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I. INTRODUCTION

American history has witnessed recurrent conflict between the judiciary and the executive or legislative branches of our government.[1] The conflict generates heated passions perhaps because it involves both significant struggles for power and fundamental views about the rule of law. New opportunities for confiict have arisen as the number of administrative agencies has grown. In the last decade, administrative agencies[2] and the courts have engaged in a continuing controversy over whether agencies must follow lower court precedents. Although the controversy has touched a number of agencies at least peripherally, the National Labor Relations Board (NLRB or Board) and the Social Security Administration (SSA) have figured most prominently in the battle. Both agencies on occasion have announced explicitly their intention to disregard judicial precedent, even in cases that arise within the same judicial territory.[3]

The NLRB's actions have provoked repeated, angry outbursts from the courts but little detailed analysis, on either a doctrinal or a theoretical level.[4] The SSA has drawn wider attention because the agency's actions were part of a controversial program designed to terminate the benefits of persons who were receiving Social Security disability payments. Several lawsuits explicitly challenged

1. Conflict between the judiciary and other departments of government often has centered around the obligation of the executive and the legislature to follow the Supreme Court's interpretations of the Constitution. *See* G. GUNTHER, CONSTITUTIONAL LAW 21-29 (11th ed. 1985). Famous examples include Abraham Lincoln's opposition to the *Dred Scott* decision and conflict over the Supreme Court's invalidation of New Deal economic regulation, which led to President Roosevelt's Court packing plan of 1937.

2. The focus of this Article is administrative agency nonacquiescence at the federal level. The problem appears to be widespread at the state level also. *See* Kelly & Rothenberg, *The Use of Collateral Estoppel by a Private Party in Suits Against Public Agency Defendants*, 13 U. MICH. J. L. REF. 303 (1980).

3. *See infra* notes 15, 19, and 20.

4. *See infra* notes 549-52.

the agency's nonacquiescence[5] in judicial precedent.[6] The press attacked the SSA's behavior,[7] which drew the predictable counterattacks.[8] The attention drawn to nonacquiescence in this context, however, has not produced a thorough understanding of the problem.

This Article will analyze the phenomenon of administrative agency nonacquiescence. Section II defines different types of nonacquiescence, surveys current agency practices, and examines the judicial response to various forms of nonacquiescence. Section III identifies the causes of nonacquiescence and the effects of the practice on litigants and agencies. Section IV analyzes four doctrinal approaches to nonacquiescence and demonstrates that the doc-

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5. The term nonacquiescence is hardly a household word, even among lawyers. As section II demonstrates, however, the practice is widespread. Nonacquiescence has not been accorded much attention because the practice often operates without being laheled and identified.

The term nonacquiescence apparently was coined by the Internal Revenue Service (IRS) in the 1920's. At that time the Commissioner had one year to appeal adverse decisions by the Board of Tax Appeals (the Board). As an accommodation to taxpayers, the IRS developed the practice of issuing an announcement when the IRS did not intend to appeal the Board's decision. This announcement, known as an "acquiescence," allowed the taxpayer to treat the Board's decision as final without waiting for the full appeal period to run. Conversely, announcement of the Commissioner's nonacquiescence in a case signaled an intention to appeal. This rationale for nonacquiescence evaporated when the appeal period was shortened, first to six and then to the current three months. The term nonacquiescence did not disappear, however. The IRS retained the practice of announcing nonacquiescence in Tax Court decisions as an informal system of precedent for IRS personnel as well as for taxpayers. *See* Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity—A View from Within*, 43 TAXES 756, 773 (1965).

More recently other administrative agencies have adopted the term. Both the SSA and the NLRB occasionally have refused to follow judicial precedent in rendering agency decisions and have called their practice nonacquiescence. Only recently has the general commentary on administrative law acknowledged the existence of the phenomenon of nonacquiescence. *Compare* J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 268 (2d ed. 1985) [hereinafter cited as MASHAW & MERRILL, ADMINISTRATIVE LAW] *with* J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM (1975) (no mention of problem) [hereinafter cited as MASHAW & MERRILL, INTRODUCTION]; *compare* R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 413-17 (1985) (topic discussed and listed in index) *with* B. SCHWARTZ, ADMINISTRATIVE LAW (2d ed. 1984) (no mention of nonacquiescence).

6. *See infra* note 54.

7. *See, e.g., U.S. Flouts Courts in Determination of Benefit Claims*, N.Y. Times, May 13, 1984, § 1 at 1, col. 1; Lewis, *Respect for Law*, N.Y. Times, June 18, 1984, at Y3, col. 1; Lewis, *Enough Was Enough*, N.Y. Times, Sept. 20, 1984, at Y25, col. 2.

8. *See, e.g., Statement of Carolyn B. Kuhl, Deputy Assistant Attorney General, Civil Division, Department of Justice, Before the Senate Finance Committee* (Jan. 25, 1984), (concerning SSA's nonacquiescence policy), *excerpted in* Kuhl, *The Social Security Administration's Nonacquiescence Policy*, 1984 DET. C.L. REV. 913; Address by Paul Bator 61 A.L.I. PROC. 493 (1984) [hereinafter cited as BATOR].

trines do not resolve the nonacquiescence problem because of unresolved fundamental underlying value conflicts between judicial and agency perspectives. Section V then reviews four possible responses to nonacquiescence and the issues that litigants and decisionmakers who face nonacquiescence must address. The Article concludes that no permanent solution to the problem of nonacquiescence can be expected in light of the unresolved value choices identified in section IV. Greater awareness and knowledge concerning the problem, however, may lead to more desirable provisional solutions.

II. AGENCY NONACQUIESCENCE PRACTICES AND THE JUDICIAL RESPONSE

As used in this Article, the phrase "administrative agency nonacquiescence" refers to an administrative agency's refusal to follow judicial precedent when the agency handles cases that involve similar issues.[9] Nonacquiescence is distinguishable from agency relitigation.[10] Both practices involve the larger problem of the relationship between administrative agencies and the judiciary, but they are not identical. Nonacquiescence involves internal agency activity: to what extent will the agency follow judicial precedent in taking action at the agency level? Relitigation, on the other hand, involves the agency's external behavior in litigation in which the agency is a party: to what extent will the agency relitigate issues

9. Because nonacquiescence issues involve refusal to follow judicial precedent, those issues will involve questions of law or mixed questions of law and fact, which typically are questions of statutory interpretation.

10. Professor Vestal analyzed agency relitigation practices in Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 122 (1977), but he did not refer explicitly to nonacquiescence. Several recent articles have considered nonacquiescence. *See* Williams, *The Social Security Administration's Policy of Non-Acquiescence*, 12 N. KY. L. REV. 253 (1985); Comment, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 583 & n.8 (1985) (distinguishing nonacquiescence from relitigation but focusing on the relationship of nonacquiescence to judicial review of agency decisions) [hereinafter cited as Comment, *Intracircuit Nonacquiescence*]; Comment, *"Respectful Disagreement": Nonacquiescence by Federal Administrative Agencies in United States Courts of Appeals Precedents*, 18 COLUM. J. L. & SOC. PROBS. 463 (1985) [hereinafter cited as Comment, *Respectful Disagreement*]; Comment, *Social Security Continuing Disability Reviews and the Practice of Nonacquiescence*, 16 CUM. L. REV. 111 (1985) [herinafter cited as Comment, *Continuing Disability Reviews*]; Note, *Administrative Nonacquiescence in Judicial Decisions*, 53 GEO. WASH. L. REV. 147 (1985) [hereinafter cited as Note, *Administrative Nonacquiescence*]; Note, *Denying the Precedential Effect of Federal Circuit Court Decisions: Nonacquiescence by Administrative Agencies*, 32 WAYNE L. REV. 151 (1985). Some works tend to collapse nonacquiescence and relitigation, *see, e.g.*, Comment, *Respectful Disagreement*, *supra* at 473-83.

that other courts previously have decided adversely to the agency?[11]

Administrative agencies may not appeal their own decisions. To relitigate the underlying issue, therefore, an agency must nonacquiesce, that is, refuse to follow judicial precedent in agency decisionmaking. Because most agency decisions are not appealed, the agency does not relitigate every issue in which it has nonacquiesced. Thus, the incidences of nonacquiescence and relitigation are not identical.[12]

An agency that decides not to follow judicial precedent must make two preliminary decisions. First, should the agency publicize its decision and, if so, how? Second, should the agency consider itself bound by some, even if not all, judicial decisions with which agency members disagree? Nonacquiescence may take a variety of forms, depending on the two decisions that an agency makes. Those choices in turn may affect the response of both litigants and the courts to agency practices. The following discussion sets out the approaches that federal agencies take to these problems and the judicial responses to these approaches.

A. Announcing the Agency's Action

Current agency nonacquiescence practices run the gamut from self-conscious, public assertions that the agency refuses to be bound by particular judicial precedent to omission of relevant judicial precedent from agency opinions.

1. Formal Nonacquiescence

The most visible form of agency nonacquiescence is an explicit public statement that the agency intends to disregard a particular

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11. An agency's refusal to implement the mandate of a court raises a third and different set of problems. Such refusal is uncommon but not unknown. *See, e.g.*, NLRB v. Jamaica Towing, Inc., 632 F.2d 208 (2d Cir. 1980); Valdez v. Schweiker, 575 F. Supp. 1203 (D. Colo. 1983); H.R. REP. No. 138, 99th Cong., 1st Sess. (1985) (discussing Reagan Administration's dispute with the judiciary over constitutionality of Competition in Contracting Act, Pub. L. No. 98-369).

12. In the SSA, for instance, claimants typically seek judicial review of approximately 4% of administrative law judge (ALJ) decisions after a hearing and 1% of initial decisions by the agency, *see* MASHAW & MERRILL, ADMINISTRATIVE LAW, *supra* note 5, at 267; *see also* J. MASHAW, C. GOETZ, F. GOODMAN, W SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS 125-30 (1978) [hereinafter cited as HEARINGS AND APPEALS]. During the Securities and Exchange Commission's (SEC) first decade, 5% of the agency's formal orders were appealed to the courts. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 213-14 (1960), *cited in* MASHAW & MERRILL, ADMINISTRATIVE LAW, *supra* note 5, at 267.

judicial decision. This approach, often described as "formal nonacquiescence,"[13] may be implemented in several ways. Two agencies, the IRS[14] and the SSA,[15] state in publications issued separately from ongoing adjudicatory proceedings that they will not follow certain judicial decisions. Other agencies, such as the NLRB,[16] the Occupational Health and Safety Review Commission, and, during

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13. In Note, *Administrative Nonacquiescence, supra* note 10, the author distinguishes formal and informal nonacquiescence. *See id.* at 152 n.36. The article does not address the differing implications of the two forms of agency behavior. *See also* 1 SOC. SEC. COORD. ¶ 50,330 (RIA) (Feb. 15, 1984).

