Second, venue choice allows an agency to continue to advocate its preferred policy nationwide even after such a strategy has ceased to be desirable from the perspective of the administrative lawmaking system. In a venue-certain regime, an agency could apply its preferred policy at the administrative level, without restrictions, in circuits that had not yet ruled on the legality of that policy and in circuits that had sided with the agency. But in circuits that had rejected that policy, the agency could continue to apply it only if it met the rationality standard set forth in Section V(A). Venue choice eliminates the restraining force of rationality review. It is thus not surprising that some agencies perceive that broad venue provisions increase their power at the expense of the courts of appeals.<sup>384</sup>

Venue choice also has undesirable effects in areas unrelated to the focus of this study.<sup>385</sup> First, and perhaps most importantly, broad venue provisions lead to forum shopping. To the extent that review of administrative action is available in several courts of appeals, litigants will seek to obtain review in the court with the case law most favorable to their position. For

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accompanying notes 334-48.

383. See *supra* text accompanying notes 291-95.

384. Collyer Letter, *supra* note 41, at 13-14. One could argue, of course, that the proper way to address this problem is by requiring agencies to acquiesce in the adverse ruling of any circuit with venue over the agency's decision, even if the other available fora had ruled for the agency or were uncommitted. But, as we have explained, costs of imposing such limits are simply too high because of the extent to which they would impair an agency's relitigation efforts in circuits that had not rejected its policy and because of the undue weight accorded to the positions of circuits which ruled against the agency. Thus, the better course is to remove the venue uncertainty.

385. See Note, *Venue for Judicial Review of Administrative Action: A New Approach*, 93 HARV. L. REV. 1735, 1736-44 (1980).

example, until the advent of recent legislation,<sup>386</sup> there had been intense competition among interested parties to be the first to file a petition for review. Under then-prevailing law, the court in which the first challenge was filed became the forum for review of the administrative action; challenges filed elsewhere were transferred to that court.<sup>387</sup> The result was that the applicable circuit court law was determined by who won the "race to the courthouse."

The unseemliness of this race led Congress to provide, in the recent amendments, that the reviewing circuit be determined by lottery from among all of the circuits in which petitions for review are filed within ten days of the agency's order; the rule of first filing would continue where petitions are filed after the ten-day period.<sup>388</sup> It is not clear, however, why it is preferable to determine venue by lottery, after actions have been filed in several circuits, rather than to make it clear *ex ante*.

For review of NLRB decisions, for example, a predictable venue could be the circuit in which the unfair labor practice occurred. Admittedly, in some cases it will be difficult to determine the site of the underlying events, or those events may have occurred in several circuits. We believe, however, that such cases will be rare and that predictable rules could be fashioned. Marginal applications of any venue rule will produce some collateral litigation. But such litigation is present even under the current venue provisions,<sup>389</sup> and there is little reason to believe that a predictable venue regime will exacerbate this difficulty. In any event, the few cases in which this rule will not be wholly predictable should not drive venue policy for the vast majority of cases.<sup>390</sup>

Second, venue choice, as it operates in practice, places some administrative agencies at a strategic disadvantage. For example, the NLRB generally seeks enforcement of its orders in the court of appeals with jurisdiction over the geographic area where the unfair labor practice occurred.<sup>391</sup> Thus, it does not take full advantage of the strategic benefits of venue choice, which would allow it, if it were so inclined, instead to seek enforcement in the circuit with the most favorable case law from among those in which respondents reside or "transact business." In contrast, parties aggrieved by the NLRB's order use venue uncertainty more strategi-

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386. See Pub. L. No. 100-236, 101 Stat. 1731 (1988) (amending 28 U.S.C. § 2112(a) (1982)); H.R. REP. NO. 72, 100th Cong., 1st Sess. (1987).

387. In general, courts apply the law of the *transferee* circuit. See *supra* note 242.

388. See *supra* note 386.

389. See, e.g., *supra* text accompanying notes 158-60.

390. The fact that the NLRB, by internal policy, already seeks enforcement of its orders in the circuit in which the unfair labor practice occurred, see *supra* text accompanying note 142, makes clear that such a venue rule can be practicably administered. Indeed, the Board, in its comments on an earlier draft of this Article, did not raise practicability as an argument in support of status quo arrangements. See Collyer Letter, *supra* note 41.