14. The IRS engages in formal nonacquiescence in courts of appeals decisions by issuing revenue rulings. *See, e.g.*, Rev. Rul. 75-83, 1975-1 C.B. 112; Rev. Rul. 70-101, 1970-1 C.B. 278; Rev. Rul. 69-185, 1969-1 C.B. 108, 109; Rev. Rul. 69-162, 1969-1 C.B. 158. The IRS maintains a List of Prime Issues indicating issues on which the IRS will continue to litigate despite the existence of unfavorable judicial precedent. Because of the statutory provisions for appeal from IRS determinations, the IRS is faced with precedents from the Tax Court in addition to those from the district courts and courts of appeals. *See infra* note 73. The relationship between the IRS and the Tax Court involves some of the issues discussed in this Article. The IRS publishes announcements of acquiescence or nonacquiescence in Tax Court decisions in its weekly Internal Revenue Service Bulletin, which is consolidated into the Cumulative Bulletin twice a year. IRS nonacquiescence practices are discussed in Rodgers, *The Commissioner "Does Not Acquiesce"*, 59 NEB. L. REV. 1001 (1980); Comment, *The Commissioner's Nonacquiescence*, 40 S. CAL. L. REV. 550 (1967); Comment, *Treasury Department's Practice of Non-acquiescence to Court Decisions*, 28 ALB. L. REV. 274 (1964); R. PAUL & J. MERTENS, LAW OF FEDERAL INCOME TAXATION ch. 51 (1934); Taxation with Representation Fund v. IRS, 646 F.2d 666, 672-73 (D.C. Cir. 1981).

15. In 1967 the SSA began publishing its formal nonacquiescence decisions as social security rulings. Social Security rulings currently are published quarterly by the SSA and are considered binding on the agency in accordance with 20 C.F.R. § 422.408 (1985). The SSA has puhlished nonacquiescence rulings in ten cases, including: Soc. Sec. Rul. 68-48c (nonacquiescing in Rasmussen v. Gardner, 374 F.2d 589 (10th Cir. 1967)); Soc. Sec. Rul. 77-35c (nonacquiescing in Pleasantview Convalescent and Nursing Center, Inc. v. Weinberger, 565 F.2d 99 (7th Cir. 1976) (rescinded)); Soc. Sec. Rul. 80-10c (nonacquiescing in Johnson v. Califano, 607 F.2d 1178 (6th Cir. 1979)); Soc. Sec. Rul. 80-11c (concerning Levings v. Califano, 604 F.2d 591 (8th Cir. 1979)); Soc. Sec. Rul. 81-1c (concerning Boyland v. Califano, 633 F.2d 430 (6th Cir. 1980)); Soc. Sec. Rul. 81-28c (on Hutelieson v. Califano, 638 F.2d 96 (9th Cir. 1981)); Soc. Sec. Rul. 82-10c (on Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981)); and Soc. Sec. Rul. 82-49c (on Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982)). The frequency of formal SSA nonacquiescence has increased in recent years. Six of the nonacquiescence rulings were issued after 1978. *See also* Soc. Sec. Rul. 81-6, containing a general statement that SSA need not show that a claimant's medical condition has improved before terminating the claimant's benefits. This policy conflicted with numerous court decisions. Three recent law review articles specifically address nonacquiescence by the SSA. Williams, *supra* note 10; Comment, *Continuing Disability Reviews, supra* note 10; Comment, *Nonacquiescence: Health and Human Services' Refusal to Follow Federal Court Precedent*, 63 WASH. U.L.Q. 737 (1985); *see also* Case Comment, *Administrative Law—Jurisdiction, class action, injunctive relief, and nonacquiescence*: Lopez v. Heckler, 104 S. Ct. 221 (1984), 7 W. NEW ENG. L. REV. 277 (1984).

16. The NLRB's nonacquiescence practices are discussed in Marrson, *The United States Circuit and the NLRB: "Stare Decisis" Only Applies if the Agency Wins*, 53 OKLA. L.J. 2561 (1985).

the 1950s and 1960s, the Tax Court,[17] typically assert their intention to disregard judicial precedent when the issue arises in the context of ongoing litigation. An agency may make such claims at any stage of the litigation process. Faced with a party's claim that judicial precedent controls, a hearing officer or an administrative law judge (ALJ)[18] may assert that he or she is bound only by decisions of the agency.[19] In its adjudication opinions the agency itself

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17. The Tax Court formerly was an administrative agency but Congress designated it as an Article I court under legislation adopted in 1969. Pub. L. No. 91-172, § 951, 83 Stat. 730 (amending 26 U.S.C. § 7441 (1982)). The practical significance of this redesignation is that, as a court of the United States, the Tax Court is not subject to the Administrative Procedure Act, 5 U.S.C. § 551(1)(B) (1982). On several occasions, the Tax Court as an administrative agency expressly refused to follow decisions of the courts of appeals in cases that later were subject to judicial review. *See, e.g.* Houston Farms Dev. Co., 15 T.C. 321 (1951), *rev'd*, 194 F.2d 520 (5th Cir. 1952) (two to one decision); Arthur L. Lawrence, 27 T.C. 713 (1957); Stern v. Comm'r, 242 F.2d 322, 324 (6th Cir. 1957) ("The Tax Court . . . in the instant case, stated that it would follow its own prior decisions in spite of numerous reversals of such holdings by the Courts of Appeal, specifically alluding to the decision of this court in Tyson v. Commissioner . . . ."). The Tax Court's refusal to follow court of appeals decisions was the subject of criticism, *see, e.g.*, Comment, *Heresy in the Hierarchy: Tax Court Rejection of Court of Appeals Precedents*, 57 COLUM. L. REV. 717 (1957), and the Tax Court subsequently reversed itself. Jack E. Golsen, 54 T.C. 742 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1971). Subject to limited exceptions, the Tax Court now follows court of appeals decisions when applicable. *See* Comment, *The Burgeoning Impact of the Golsen Rule on the United States Tax Court*, 29 U. KAN. L. REV. 235 (1981).

18. The NLRB, for instance, uses both ALJs and hearing officers. The bulk of the work of the NLRB is divided into two categories: unfair labor practice cases under § 10 of the National Labor Relations Act (NLRA), 29 U.S.C. § 160 (1982), and representation cases under § 9(b) and (c) of the NLRA, 29 U.S.C. § 159(b), (c). The investigation and hearing process differs for the two categories. Unfair labor practice charges are filed with a regional director of the NLRB. The regional director investigates the charge and either dismisses the charges or files a complaint and notice of hearing. ALJs preside over the hearings and issue a recommended decision, which is reversable by the Board on request of a party. Representation questions also are initiated by filing a petition with the regional office. If a formal hearing is held after regional office investigation of the petition, however, a hearing officer presides rather than an ALJ. Normally the hearing officer is an attorney or field examiner employed in the regional office. The hearing officer analyzes the issues and evidence but does not make a recommended decision. The petition ordinarily is decided by the regional director, and only limited Board review is available at the request of the parties. Procedures in other types of cases differ somewhat. *See* 29 C.F.R. §§ 101.1-.36 (1985).

19. *See, e.g.*, Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978). The *Federal-Mogul* court reviewed a decision in which the ALJ had found that an employer violated the NLRA by coercively interrogating certain employees. The ALJ refused to follow criteria for evaluating coerciveness of employer questions that were set out in a Second Circuit case and later adopted by the Fifth Circuit—the "*Bourne* rule". In a discussion with the employer's attorney, the ALJ made comments such as "I don't know that the Board has adopted the rule in the *Bourne* case" and "I try cases for the Board, with all due deference to the Fifth Circuit." *Id.* at 1251-52. *See also* Ithaca College v. NLRB, 623 F.2d 224 (2d Cir. 1980), *cert. denied* 444 U.S. 975 (1980). In *Ithaca College*, a regional director of the NLRB had refused to follow the Second Circuit's earlier decision in Yeshiva University v. NLRB, 582 F.2d 686 (2d Cir. 1978), which had held that University faculty members fell outside the

may acknowledge the existence of contrary judicial authority, but may assert that the judicial precedent does not bind the agency.[20]

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coverage of the NLRA because faculty members fell within the Act's exclusion for supervisory and managerial employees. An appeal of the *Yeshiva* case was then pending before the Supreme Court. The regional director stated that he was "bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce." 623 F.2d at 226. In Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32 (3d Cir. 1980), the ALJ held that an employer had committed "repeated" violations of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 666(a) (1976). In so ruling the ALJ followed an interpretation of the Commission that "held that a violation was 'repeated' if the employer had previously been cited for a single substantially similar infraction." 636 F.2d at 33. The ALJ expressly declined to follow Third Circuit precedent, which limited the definition of a "repeated" violation to situations that involved several violations demonstrating "a flouting of OSHA standards." *Id.* In PPG Indus., Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982), an employer objected to the results of a representation election on grounds, inter alia, that an employee group allegedly acting as agent for the union engaged in economic coercion. The hearing officer distinguished on the facts a case in which the Fourth Circuit had defined union-employee group agency relationships. The hearing officer went on to attack the merits of that precedent, however, suggesting in the process that the Board was not bound by the court's decision and that a hearing officer was bound only by the Board's decisions. *Id.* at 820 n.5.

20. As early as 1944, the NLRB explicitly refused to follow lower court precedent. In *In re* Schmidt, 58 N.L.R.B. 1342 (1944), after finding that an employer committed unfair labor practices, the Board awarded back pay to two employees who refused either to resign tbeir union membership or to accept a transfer. Earlier in NLRB v. Waples-Platter Co., 140 F.2d 228 (5th Cir. 1944), the court had reversed a back pay award in similar circumstances. The Board in *Schmidt* refused to follow the appellate decision, stating "[i]n the absence of a final determination of the question by the Supreme Court, we adhere to our view in [the earlier] case." 58 NLRB at 1344 n.3. The Board went on to say that "[w]e also note that the opinion of Member Reilly herein construes the Board's failure to apply to the Supreme Court for a writ of certiorari . . . in the *Waples-Platter* case as tantamount to acquiescence on our part in the view of that court with respect to the back-pay issue. We do not so view the matter. Our determination to forego review by the Supreme Court in that case rested upon administrative considerations having no relationship to the merits of the back-pay issue." *Id.* at 1344-45.

In *In re* Insurance Agent's Int'l Union, 119 N.L.R.B. 768 (1957), an employer charged the union with refusal to bargain, constituting an unfair labor practice, because the union sponsored a slowdown during the course of contract negotiations. The trial examiner dismissed the charges and relied in part on Textile Worker's Union v. NLRB, 227 F.2d 409 (D.C. Cir. 1955), in which the court held that the Board may not find that a union violates its obligation to bargain in good faith based on evidence that the union engages in unprotected harassing tactics during the course of negotiations. The Board reversed the trial examiner, stating

> [i]t 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.

119 N.L.R.B. at 773.

In Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965 (3d Cir. 1979), after an ALJ recommended on the basis of Third Circuit precedent that the board dismiss a union unfair labor practice charge, the Board declined, both initially and again on remand, to follow the judicial decision. The Board in Ithaca College, 244 N.L.R.B. 517 (1979), adhering to prior rul-

2. Informal Nonacquiescence

In informal nonacquiescence, the agency does not draw attention to its practice by public announcement. Instead, the agency either disregards judicial precedent[21] or attempts to identify factual distinctions.[22] Consequently, informal nonacquiescence is

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ings in four lines of cases, found that college faculty members were employees within the meaning of the NLRA and declined to follow a contrary Second Circuit precedent, Yeshiva Univ. v. NLRB, 582 F.2d 686 (2d Cir. 1978). The Board stated: "With all due respect to the view expressed by the Second Circuit, [the NLRB] will adhere to its position until the Supreme Court has ruled on the matter." 244 N.L.R.B. at 518 n.3.

In S&H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273 (5th Cir. 1981), the Commission cited the employer for failure to provide safety belts to employees. The citations were issued under a general OSHA regulation that did not define the specific circumstances under which safety equipment was required. The Fifth Circuit previously had held that the regulations could be constitutionally applied only if the employer either failed to comply with general industry practice or had actual notice that a hazard existed or that the regulations required safety equipment under the circumstances. The Commission "respectfully declined to follow" the Fifth Circuit's precedent, stating that " 'an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of U.S. courts of appeals that conflict with those of the agency.' " 659 F.2d at 1278 (quoting OSHRC opinion at 15). *Cf.* Summa Corp., 265 N.L.R.B. 343 (1982), in which the Board denied the employer's motion for an order requiring the regional director to transmit to the Board the full investigative record concerning objections to a representation election covering Las Vegas employees. The Board adhered to the procedure set out in agency regulations, 29 C.F.R. §§ 102.68-.69 (1985), which excluded witness statements from the record, while noting court decisions taking a contrary view, including a Ninth Circuit decision. The Board asserted that the full record was in fact before it in the case under consideration.

21. *See, e.g.*, Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 861 (7th Cir. 1980) ("Board did not even make a token mention of the congressional admonition"). On summary judgment entered without a published opinion, the Board found that the employer hospital committed an unfair labor practice by refusing to bargain with a separate bargaining unit of four stationary engineers. The case centered around differing interpretations of 1974 amendments to the NLRA, which expanded the Act's coverage to include hospital employees. The committee report on the NLRA amendments "cautioned the Board to give due consideration to preventing the proliferation of bargaining units in the health care industry." 621 F.2d at 861. The Seventh Circuit set aside the order and denied enforcement because the Board failed to consider the congressional intent of the amendment. In NLRB v. West Suburban Hosp., 570 F.2d 213 (7th Cir. 1978), the Seventh Circuit previously had reversed a similar order of the Board on the ground that the NLRB applied its traditional community of interest standard for determining the site of bargaining units without adequately considering this "congressional admonition." *Id.* at 216. *See also* Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351 (6th Cir. 1983) in which the Board, consistent with agency regulations, 29 C.F.R. §§ 102.68-.69 (1985), overruled employer objections to the conduct of a representation hearing. The regional director's record of the investigation did not include the affidavits collected from any of the parties, although judicial precedent indicated that affidavits of parties did constitute a part of the record. The employer failed to object to the omission of the affidavits; therefore, the Board did not discuss its practice or refer to contrary judicial precedent.

22. The court in NLRB v. Gibson Prods. Co., 494 F.2d 762 (5th Cir. 1974), remanded the case to the Board for reconsideration of the remedy entered (bargaining order directed

more difficult to identify than formal nonacquiescence. Only by exhaustively tracing the history of individual cases and issues can one identify instances of agency failure to follow judicial precedent. And even then it may be difficult to distinguish informal nonacquiescence from oversight or incompetence, without review of the litigants' briefs and information about internal agency decisionmaking processes.

Nonetheless, informal nonacquiescence appears to be widespread. Even those agencies that occasionally engage in formal nonacquiescence use informal nonacquiescence mechanisms. In addition to issuing public nonacquiescence rulings concerning specific cases, beginning in 1976 the SSA specifically instructed its ALJs that judicial precedent should not be applied if it is inconsistent with agency interpretations.[23] The SSA has disregarded appellate and district court precedents with some frequency[24] despite some

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at the company) in light of intervening Supreme Court precedent, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The Board stayed its remand decision until the court of appeals decided another factually similar case that the appellate court categorized as one in which a bargaining order was not a permissible remedy. The ALJ entered a remand decision that criticized the second court of appeals decision at length and then reaffirmed the entry of a bargaining order. The ALJ justified his decision on the ground that the case fell in the category of cases in which bargaining orders still were permissible under the Supreme Court precedent.

Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983), involved a taxi cab company that withdrew recognition of and refused to bargain with a union representing taxi cab drivers who leased cabs from the company. An ALJ found that the drivers were employees, not independent contractors. The ALJ further determined that the facts of the case were not materially different from the facts of a previous case in which the Board had found that cab drivers were employees, Yellow Cab Co., 229 N.L.R.B. 1329 (1973). On appeal, however, the D.C. Circuit disagreed, and held that cab drivers were independent contractors. The Board in *Yellow Taxi* apparently had agreed with the ALJ's characterization of the facts and had adopted the ALJ's findings. *See* Yellow Taxi, 249 N.L.R.B. 265 (1980).

Shortly thereafter, the D.C. Circuit Court of Appeals decided another case involving lessee taxi cab drivers and approved the Board's finding of employee status for the drivers. *See* City Cab Co. v. NLRB, 628 F.2d 261 (D.C. Cir. 1980). The Board in *Yellow Taxi* then issued sua sponte a supplemental decision and order justifying its earlier decision on the ground that the case before it was factually similar to *City Cab* and thus was distinguishable from Yellow Cab Co., 229 N.L.R.B. 1329 (1973), *rev'd sub nom.* Seafarer's Int'l Union Local 777 v. NLRB, 603 F.2d 862 (D.C. Cir. 1978).

23. OFFICE OF HEARINGS AND APPEALS HANDBOOK § 1-161 (1981). The SSA has since modified its policy and now authorizes ALJs to follow judicial precedent in narrow circumstances. *See infra* notes 199 and 200.

24. *See, e.g.*, Morrison v. Heckler, 582 F. Supp. 321 (W.D. Wash. 1983) (class action challenging the SSA's refusal to follow specific judicial precedents, including Day v. Weinberger, 522 F.2d 1154 (9th Cir. 1975), and Griffis v. Weinberger, 509 F.2d 837 (9th Cir. 1975)—SSA did not formally nonacquiesce in either decision). Mayburg v. Heckler, 574 F. supp. 922 (D. Mass. 1983), *modified sub nom.*, Mayburg v. Secretary of Health and Human Servs., 740 F.2d 100 (1st Cir. 1984), was a class action challenging the SSA's adherence to its

public suggestions to the contrary.[25] Similarly, an informal survey

interpretation of the statute limiting Medicare coverage to 150 days of inpatient hospital days during any spell of illness. *See* 42 U.S.C. § 1395(a)(1), (2) (1982). SSA interprets "spell of illness" as continuing while an individual resides in a skilled nursing home, even if the individual receives custodial as opposed to skilled nursing care. *See* Soc. Sec. Rul. 69-62, (incorporating former Health Care Financing Administration Rule 79-28). According to plaintiff's complaint nine federal district courts had ruled adversely to the agency on this issue but there were no appeals. *See also* Adamson v. Heckler, No. 84-C-2024 (D. Colo. filed Jan. 4, 1985) (action challenging agency's alleged informal nonacquiescence in Tenth Circuit precedents specifying the weight accorded to a treating physician's report in deciding a claim for disability benefits); Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985) (class action challenging SSA's policy of nonacquiescence, citing informal refusal to follow Second Circuit precedents concerning the evaluation of pain in deciding claims for disability henefits); Douglas v. Schweiker, 734 F.2d 399 (8th Cir. 1984) (individual appeal in which agency apparently had disregarded Eighth Circuit precedent concerning burden of proof in disability cases); Capitano v. Secretary of Health and Human Servs., 732 F.2d 1066 (2d Cir. 1984) (individual appeal in which agency failed to follow Second Circuit precedent concerning conflicting claims to widow's benefits); Layton v. Heckler, 726 F.2d 440 (8th Cir. 1984) (individual claim in which agency disregarded Eighth Circuit precedents concerning evaluation of a disability claimant's subjective complaints of pain); Polaski v. Heckler, 585 F. Supp. 1004 (C.D. Minn. 1984) (class action challenging failure to abide by Eighth Circuit precedents on evaluation of pain).

Both Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984), and Hyatt v. Heckler, 579 F. Supp. 985 (D.N.C. 1984), *vacated and remanded*, 757 F.2d 1455 (4th Cir. 1985), challenged the agency's refusal to follow precedents that allowed the agency to terminate disability benefits only on a showing that a disability recipient's condition had shown medical improvement since the original claim for benefits was approved. The agency published Social Security rulings of nonacquiescence in Ninth Circuit precedents that adopted this medical improvement standard but did not separately nonacquiesce in similar precedents from other circuits.