391. See *supra* text accompanying note 144.



cally.<sup>392</sup> We can think of no desirable reason for handicapping agencies in this way. Neither can we think of a legitimate justification for equalizing the scales by encouraging agencies to engage in forum shopping, rather than by simply eliminating venue choice.<sup>393</sup>

Third, venue choice is undesirable from a distributional standpoint. It gives multistate actors and wealthy, well-organized parties (or those otherwise having access to litigation resources) an advantage over less well-situated parties, who are more likely to seek review in the court of appeals that is geographically closest, rather than in the one that offers them the best case law.

It is important to stress that in criticizing the effects of venue uncertainty, we are not advocating the use of exclusive venue provisions. Under an exclusive venue provision, challenges to particular types of administrative action can be brought only in one circuit. For example, the D.C. Circuit is the only proper venue in which to challenge regulations promulgated by EPA establishing emission standards for new sources under section 111 of the Clean Air Act.<sup>394</sup> In contrast, under a scheme in which venue is predictable but not exclusive, ultimately all of the circuits may entertain challenges to agency action, even though for each particular decision only one circuit will be the proper venue. Thus, whereas exclusive venue provisions hamper intercircuit dialogue,<sup>395</sup> predictable venue provisions do not.<sup>396</sup>

The benefits attributed to broad venue provisions do not outweigh the problems that we have identified. It is true that venue choice may promote the convenience of certain parties. Emphasizing this consideration, NLRB General Counsel Collyer states:

The convenience of citizens aggrieved by government action is also a factor that is still entitled to respectful consideration. That convenience may involve no more than that a party's Manhattan attorney may seek review in a New Jersey dispute without going to Philadel-

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392. See *supra* text accompanying notes 155-60.

393. Before 1958, the court in which the NLRB filed the transcript of its proceeding obtained exclusive jurisdiction over the entire case even where an aggrieved party may have previously petitioned in another circuit. Congress removed the Board's power to choose the forum by adding 28 U.S.C. § 2112. See H.R. REP. NO. 842, 85th Cong., 1st Sess. 4-5 (1957). It has been suggested that the purpose of the 1958 amendment was to "punish" the NLRB for its forum-shopping practice, see McGarity, *supra* note 160, at 347, but it appears that Congress's purpose was to limit forum-shopping by agencies generally, see Comment, *A Proposal to End the Race to the Court House in Appeals from Federal Administrative Orders*, 68 COLUM. L. REV. 166, 168-69 (1968). In light of the Board's policy to seek enforcement only in the circuit where the ULPs occurred, see *supra* note 144, a return to pre-1958 arrangements would have the same effect as creating predictable venue in that circuit.

394. 42 U.S.C. § 7607(b)(1) (1982).

395. Exclusive venue provisions, however, may have other benefits, which may outweigh the loss of intercircuit dialogue. Perhaps most importantly, they provide a quick, authoritative resolution of legal controversies. They also promote expertise on the part of the reviewing court. The wholesale use of exclusive venue provisions, however, is inconsistent with the rejection of intercircuit stare decisis and the preeminence of generalist courts. See R. Revesz, *supra* note 278, at 70-71.

396. See R. Revesz, *supra* note 278, at 70.

phia. However, it may also involve the more substantial claim of an employee who was discharged in Wisconsin but who lives in Nevada at the time he petitions for review. Or the convenience may be that of employees whose case technically arose in an Indiana border town but who live much closer to Cincinnati than Chicago.<sup>397</sup>

There is reason to be skeptical about the claim that broad venue choice of the type present in the NLRA is necessary to ensure that litigants are not relegated to an inconvenient forum. Most importantly, individuals and small corporations opposed to agency action are likely to be residents of the circuit in which the allegedly unlawful conduct occurred. In general, the forum choice afforded by broad venue rules is significant only for a particular class of litigants—large organizations that would like to petition for review in circuits where they have their headquarters or “transact business.” But even in such cases, the convenience rationale is not persuasive. Appellate review of agency action, such as actions under the NLRA, involve only briefing and oral argument and review on the basis of the administrative record; there are no witnesses to be called, and other fact-gathering activity does not take place. Moreover, in the case of multiple challenges to the same administrative decision, if different parties prefer to litigate in different circuits, it is far from clear that venue determined by the time of filing or by lottery would be more convenient, for most litigants, than a rule fixing venue in the circuit where the underlying events occurred.