25. In 1979, in the course of attacking lower court certification of class actions in lawsuits challenging SSA procedures for collection of overpayments of Social Security benefits, the Solicitor General represented in his brief that the agency either would "appeal adverse decisions or abide by them within the jurisdiction of the courts rendering them." Brief for Appellant at 68-69, Califano v. Yamasaki, 442 U.S. 682, 699 (1979). Just four years later, in the same litigation, the SSA failed to abide by this pledge. *Yamasaki* was a consolidated appeal of two cases, *Yamasaki*, a class action representing SSA recipients in the District of Hawaii, and Buffington v. Weinberger, Civ. No. 734-73C2 (W.D. Wash. 1974), *aff'd sub nom.* Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), *aff'd in part, rev'd in part sub nom.* Califano v. Yamasaki, 442 U.S. 682 (1979), a nationwide class action filed in the Western District of Washington. The Supreme Court held that in certain circumstances oral hearings were required prior to recoupment of overpayments and remanded both cases to determine what notice should he given to class members.

On remand, the agency insisted that claimants first file a written request for waiver of recoupment, then file a written request for an oral hearing if the agency denied waiver of recoupment based on the written record. The District Court of Hawaii entered an order that required the agency to schedule oral hearings automatically whenever the agency would deny the claimant's request to waive recoupment of an overpayment based on available written information. The District Court order was affirmed in Yamasaki v. Schweiker, 680 F.2d 588 (9th Cir. 1982), and the agency did not seek certiorari. The plaintiffs in *Buffington* then moved for entry of judgment, and the agency sought to avoid automatic scheduling of any hearings despite the earlier unappealed order in *Yamasaki*. The District Court, however, rejected the agency's attempt and the Ninth Circuit summarily affirmed. Buffington v.

of NLRB decisions and secondary literature locates a substantial number of cases involving informal nonacquiescence.[26]

Other agencies that have no formal policy also engage in nonacquiescence on an informal basis. A survey of agency relitigation by the Administrative Conference of the United States found that many agencies decide informally on a case-by-case basis whether to follow judicial precedents or to continue relitigating issues decided adversely to the agency.[27] Apparently, many agencies have nonacquiesced on at least one occasion, for at least thirteen agencies encountered intercircuit conflicts in decisions that affected the agency during the five years preceding the survey.[28] In excess of eighty conflicts were involved.[29] In each case the agency necessarily encountered the question of how to resolve the issue addressed by the conflicting judicial precedents.

3. Formality and the Judicial Response to Nonacquiescence

Neither judicial opinions nor scholarly commentary suggests that the acceptability of nonacquiescence depends on whether the agency formally announces its policy. As a practical matter, however, the court's reaction to nonacquiescence is influenced heavily by the formal or informal nature of the agency's practice. Most judicial statements on nonacquiescence are triggered by formal, intracircuit nonacquiescence—explicit agency refusal to follow precedents decided by the reviewing court.[30] No doubt this occurs in part because formal nonacquiescence is visible. The tone of the judicial comments, which usually evince indignation and outrage, suggests, however, that the courts may be responding more to the form of nonacquiescence than to the decision to nonacquiesce.[31]

Schweiker, Civ. No. 734-73C2 (9th Cir. Oct. 28, 1982).

26. *See, e.g.*, C. SUMMERS, REPORT ON LABOR LAW CASES IN THE FEDERAL APPELLATE SYSTEM (1974), *cited in* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 138 n.26 (1975) [hereinafter cited as COMMISSION ON REVISION].

27. The survey was discussed by the COMMISSION ON REVISION, *supra* note 26, at 140-43. The responses do not specify whether the cited instances involved intercircuit or intracircuit nonacquiescence.

28. *See* COMMISSION ON REVISION, *supra* note 26, at 157-60.

29. *Id.*

30. *See, e.g.*, Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965 (3d Cir. 1979); Ithaca College v. NLRB, 623 F.2d 224 (2d Cir. 1980), PPG Indus. v. NLRB, 671 F.2d 817 (4th Cir. 1982); Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32 (3d Cir. 1980); Lopez v. Heckler, 572 F. Supp. 26 (C.D. Cal. 1983), *aff'd in part*, 725 F.2d 1489 (9th Cir.), *vacated and remanded*, 105 S. Ct. 583 (1984).

31. *See, e.g.*, Ithaca College v. NLRB, 623 F.2d 224, 227-29 (2d Cir.), *cert. denied*, 444

That is, formal nonacquiescence simply may be perceived as too blatant a threat to judicial status.

Certain circumstances have triggered judicial responses to informal nonacquiescence. For instance, the parties may attack directly the legality of agency nonacquiescence practices.[32] A party may seek to challenge on appeal an issue that it did not raise before the agency. To justify its failure to exhaust administrative remedies the agency may argue that exhaustion would have been futile because of the agency's consistent refusal to follow precedent.[33] Moreover, the agency's appellate briefs may so slight the court's own precedent as to draw a rebuke from the court.[34] In most situations, however, informal nonacquiescence evokes no comment, perhaps because it simply goes unnoticed.[35]

B. Intracircuit and Intercircuit Nonacquiescence

1. Agency Practices

In public statements, federal administrative agencies uniformly acknowledge that Supreme Court decisions are binding. When agencies nonacquiesce in judicial precedent, therefore, they refuse to follow *lower* court decisions. The agency has two choices if it is unwilling to follow a lower court decision. First, the agency can disregard the precedent in all cases, even those cases appealable to the court that issued the controversial precedent. This refusal to follow the decisions of the reviewing appellate court is called intracircuit nonacquiescence.[36] Second, the agency can choose to disregard only precedents in cases arising in other geographical areas. This intermediate approach has been labelled intercircuit nonacquiescence.[37]

Most discussions of nonacquiescence concern agency refusal to follow courts of appeals decisions rather than failure to abide by

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U.S. 975 (1980).

32. *See, e.g.*, Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984); Hyatt v. Heckler, 579 F. Supp. 985 (D.N.C. 1984), *vacated and remanded*, 757 F.2d 1455 (4th Cir. 1985).

33. *See* Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351 (6th Cir. 1983).

34. *See* Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858 (7th Cir. 1980).

35. This view is consistent with the lack of attention paid to formal nonacquiescence until recently.

36. *See* Comment, *Intracircuit Nonacquiescence*, *supra* note 10, at 583-84.

37. Comment, *Intracircuit Nonacquiescence*, *supra* note 10, discusses agency relitigation of issues in circuits other than the circuit that issues a precedent, implicitly assuming that in those cases the agency follows court of appeals precedents within the circuit of issuance. *Id.* at 583. That assumption need not be valid.

district court precedents.[38] Several reasons are apparent. Many agencies' decisions are appealable directly to the courts of appeals and not to the district courts.[39] For those agencies, the problem of nonacquiescence is limited to the question whether to follow court of appeals precedents. In addition, district court decisions generally are not considered binding on other courts, and some district courts do not publish many of their opinions.[40] Nonetheless, a complete discussion of nonacquiescence must include agency refusal to follow district court opinions. Such refusals have been challenged when an agency is subject to repeated adverse district court decisions on a particular issue, and the agency persistently chooses not to appeal.[41]

The approximate incidence of formal intracircuit nonacquiescence is comparatively easy to determine because agencies generally publish rulings of nonacquiescence in advance of litigation only in cases of intracircuit nonacquiescence.[42] Similarly, agency nonacquiescence statements that are issued in the course of agency adjudication typically involve intracircuit nonacquiescence.[43]

No doubt formal intercircuit nonacquiescence also takes place in which agencies indicate during adjudicative proceedings that they will not follow precedent from another circuit. Neither agencies nor courts ordinarily label this practice nonacquiescence, however. Intercircuit nonacquiescence seems to be widely accepted, perhaps because it is similar to the judicial practice of treating precedent from outside the circuit as having only persuasive value.

In analyzing informal nonacquiescence, distinguishing intercircuit from intracircuit nonacquiescence presents difficulties. Discussions of agency relitigation practices typically do not identify whether an agency ignores or follows judicial precedent in cases arising within a circuit while relitigating similar cases in other circuits.[44] In addition, some agencies seem disinclined to acknowledge

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38. *See, e.g.*, Comment, *Intracircuit Nonacquiescence*, *supra* note 10; Note, *Administrative Non-acquiescence*, *supra* note 10, at 583, *see also supra* text accompanying note 13.

39. *See* 29 U.S.C. § 160(e), (f) (NLRB); 15 U.S.C. §§ 21(c), 45(c) (Federal Trade Commission); 26 U.S.C. § 7482 (Tax Court).

40. A computer search of the federal district court data base for opinions written by Ninth Circuit district court judges revealed wide variation in the number of opinions written by the judges over a comparable time period.

41. *See* Mayburg v. Heckler, 574 F. Supp. 922 (D. Mass. 1983).

42. *See, e.g.*, *supra* notes 13-20 and accompanying text; *see also* Chee v. Schweiker, 563 F. Supp. 1362 (D. Ariz. 1983).

43. *See* cases cited *supra* notes 19 and 20.

44. *See, e.g.*, Vestal, *supra* note 10; Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 HOUS. L. REV. 1101, 1104 (1974).

the extent of their nonacquiescence activity.[45] At least within the SSA, informal intracircuit nonacquiescence appears to be widespread, judging from a spate of recent lawsuits challenging SSA practices.[46]

2. Judicial Reaction to Intracircuit Nonacquiescence

Not surprisingly, judicial decisions addressing the propriety of nonacquiescence have focused primarily on intracircuit nonacquiescence. Most courts have not taken kindly to the disrespect for authority reflected in an agency's refusal to follow the court's decisions. The judicial opinions that have addressed intracircuit nonacquiescence[47] span a period of thirty years and several agencies, but most judicial activity in the nonacquiescence area has taken place within the last decade. Three court of appeals decisions during the mid-1950s addressed the Tax Court's refusal to follow the precedents of the reviewing circuit court.[48] After a lengthy hiatus, beginning in the mid-1970s a series of cases arising out of the NLRB,[49]

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45. *See, e.g.*, COMMISSION ON REVISION, *supra* note 26. The report quoted the NLRB's general counsel as saying, "[I]f a circuit has ruled against the Board and another case presenting the same issue arises in that circuit, the Board will seek to distinguish the adverse case on its facts. In the rare instances where that has not been possible, the Board has acquiesced in the adverse decision." *Id.* at 140. The report also noted contrary cases.

46. *See* cases cited *supra* note 24.

47. Although most judicial opinions do not expressly distinguish intercircuit and intracircuit nonacquiescence, this Article will use that terminology for the sake of clarity. The term has crept into recent opinions. *See, e.g.*, Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985).

48. Stacey Manufacturing Co. v. Commissioner, 237 F.2d 605 (6th Cir. 1956); Sullivan v. Commissioner, 241 F.2d 46 (7th Cir. 1957), *aff'd*, 356 U.S. 27 (1958); Stern v. Commissioner, 242 F.2d 322 (6th Cir. 1957, *aff'd*, 357 U.S. 39 (1958).

49. Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351 (6th Cir. 1983); PPG Indus., Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982); Ithaca College v. NLRB, 623 F.2d 224 (2d Cir. 1980); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858 (7th Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965 (3d Cir. 1979); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978); NLRB v. Gibson Prods. Co., 494 F.2d 762 (5th Cir. 1974); *see also* NLRB v. Blackstone Co., 685 F.2d 102 (3d Cir. 1982). In *Blackstone* after the agency issued its decision, the Third Circuit reached a contrary result on the same issue in a different case. The issue was the burden of proof in discharge cases (the *Wright Line* test). No such precedent was available at the time of the Board's decision. At oral argument, however, counsel for the Board defended NLRB nonacquiescence and drew the following response in the court's opinion: "We consider the Board's contrary instructions to its administrative law judges to be completely improper and reflective of a bureaucratic arrogance which will not be tolerated." *Id.* at 106 n.5.

In Beverly Enters. v. NLRB, 727 F.2d 591 (6th Cir. 1983), the court was faced, not with nonacquiescence per se, but with the Board's reluctance to follow the law of the case. In an earlier appeal, the court found the record ambiguous and remanded to the Board for specific findings by the regional director. The Board itself responded to the court's questions based on the record the court considered ambiguous.

the Occupational Safety and Health Review Commission,[50] and the SSA[51] discussed intracircuit nonacquiescence.

The initial judicial response to intracircuit nonacquiescence was uniformly negative, but involved limited analysis of the problem. Generally, the courts simply asserted that agencies are bound to follow judicial precedents based either on notions of stare decisis and the law of the circuit[52] or on conceptions of separation of powers as set forth in *Marbury v. Madison.*[53] More recently, how-

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50. Jones & Laughlin Steel Corp. v. Marshall, 626 F.2d 32 (3d Cir. 1980); S&H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273 (5th Cir. 1981).

51. Lopez v. Heckler, 572 F. Supp. 26 (C.D. Cal. 1983), *aff'd in part*, 724 F.2d 1489 (9th Cir.), *vacated and remanded*, 105 S. Ct. 583 (mem. 1984); Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984); Hyatt v. Heckler, 579 F. Supp. 985 (D.N.C. 1984), *vacated and remanded*, 757 F.2d 1455 (4th Cir. 1985).

52. *See* Stacey Mfg. Co. v. Commissioner, 237 F.2d 605, 606 (6th Cir. 1956) ("[T]he Tax Court of the United States is not lawfully privileged to disregard and refuse to follow, as the settled law of the circuit, an opinion of the court of appeals for that circuit."). The court of appeals in *Stacey* noted that the Tax Court operated in a similar fashion to the district courts that handle taxpayer suits for refunds and was equally bound by court of appeals precedent. *Id.* at 606. *See also* Stern v. Commissioner, 242 F.2d 322 (6th Cir.), (quoting *Stacey*), *aff'd on other grounds*, 357 U.S. 34 (1958); NLRB v. Gibson Prods. Co., 494 F.2d 762, 766 (5th Cir. 1974) (Court stated that prior practice "is the law of this circuit and is as binding on the Trial Examiner and the Board, however great their displeasure with it, as it is on us."); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) ("[O]ur judgments . . . are binding on all inferior courts and litigants in the Third Judicial Circuit, and also on administrative agencies . . . . [T]he Board is not a court nor is it equal to this court in matters of statutory interpretations. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect."); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980) ("Such flagrant disregard of judicial precedent must not continue . . . . [T]he Board [is] obligated under the principles of *stare decisis* . . . ."); Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980). The *Ithaca College* court addressed the Board's "nonacquiescence" and stated emphatically that "[t]he position of the Board is one in which we cannot acquiesce." *Id.* Noting the Board's "consistent practice of refusing to follow the law of the Circuit unless it coincides with the Board's views," the court wrote, "[t]his is intolerable if the rule of law is to prevail." *Id. See also* PPG Indus., Inc. v. NLRB, 671 F.2d 817, 820-21, 23 (4th Cir. 1982) (Rejecting the hearing officer's "feeble attempt to distinguish" the court's prior case, the court said, "[T]he Hearing Officer was obliged by law to recognize that [prior precedent] was binding authority in the Fourth Circuit and as such he was not free to disregard it."); Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 357 n.12 (6th Cir. 1983) ("the Board is bound to apply the law of the circuit in which a case arises"); Lopez v. Heckler, 572 F. Supp. 26, 29 (C.D. Cal. 1983) (Plaintiffs "demonstrated probable success on the merits by making a strong argument that agencies are bound by the laws of the circuit."), *aff'd in part*, 724 F.2d 1489 (9th Cir.), *vacated and remanded*, 105 S. Ct. 583 (mem. 1984).

53. *See* Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) (After citing the provisions of the NLRA authorizing judicial review of agency decisions and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the court said, "[f]or 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."); Hyatt v. Heckler, 579 F. Supp. 985, 999 (D.N.C. 1984), *vacated and remanded*, 757 F.2d 1455 (4th Cir. 1985) (Under "the principle of separation of powers . . . federal courts retain the ultimate authority to interpret the law."); Lopez v. Heckler, 572 F. Supp.

ever, courts have faced direct challenges to the legality of agency nonacquiescence and have ruled on requests for injunctive relief or imposition of sanctions against the agency. The judicial response has been ambiguous.[54] A series of direct challenges to nonacquiescence has been filed,[55] most involving the SSA,[56] but the question

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26, 29 (C.D. Cal. 1983), *aff'd in part*, 724 F.2d 1489 (9th Cir.), *vacated and remanded*, 105 S. Ct. 583 (mem. 1984).

54. *See, e.g.*, Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1981). The court in *Yellow Taxi* faced an employer's request for sanctions against the NLRB. The majority criticized the Board for its disregard of precedent but stated that "the Board is not required to conform its rulings to every decision by a Court of Appeals." *Id.* at 383. Judge MacKinnon would have required adherence only to "firmly established" precedent. *Id.* In a concurring opinion, Judge Skelly Wright approved nonacquiescence, suggesting that the agency should be allowed to adhere to its position until Supreme Court review is obtained. *Id.* at 384-85. Judge Wright noted that S&H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273, 1278-79 (5th Cir. 1981), was a case in which the court "assume[d] without deciding that the Commission [was] free to decline to follow decisions of the Courts of Appeals with which it disagree[d], even in cases arising in those circuits," *id.* at 1278, despite prior Fifth Circuit decisions in which the court disapproved of NLRB refusal to follow judicial precedent. The *S&H Riggers* court adhered to its prior views, however, and reversed on the merits of the underlying question of statutory interpretation.

55. Recent challenges to nonacquiescence include two broad attacks on the legality of nonacquiescence. Lopez v. Heckler, 572 F. Supp. 26 (C.D. Cal. 1983), (class action plaintiffs sought and obtained preliminary injunction requiring SSA to abide by Ninth Circuit decision), *aff'd in part*, 725 F.2d 1489 (9th Cir.), *vacated and remanded*, 105 S. Ct. 583 (mem. 1984); Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985) (class action plaintiffs obtained preliminary injunction requiring SSA to follow Second Circuit precedent). Other cases attack nonacquiescence in the context of specific issues. *E.g.*, Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1981) (employer unsuccessfully sought order holding agency personnel in contempt for its disregard of judicial precedent, or requiring the Board to promulgate prospective rules); Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984) (plaintiffs sought and obtained injunction against the secretary's refusal to follow Sixth Circuit precedent, which adopted a "medical improvement" standard for terminating disability recipients); Polaski v. Heckler, 588 F. Supp. 1004 (D. Minn. 1984) (class action plaintiff obtained preliminary injunction requiring agency to follow Eighth Circuit precedents concerning evaluation of pain); Aldrich v. Schweiker, 555 F. Supp. 1080 (D. Vt. 1982) (court certified class and denied motion to dismiss for lack of subject matter jurisdiction in action challenging the SSA's refusal to follow Second Circuit precedents that allegedly (1) required the agency to follow the treating physician's opinion on disability unless the opinion was contradicted by substantial evidence; (2) required SSA to give some weight to a determination by another agency that the claimant was disabled; and (3) held that finding of disability was permissible based on claimant's subjective complaints, absent "objective evidence of an underlying impairment"); Wheeler v. Schweiker, 547 F. Supp. 599 (D. Vt. 1982), *aff'd in part, rev'd in part*, 719 F.2d 595 (2d. Cir. 1983). *Wheeler* was an action challenging the SSA's refusal to apply a medical improvement standard in terminating grandfatherees. According to the court, no Second Circuit precedent explicitly required a medical improvement standard. The court refused to certify a class and rejected the medical improvement standard in part. In Rivera v. Heckler, 568 F. Supp. 235 (D.N.J. 1983), the court certified a class and found subject matter jurisdiction in an action challenging the Secretary's refusal to follow Third Circuit precedents that (1) required the agency to give substantial weight to the opinion of a treating physician when that opinion was not contradicted by substantial evidence, and (2)

required the agency to consider the claimant's subjective complaints of pain in evaluating disability. In evaluating plaintiffs' claim that mandamus jurisdiction was available under 28 U.S.C. § 1361 (1982), the court found "more than colorable" the plaintiffs' claim that fifth amendment due process "requires the Secretary to follow controlling judicial precedent." 568 F. Supp. at 243.