A separate issue is whether the benefits of maintaining an alternative venue in the D.C. Circuit outweigh the costs engendered by the resulting unpredictability of venue. The NLRA's provision for alternate venue in the D.C. Circuit (a common characteristic of New Deal legislation) was not present in the earlier Clayton and Federal Trade Commission Acts.<sup>398</sup> We suspect that the initial impetus was to permit opponents of agency action the option of suit in the seat of national government, rather than a deliberate judgment to allocate reviewing authority to a court which would, over time, acquire expertise in administrative law. Such an interpretation explains why the statute affords this option to parties aggrieved by NLRB orders while Senator Wagner eliminated the provision which would have given the agency the same choice.<sup>399</sup>

Whatever the original design may have been, the D.C. Circuit has developed a special competence in the administrative area, which undoubt-

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397. Collyer Letter, *supra* note 41, at 12 (footnote omitted).

398. See J. CHAMBERLAIN, N. DOWLING & P. HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* 170-72 (1942).

399. Compare S. 1958, Original Senate Print, 74th Cong., 1st Sess. 13-14 (Feb. 21, 1935) with S. 1958, as reported, 2d Senate Print, 74th Cong., 1st Sess. 15-16 (May 2, 1935), reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935*, at 1302-03, 2293 (1985).

edly has enriched the intercircuit dialogue.<sup>400</sup> It is unclear, however, to what extent alternative venue provisions rather than exclusive jurisdictional grants have contributed to this phenomenon. We are willing to concede, for purposes of discussion, that because of its limited geographic reach, the D.C. Circuit's role in the administrative state would be reduced under predictable venue rules.

The question is whether the incremental contribution to the D.C. Circuit's expertise stemming from its role as the alternative venue in administrative cases outweighs the costs of the attendant venue uncertainty. In considering this point, one should bear in mind that if the D.C. Circuit were to become the sole alternative venue in an otherwise venue-certain regime, its decisions would acquire a national prominence even greater than it now enjoys, overshadowing the regional courts, skewing the intercircuit dialogue, and creating pressure on the Supreme Court to police its determinations aggressively. Such an arrangement is problematic for many of the same reasons that counsel against creation of a national court of appeals situated between the existing circuit courts and the Supreme Court.<sup>401</sup> On balance, we think that the better approach is pervasive predictable venue.

Yet another justification for venue choice, extending well beyond considerations of party convenience and of the D.C. Circuit's special role, was offered by NLRB General Counsel Collyer, commenting for the Board on an earlier draft of this Article. In the Board's view, existing venue provisions reflect congressional rejection of a district court model of agency review:

Rather than giving the circuit courts exclusive authority over all agency activities within their geographic jurisdiction, Congress instead established a system whereby two or more circuits may review virtually any case—and the jurisdiction to review may turn on no more substantial ground than the results of a lottery. Such a system is a deterrent to those courts that would command an agency's resources on a territorial basis.<sup>402</sup>

Moreover, Ms. Collyer noted:

Venue uncertainty removes any incentive for the Board to behave like a district court . . . . The knowledge that acquiescence is no safe harbor but a *Board* decision that *the Board* must be prepared to defend nationwide serves to underscore the responsibility that Con-

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400. See Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976 (1982); Wald, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 137 (1982).

401. See S. ESTREICHER & J. SEXTON, *supra* note 243, at 111-15.

402. Collyer Letter, *supra* note 41, at 13 (footnote omitted).

gress has placed upon the Board to fill in the broad outlines of national labor policy.<sup>403</sup>

This articulate statement betrays a misconception that pervades judicial and academic commentary on the subject of agency nonacquiescence—the tendency to endow venue provisions with structural significance for allocating the roles of administrative agency and reviewing court. Critics of SSA make the argument that predictable venue invites the district court analogy: that Congress's choice of predictable venue demonstrates a legislative intent to bar outright intracircuit nonacquiescence.<sup>404</sup> For the NLRB, venue uncertainty conjures up the co-equal branch metaphor: that, in fashioning a broad venue provision, Congress chose to endow the agency with power to disregard circuit precedent until the Supreme Court has spoken. Both projections miss the mark. In our view, in a multi-circuit system of review, the agency's responsibility for a nationally uniform administration of its organic statute is simply not a function of the venue provision. The agency's responsibility, and the attendant checking function of the courts of appeals, remains the same regardless of the venue provision.