56. Most of these SSA lawsuits grow out a politically controversial effort to cut back on the social security rolls, and seem to stem partially from two formal nonacquiescence rulings by the SSA. Thus, a brief review of the background of those rulings may be helpful. In 1974, the SSA initiated a new federal program known as Supplemental Security Income (SSI). Pub. L. No. 92-608, § 30, 86 Stat. 1465 (codified at 42 U.S.C. § 1381 (1982)). The uniform, federally funded SSI program was a needs-based welfare program for the aged, blind, and disabled, which replaced separate, widely varying state administered and federal-state funded programs covering the same categories of individuals. These federal-state programs were authorized under former Title XVI of the Social Security Act, previously codified at 42 U.S.C. § 1381. Recipients of state benefits were transferred automatically to the new federal program under a process known as grandfathering. The transfer process was at best chaotic. In 1978, the SSA began an experimental effort in the State of Washington to review systematically the continuing eligibility of these grandfatherees. A high percentage of recipients were terminated from the program, and a dispute arose between the agency and claimants over the proper criteria under which grandfatherees' eligibility should be determined.

In Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981), the Ninth Circuit considered an appeal by a grandfathered individual whose benefits were terminated on the ground that he was not disabled according to the current federal definition of disability. The claimant argued that disability must be evaluated under the previous state standard for the Title XVI program. The Ninth Circuit agreed and held that a grandfatheree could not be terminated from the program absent proof of a material improvement in the person's medical condition or a clear and specific error in the prior state determination awarding benefits. *Id.* at 1347. The SSA did not request certiorari but instead published a notice of nonacquiescence in the Ninth Circuit's opinion. Soc. Sec. Rul. 82-10c.

One year later the Ninth Circuit faced a similar issue in Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982). The case arose in the context of the SSA's Title II disability program for workers who had paid into the Social Security retirement system. *See* 42 U.S.C. § 401 (1982). The SSA had terminated Juanita Patti's disability benefits on the ground that she was no longer disabled after undergoing a lumbar laminectomy. An ALJ reversed the decision. One year later the SSA again terminated Ms. Patti's benefits. The evidence showed no improvement in Ms. Patti's condition since the first hearing decision. Nonetheless, after a hearing on the second termination an ALJ upheld the decision. On appeal the Ninth Circuit reversed and held that a prior ruling of disability as to a non-grandfathered SSI recipient gives rise to a presumption that the disabling condition remains unchanged. The SSA then bears the burden of going forward with evidence to rebut the presumption. Again the SSA did not request certiorari but instead published its notice of nonacquiescence. Most other circuits followed the decisions in *Finnegan* and *Patti* that adopted a "medical improvement" standard for termination of SSI and SSA benefits. These decisions took on considerable significance as the SSA implemented its Continuing Disability Investigation (CDI) reviews, a congressionally mandated program that reviewed the eligibility of recipients of social security disability benefits. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 95 Stat. 441 (1980). The Reagan Administration implemented these reviews on an accelerated basis, anticipating substantial cost savings. As a result large numbers of recipients were terminated. Numerous lawsuits were filed challenging aspects of the review process, including several class actions that explicitly challenged the SSA's refusal to follow judicial precedent. For background on the controversy surrounding the attempts to cut back on social security disability benefits, see SENATE SUBCOMM. ON OVERSIGHT OF GOV'T MANAGE-

has not been definitively resolved.[57]

3. Responses to Intercircuit Nonacquiescence

The courts rarely comment on intercircuit nonacquiescence. To a large extent, the structure of American appellate courts appears to approve of and even demand intercircuit nonacquiescence in cases in which the agency desires Supreme Court review of an issue.[58] Certainly, participants in the American legal system have become accustomed to differences in the law applied by different circuits. Persistent intercircuit nonacquiescence and relitigation or even interdistrict nonacquiescence and relitigation, however, occasionally have drawn adverse comment by the courts, particularly when the pattern seems to be part of an agency effort to continue challenged practices without judicial review.[59]

III. NONACQUIESCENCE: CAUSES AND CONSEQUENCES

Administrative agencies refuse to follow judicial precedent for various reasons, many of which are endemic to the American legal and political systems. Thus, nonacquiescence may prove difficult to eradicate. Yet the consequences of nonacquiescence are sufficiently serious that litigants can be expected to challenge the practice, and decisionmakers may wish to limit the practice. An understanding of the causes and consequences of nonacquiescence, therefore, may help to illuminate the advantages and disadvantages of available responses.

A. Why Agencies Engage in Nonacquiescence

Administrative agencies presumably engage in nonacquiescence because agency personnel disagree with the results of judicial decisions and are unwilling to abandon the agency's position in favor of the court's approach to the problem. But that unobjection-

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MENT, 97TH CONG., 2D SESS. OVERSIGHT OF THE SOCIAL SECURITY ADMIN. DISABILITY REVIEWS(Comm. Print. 1982). A good example of press response to the problem may be found in Wyrick & Owens, *The Disability Nightmare*, Newsday, March 20-22, 1983, at 6.

57. *See* cases cited *supra* note 55; *see also infra* note 184; *infra* notes 199-200 agency responses.

58. *See, e.g.*, SUP. CT. R. 17(a) (specifying consideration governing review and certiorari).

59. *See, e.g.*, Mayburg v. Heckler, 574 F. Supp. 922 (D. Mass. 1983) (defining class to include persons who will meet class definitions in the future is appropriate because otherwise Department of Health and Human Services will "persist in [its] course of conduct despite repeated adjudications that it is contrary to law."), *modified sub nom.* Mayburg v. Secretary of Health and Human Servs. 740 F.2d 100 (1st Cir. 1984).

able statement says very little. After all, agencies sometimes do follow judicial precedent. What influences the decision to nonacquiesce? Most agency nonacquiescence decisions appear to result from an amalgam of factors ranging from politics to bureaucratic inertia to institutional structures.[60]

1. The Political Factor

American administrative agencies oversee statutes that delegate complex functions involving important value choices. Consequently, agency decisions can affect the distribution of power in American society significantly. When an agency decides whether to follow judicial precedent or to adhere to the agency's own interpretation of a statute, agency personnel may be strongly influenced by their own views on the merits of the underlying issue. In addition, administrative agencies often are subject to intense political pressures—from Congress, the executive branch, the press, and the public. There are two ways in which outside political pressures may encourage an agency to nonacquiesce. Influential members of the agency's constituency or overseers may care deeply about the underlying issue triggering the court-agency dispute and may communicate these feelings to the agency. Alternatively, the agency may be under pressure to accomplish broader goals that seem incompatible with agency adherence to a given judicial precedent.

The NLRB nonacquiescence cases often have appeared to involve statutory interpretation questions influenced by fundamental political disagreements between pro-union agency members and management-oriented courts over the desirability of unionization efforts. In these disputes, agency members no doubt are influenced both by their own views and the views of outsiders because agency members are political appointees subject to political scrutiny.[61]

By contrast, the recent series of SSA nonacquiescence cases appears to stem only peripherally from strong agency views concerning the underlying issue itself.[62] Compliance with judicial precedents seemed inconsistent with agency attempts to reduce growth in expenditures for disability benefits. The goal of budget reduction stemmed from both congressional pressure over a period of years and executive branch efforts under the Reagan Adminis-

60. The following discussion is not based on an empirical study of agency decisionmaking. Such a study might yield important insights into the importance of the factors discussed below.

61. *See* 29 U.S.C. § 154 (1982).

62. *See* cases cited *supra* note 56.

tration to cut the portion of the federal budget that finances social programs.[63]

2. The Bureaucracy Factor

Federal administrative agencies are large bureaucratic organizations. Two common characteristics of bureaucratic decisionmaking may help explain why agencies engage in nonacquiescence.[64] First, decisionmaking in bureaucratic organizations ordinarily is dispersed among numerous individuals.[65] Obtaining any decision from the agency thus can necessitate overcoming considerable bureaucratic inertia.[66] Because the agency often must affirmatively change its policy if it decides to follow judicial precedent, de facto nonacquiescence may be the easiest course for agency personnel. Second, a territorial imperative may characterize bureaucratic organizations. Participants in the bureaucracy tend to define the agency's function in such a way that power and resources accrue to the agency.[67] Under this view, internal factors in the agency structure may discourage agency personnel from conceding ultimate decisionmaking authority to the courts.

3. Factors Relating to Institutional Structure

A variety of factors relating either to internal agency structure, the organization of the American judicial system, or the relationship between the two, may deter an agency from following judicial precedent.

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63. *See supra* note 56; *see also* J. MASHAW, BUREAUCRATIC JUSTICE (1983); Maranville, Book Review, 69 MINN. L. REV. 325 (1984).

64. The bureaucratic character of federal agencies is universally shared. The factors mentioned here, therefore, cannot explain why agencies nonacquiesce in some precedents but not in others.

65. If decisionmaking authority in a large organization is central rather than dispersed, the decisionmaker may have insufficient time to attend to all issues requiring a decision. Thus, bureaucratic nonacquiescence may develop, but for different reasons.

66. An interesting illustration of this phenomenon in another context has occurred recently in the SSA. The SSA published new regulations defining mental disability on August 28, 1985, 50 Fed. Reg. 35038 (1985), largely in response to injunctive relief entered in lawsuits that successfully challenged existing practices as unduly restrictive. *See, e.g.*, Mental Health Ass'n v. Heckler, 720 F.2d 965 (8th Cir. 1983). Upon publication of the new regulations, hearings in all mental disability cases currently pending before ALJs were stayed, and the cases were returned to the initial claims proceeding stage, despite the presumptive intention of the courts enjoining prior SSA practices that the new regulations would increase the number of cases in which the disability claim was approved. Soc. Sec. teletype (Region X).

67. *See, e.g.*, H. KAUFMAN, ARE GOVERNMENTAL ORGANIZATIONS IMMORTAL 9-10, 67 (1976).

a. *Information Transmittal and the Combination of Functions*

Administrative agencies can follow judicial precedents only if agency personnel are aware of the precedents and know how to implement them. Yet federal administrative agencies typically perform a combination of functions, including formal adjudication, informal investigation, enforcement activities, and claims processing. Many of the personnel who are hired to perform these functions have no formal legal training.[68] Thus, these agency personnel realistically can follow judicial precedent only if someone within the agency gives them appropriate instructions. To the extent that the agency is subject to different precedents in offices that are within the geographic territory of different courts, the process of transmitting instructions may be complex, costly, time consuming, and subject to a time lag between issuance of the court decision and implementation of acquiescence instructions.

b. Uniformity and Precedents by the Hundreds

Even an agency staffed by competent, legally trained personnel may be disinclined or effectively unable to follow judicial precedents if the volume of binding decisions is excessive.[69] For smaller agencies, the volume of judicial precedents is not a concern. For the larger agencies such as the SSA, whose decisions are reviewable in the district courts, the volume of potential court precedents is staggering.[70] As a result, high level agency decisionmakers may have difficulty in keeping track of all potentially significant litigation. If the agency has insufficient resources to litigate each case fully, some potentially significant cases will be decided without an adequate evidentiary record or thorough briefing.[71] In addition, agency personnel simply may have difficulty in

68. Tbis is particularly true of agencies like the SSA that distribute benefits.

69. *Cf.* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1700-01, 1704-61 (1976).

70. The volume of appeals from decisions of the SSA has been increasing. From 1970 through 1975, the federal courts decided 11,927 appeals from decisions of the SSA. *See* HEARINGS AND APPEALS, *supra* note 12, at 129. In 1982 almost 13,000 cases involving disability claims were appealed to the district courts. H.R. REP. No. 432, 98th Cong., 1st Sess. 429 (1983). Recent Social Security appeals seem to involve more sophisticated issues of statutory interpretation rather than simple challenges to the sufficiency of the evidence. This may reflect increased specialization and the development of a Social Security plaintiffs' bar through the creation of the National Organization of Social Security Claimants' Representatives (NOSSCR).

71. The SSA apparently did not track closely the case of Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981). *See infra* note 80. When a class action was filed later on the same

identifying applicable precedents promptly and accurately.[72]

c. *Venue Problems*

Agencies such as the NLRB, the IRS, and the FTC encounter a special problem in following judicial precedents. These agencies are subject to venue provisions that give adversely affected parties a choice of courts in which to seek review.[73] In such cases, the agency legitimately may be uncertain about which court's precedents control.

B. Focusing the Problem: Why Nonacquiescence Matters

Administrative agency nonacquiescence has important effects, both on litigants and on the process of decisionmaking in the American governmental system. Before defining the phenomenon as a problem—or a nonproblem—a survey of those effects is appropriate.

1. Effects of Nonacquiescence on Litigants

Nonacquiescence matters to litigants for the reasons that any procedure, including choice of decisionmaker, matters to litigants. The procedures chosen—who decides and how—potentially affect

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issue the agency did not add measurably to the record before the court. Siedlecki v. Schweiker, 563 F. Supp. 43 (W.D. Wash. 1983).

72. In 1980 and 1981, I observed this problem in local offices of the State Department of Social and Health Services. In response to state fiscal difficulties, the state agency implemented a series of program changes that restricted the availability of welfare programs. Many of these changes were challenged in court, sometimes successfully, sometimes with differing results at the temporary restraining order and preliminary injunction stages. The result was a rapid series of conflicting instructions, and line workers often encountered difficulty in keeping abreast of those changes.

73. Any circuit in which the challenged unfair labor practice occurred or in which the person affected by the Board's order resides or does business may review NLRB decisions. *See* 24 U.S.C. § 160(e), (f) (1982). The resulting forum shopping problems are discussed in Comment, *Forum Shopping in the Review of NLRB Orders*, 28 U. CHI. L. REV. 552 (1961). A taxpayer who disagrees with the IRS' assessment of a tax currently has three options. The taxpayer may pay the tax and sue for a refund in the district court in which the taxpayer resides, I.R.C. § 7422 (1982); 28 U.S.C. § 1346(a)(i) (1982), and then follow normal appeal procedures. The taxpayer also may seek a refund from the United States Claims Court, 28 U.S.C. § 1491 (1982), in which case appeal lies to the Court of Appeals for the Federal Circuit, 28 U.S.C. § 1491 (1982). Alternatively, the taxpayer may refuse to pay the tax and may file a petition for review in the Tax Court, I.R.C. §§ 6213, 7441 (1982), with appeal to the court of appeals for the circuit in which the taxpayer resides, I.R.C. § 7482(b) (1982). Decisions of the Federal Trade Commission are reviewable in the circuit in which the challenged practice occurred, or where the affected party resides or does business. 15 U.S.C. §§ 21(c), 43(c) (1982).

the ultimate outcomes. Procedure becomes substance. Nonacquiescence can delay a decision favorable to a litigant by months or even years, which can result in increased costs to the litigant and perceived uncertainty of outcome. In many cases, these procedural effects, as a practical matter, determine the identity of the last decisionmaker because litigants are discouraged from appealing agency decisions.[74] To the extent that the characteristics of agencies and judicial decisionmakers differ in significant ways—class backgrounds, professional training, and participation in discourse systems embedded with differing values—the choice of decisionmaker will influence substantive outcomes.

Nonacquiescence arises when an agency refuses to abide by a court-imposed obligation. Administrative agency nonacquiescence, therefore, will disfavor those individuals who would benefit from that obligation. Depending on the structure of the agency, however, other private parties may benefit from nonacquiescence. For example, in most SSA cases, agency nonacquiescence has a consistent and predictable effect: agency refusal to follow judicial precedent means that recipients are denied benefits at a higher rate. This effect comes about because most social security cases involve only one party apart from the agency.[75] If the agency's position favors claimants, then the claimant will not seek judicial review. Only when the agency position leads to denial of benefits will the claimant appeal. Thus, no opportunity arises for nonacquiescence that favors the individual claimant.

The typical agency regulatory process, by contrast, involves multiple parties.[76] The typical NLRB case, for instance, will involve management, the union, and perhaps an individual worker, all with opposing interests.[77] In these cases, any agency decision

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74. A small percentage of agency decisions undergo judicial review, even in the absence of delays creating disincentives to appeal. *See supra* note 12.

75. The SSA handles two major types of cases: claims for disability benefits under 42 U.S.C. §§ 401-433 (1982) or 42 U.S.C. §§ 1381-1383, (1982) and claims for old age retirement benefits under the same provisions. In these cases the SSA's decision to grant or deny a claim has no direct effect on anyone except the claimant. A much smaller number of cases involves claims for dependents' benefits by children and past or present spouses. Approval of henefits for one dependent can reduce the amount available for another dependent because of a maximum amount payable in dependents' benefits. Similarly, a determination that one person was validly married to a wage earner at the time of death or disability may preclude payment of benefits to an individual who therefore was not legally married to the wage earner.

76. Rulemaking, health and safety regulation, consumer protection regulation, and on occasion, licensing, typically will all involve opposing interests.

77. *See supra* note 18.

may be subject to judicial review and the substantive effects of nonacquiescence are much more indeterminate. Nonacquiescence will not favor one side to a dispute consistently unless, over time, the agencies and the courts demonstrate consistently different political biases.

2. Effects on Agencies of Acquiescence in Judicial Precedent

Nonacquiescence allows administrative agencies to limit sharply the effects of judicial review on ongoing agency business. Restrictions on nonacquiescence thus would force agencies to respond to judicial precedent by altering their behavior or by seeking approval for the agency position from either the Supreme Court or Congress.

An agency can, of course, abandon its preferred approach to a problem each time a court adopts a different position. In effect, this system would enforce a first-in-time rule for following judicial precedent. Such an approach potentially hampers an agency's ability to regulate comprehensively and subjects the agency to the dictates of any federal judge, no matter how idiosyncratic or ill-informed.[78] By acquiescing in judicial precedent only within the circuit (or district) of issuance, the agency can limit substantially the effects of judicial review on agency practice. That approach, however, might undermine national uniformity and, at its extreme, might prevent an agency from administering a uniform national program.[79]

These potential disadvantages of requiring agencies to follow precedent assume, of course, that the agency has no remedies when following precedent would create serious problems. To the extent that the concerns identified above operate in a particular situation, the agency can seek Supreme Court review of lower court precedents.[80] The agency can pursue that option only at a certain cost,

78. The force of these concerns depends on the observer's view of the relative quality of decisionmaking by agencies and the judiciary. Recent books attacking judicial decisionmaking in cases involving administrative agencies include J. MASHAW, *supra* note 63, and R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

79. The need for national uniformity often is cited as a justification for federal assumption of regulatory or grant distribution programs. Thus, proponents of nonacquiescence argue that requiring agencies to follow judicial precedent would undermine this important goal. Note, however, that some lack of uniformity may already exist because of the need to delegate decisionmaking to regional offices and front line personnel.

80. Obtaining Supreme Court review can be a time consuming process. Thus, the agency still faces the question whether compliance with precedent is required pending review. At least one court has suggested that intracircuit nonacquiescence is impermissible

however. An agency that engages in nonacquiescence need not monitor lower court litigation as closely; nor must the agency concern itself in each case with ensuring an adequate record for Supreme Court review.[81] Additionally, the agency can wait for a factual situation favorable to the agency before seeking Supreme Court review on a particular issue.[82] Finally, an agency that engages in nonacquiescence has correspondingly less concern over the Solicitor General's control of the flow of litigation to the Supreme Court.[83] An agency that is required to follow judicial precedent will lose these advantages, although limits on intracircuit nonacquiescence will create fewer costs to the agency in these areas than limits on intercircuit nonacquiescence.

In addition, the agency can resort to Congress for sympathetic resolution of the underlying issues. The congressional option also has costs to the agency involving time and expenditure of the agency's political capital, which may limit the agency's ability to obtain other statutory changes.

3. Effects on the Balance of Powers

The effects of nonacquiescence are not limited to litigants before administrative agencies. By engaging in nonacquiescence, administrative agencies arrogate power that the judiciary otherwise would exercise. As an agency becomes less susceptible to judicial control, it may acquire greater ability to engage in comprehensive regulation without the disruptive influence of judicial review.[84]

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pending Supreme Court review. *See* Ithaca College v. NLRB, 623 F.2d 224 (2d Cir. 1980). The court noted that the agency could stay proceedings in later cases pending the outcome of the cases before the Supreme Court. *Id.* at 228; *cf.* Comment, *Intracircuit Nonacquiescence*, *supra* note 10, at 606-07.