In summary, it is only the accident of broad venue provisions that enables many agencies to pursue goals of national uniformity without incurring the rebuke that has bedeviled intracircuit nonacquiescence. This state of affairs has two undesirable effects. First, as a result of the relatively small number of agencies that operate under venue-certain schemes, courts have viewed intracircuit nonacquiescence as an aberrational case meriting sanctions, rather than as a more general by-product of an agency's legitimate quest for national uniformity. Second, the costs of nonacquiescence under venue uncertainty have escaped judicial scrutiny. Predictable venue rules are desirable because they facilitate this checking function without precluding responsible agency nonacquiescence.<sup>405</sup>

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403. *Id.* at 14 (footnote omitted).

404. As attorneys for the plaintiffs in the *Stieberger* litigation contend: "[W]here Congress has distributed venue throughout the country to protect the interests of parties appearing before an agency, Congress had accepted that nonuniform rules may govern the agency and determined that other interests outweigh the value of uniformity." Letter from *Stieberger* Plaintiffs, *supra* note 344, at 11. It is therefore important that, in limiting venue choice, Congress should make clear that it is not thereby prohibiting agencies from engaging in intracircuit nonacquiescence that satisfies rationality review.

405. An alternative would be to fashion choice of law rules, which would make it possible to predict, at the time of the administrative proceedings, which circuit's law would govern the review of that decision. See Note, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078 (1984). But we believe that the prospect of having one circuit apply another circuit's law fits uncomfortably with the idea of federal law as a unitary law. See *supra* note 244.

## CONCLUSION

Responding to an earlier draft of this Article, Assistant Attorney General John R. Bolton, head of the Justice Department's Civil Division, stated that "[w]hile agency decisions regarding nonacquiescence should be rational, subjecting such decisions to judicial review offers few, if any, advantages over straightforward litigation on the merits of the underlying issue itself."<sup>406</sup> Thus, a court of appeals would be free to set aside agency action that was inconsistent with a prior ruling of that court, but would not be empowered to enjoin nonacquiescence. Each litigant would have to seek judicial relief in order to benefit from the favorable circuit court ruling.<sup>407</sup> Similarly, Deputy Solicitor General Thomas W. Merrill concluded that "nonacquiescence decisions, as such, should not be separately made subject to judicial review."<sup>408</sup>

Attorneys representing Social Security claimants occupy the polar extreme. One lawyer wrote that anything short of a blanket bar of intracircuit nonacquiescence "would destroy the very basis of the notion of separation of powers by allowing an agency of the Executive Branch to ignore the judiciary."<sup>409</sup> Another stated that "[w]hen an agency refuses to follow the case law of the Circuit, knowing that venue to review will be to the Court of Appeals of that Circuit, it is engaging in anarchy, pure and simple."<sup>410</sup> Attorneys for the *Stieberger* class argued that "in the public benefits context intracircuit nonacquiescence is illegal."<sup>411</sup> Along similar lines, the State of New York urged that "there should be *no* instances in which agencies are permitted to disregard rulings of a federal court of appeals in that circuit."<sup>412</sup>

Our Article takes a middle course between the co-equal branch and district court metaphors that underlie the rhetorical positions assumed by these litigants. Our approach recognizes a role for the courts in policing agency practices in this area, but also acknowledges the legitimacy of an agency's desire to maintain a uniform administration of its governing statute while it reasonably seeks the national validation of its preferred position. The virtue of this approach is not that it travels an intermediate course. Rather, it flows from a theory of the proper functions of courts and agencies in the administrative state. It attempts to do justice to the

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406. Bolton Letter, *supra* note 359, at 6.

407. The Justice Department does concede that, at least in some of these cases, EAJA sanctions would be appropriate.

408. Merrill Letter, *supra* note 21, at 2.

409. Letter from Brian I. Clymer to Mary Candace Fowler 3 (April 28, 1988) (public comment on draft ACUS policy).

410. Letter from Gary Palmer to Mary Candace Fowler 1 (May 3, 1988) (public comment on draft ACUS policy).

411. Letter from *Stieberger* Plaintiffs, *supra* note 344, at 17.

412. Letter from Howard L. Zwickel, New York State Department of Law, to Mary Candace Fowler 1 (May 6, 1988) (public comment on draft ACUS policy).

respective responsibilities of, and the delicate interaction between, these key institutions in our administrative lawmaking system.