81. In recent years the SSA occasionally has employed students just out of their first year of law school to handle most of the briefing work on "routine" appeals from agency decisions. Some federal agencies are notoriously slow in their handling of litigation. *See, e.g.*, Johnson v. Secretary of Health and Human Services, 587 F. Supp. 1117 (D.D.C. 1984).

82. *See, e.g.*, Memorandum of Sandy Crank, Associate Commissioner for Operational Policy and Procedures for the Social Security Administration, to Donald A. Goya, Assistant General Counsel (Sept. 14, 1981) (recommending that the SSA not petition for certiorari in Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981), and instead issue a ruling of nonacquiescence). The recommendation noted that "it is questionable whether Finnegan is in fact not disabled at this time" and suggested that the SSA could "attempt to argue this issue [whether SSA must show that a claimant's medical condition has improved before terminating benefits] again before the courts in a case in which the plaintiff is clearly not disabled," when preparation and other factual conditions were more favorable.

83. *See* Comment, *The Solicitor General and Intergovernmental Conflict*, 76 MICH. L. REV. 324 (1977).

84. See *supra* note 78 for authorities arguing that judicial review interferes with ra-

Agency decisionmaking processes, typically characterized by utilitarian reasoning such as cost benefit analysis, may displace more legalistic, rights-based forms of decisionmaking. The practice of nonacquiescence also may have broader symbolic significance. As agencies consciously and visibly engage in nonacquiescence, agency personnel have less reason to internalize the values associated with the rule of law, such as consistency, fairness to individuals, and respect for the judiciary. This redistribution of power may cause either suspicion or alarm, depending on the observer's point of view concerning the political bent of agencies and the judiciary and the desirability of the decisionmaking processes that characterize the different institutions.[85]

Both administrative agencies and the federal judiciary are substantially insulated from popular control, but they operate in a checks and balances relationship with other institutions in the governmental process. Thus, nonacquiescence may have additional effects on substantive decisionmaking to the extent that other institutions respond to the practice. One can expect that litigants faced with agency decisionmaking insulated from judicial review will seek recourse through the press and Congress. By highlighting the existence of an impasse between the agency and the judiciary, nonacquiescence may focus the attention of the press, the public, and Congress on the problem, and may bring to the surface important unresolved political conflicts.[86] This process may result in wider discussion of issues by a broader range of interested parties. Again, the desirability of such effects will depend on the observer's regard for the decisionmaking characteristics of the institution—this time Congress.[87] Politicizing the underlying substantive issues will disfavor those who lack the financial resources and knowledge to participate successfully in the legislative process.

The effects of nonacquiescence on the balance of power would not end there. Politicizing the process may have effects on public perception of agencies and courts. To the extent that all issues are

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tional agency regulation.

85. *Compare, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) *with* T. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979) *and* Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 240-46 (1981).

86. *See* Maranville, Book Review, 69 MINN. L. REV. 325 (1984).

87. The traditional view of democracy supports shifting to Congress the responsibility for deciding controversial issues. For critiques of the traditional view and of congressional decisionmaking processes, see MASHAW & MERRILL, INTRODUCTION *supra* note 5, at 24-31; Parker, *supra* note 85.

seen as political, litigants may abandon any belief that issues can be resolved in the courts on neutral grounds, and simultaneously may jettison any commitment to the rule of law. Conversely, the legitimacy of bureaucratic action might well be undermined to the extent that administrative action seems "lawless." One can expect that each adjustment in this balance of power will bring forth complex and often unpredictable countermoves.

IV. VALUE CONFLICTS AND THE LIMITS OF DOCTRINAL APPROACHES TO NONACQUIESCENCE

In responding to administrative agency nonacquiescence, the courts have relied primarily on separation of powers principles and stare decisis concerns as embodied in the controlling nature of "the law of the circuit."[88] Additional doctrinal approaches to the problem, however, are also available. Nonacquiescence can be analyzed in terms of four different legal doctrines: stare decisis and its specific applications, known as the controlling case doctrine or the law of the circuit; issue preclusion; due process; and separation of powers concerns as developed in institutional competence analysis.[89] None of these four doctrines provides a satisfactory response to nonacquiescence, however, because each doctrine applies only to a limited aspect of the nonacquiescence problem, and each doctrine can provide a resolution to the problem only after the decisionmaker chooses between judicial and agency perspectives on the problem.

A. Stare Decisis, Controlling Case Doctrine, and the Law of the Circuit

The most common judicial response to nonacquiescence is a statement that administrative agencies are bound by the law of the

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88. *See* cases discussed *supra* notes 52, 53.

89. One can raise an additional technical argument concerning some forms of nonacquiescence. Arguably, an explicit policy of nonacquiescence constitutes "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" under the Administrative Procedure Act, 5 U.S.C. § 551(4) (1982), which must be published in the Federal Register in accordance with 5 U.S.C. § 553 (b) (1982). *See* Mattson, *The United States Circuit Courts And The NLRB: 'Stare Decisis' Only Applies If The Agency Wins*, 53 OKLA. B.J. 2561 (1982). That argument implicates the very messy line of cases exemplified by NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). Because this argnment does not address the merits of nonacquiescence itself but would allow the practice if the agency complied with notice and comment requirements, it is not included in the text.

circuit.[90] Implicit in this statement is the assumption that stare decisis applies to administrative agencies. That basic assumption requires additional assumptions about courts, administrative agencies, and the concept of stare decisis. This section will examine those assumptions.

Stare decisis refers to the rule that a court ordinarily follows an earlier decision by the same court or a higher tribunal in a case that requires interpretation of the same legal point or the application of law to similar facts.[91] The application of stare decisis to relationships among courts at different levels of the hierarchy normally is governed by a particular branch of stare decisis sometimes called the controlling case doctrine.[92] The controlling case doctrine requires the courts of a particular jurisdiction to follow precedents from appellate courts within the same jurisdiction.

If administrative agencies are treated as lower courts within the judicial hierarchy, the courts can bind agencies by stare decisis and the controlling case doctrine. Four questions must be answered, however. First, should agencies ever be treated as courts for purposes of the controlling case doctrine? Second, under what circumstances are a particular court's decisions considered controlling cases that bind the agency? Third, do agencies occupy a position at the bottom level of the judicial hierarchy? Fourth, which agency personnel should be treated as judges and thus bound by controlling case doctrines? Each of these questions justifiably can be answered differently depending on which aspect of the agencies' functions and structures are emphasized.

1. Agencies as Courts

Stare decisis is a common-law doctrine. Neither constitutional provisions nor statutes require adherence to prior decisions. Rather, prior decisions are binding because, in a tautological fashion, we deem them so. As one study of the doctrine quipped: "Courts are absolutely bound by their own decisions because this has been stated in other cases which are assumed to be absolutely binding."[93] The controlling case doctrine is derived from the com-

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90. *See* cases discussed *supra* note 52.

91. For an entree into the extensive literature on stare decisis, see University of Southern California Law Center, Asa V. Call, Law Library Bibliography Series No. 83, Stare Decisis and the Doctrine of Legal Precedent: A Selected Bibliography.

92. *See generally* Vestal, *supra* note 10.

93. MURPHY & RUETER, STARE DECISIS IN COMMONWEALTH APPELLATE COURTS 98 (1981).

mon law almost as a matter of definition. The higher courts in the judicial hierarchy are "higher" courts in two ways. The decision of a higher court overrides that of the lower court in a specific case, as it must if the notion of an appeal has any practical value. Beyond the individual case, the decision of the higher court controls the lower court as part of a common-law system of precedent.

The controlling case doctrine does not *a priori*[94] apply to administrative agencies. The doctrine developed to define relationships among courts in a common-law judicial system. Under a formalistic analysis, if agencies are not courts, then by definition agencies are not subject to the controlling case doctrine.

Under a functional analysis, however, the controlling case doctrine might apply to agencies to the extent that agencies perform essentially the same functions as courts. Administrative agencies function like courts in many respects. They engage in quasi-judicial adjudicatory functions that are largely indistinguishable from the activities of the courts. Agencies make decisions based on the record of adversary hearings, and they interpret statutes and decide questions of historical fact in the process.[95] Administrative agency decisions can affect litigants in much the same manner as judicial decisions.[96] Agency decisions are subject to judicial review just as trial court decisions are subject to appellate review.[97]

By focusing on the quasi-judicial functions of agencies, a functional analysis seems to dictate treating the agency like a court. Agencies, however, generally perform a variety of other functions often characterized as legislative or executive in nature.[98] The package of functions in its entirety arguably results in an entity that is sufficiently different from courts so as to make application of the controlling case doctrine either completely inappropriate or applicable only to the agency's quasi-judicial activities.[99]

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94. To say that a doctrine applies *a priori* to a given situation suggests that the doctrine can be treated as a text with a fixed meaning. In recent years, commentators from various disciplines have noted the theoretical difficulties underlying the concept of looking at the "plain meaning" of a text. Texts are, after all, composed of words that have meanings and implications that change according to the reader's beginning assumptions. Those meanings also change over time. *See* Levinson, *Law and Literature*, 60 TEX. L. REV. 373 (1982).

95. *See* 5 U.S.C. § 556 (1982) (governing proceedings in on-the-record hearings conducted by federal agencies subject to the Administrative Procedure Act).

96. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 62-90 (2d ed. 1984)

97. *See* 5 U.S.C. § 706 (1982).

98. *See* B. SCHWARTZ, *supra* note 96, at 1-14.

99. Agency activity such as initial claims processing and approval of grant moneys takes place in contexts that appear far different from the traditional judicial proceeding. To the extent that such activities are governed by the Administrative Procedure Act, 5 U.S.C.

The controlling case doctrine itself, therefore, does not provide a clear solution to the question whether administrative agencies should be treated like courts in applying the doctrine. Unfortunately, the policy justifications for the doctrine do not supply a clear answer either.

Adherents of stare decisis justify the doctrine by reference to several policy arguments. First, stare decisis furthers certainty and predictability in the law. Those characteristics are necessary both to protect individual reliance interests and to conserve litigant and judicial resources by minimizing the incentive or need to forum shop or relitigate questions of law. Second, stare decisis promotes uniformity in the law, which helps ensure equality among litigants. Third, the Constitution delegates lawmaking functions to the legislature. Stare decisis preserves constitutionally mandated separation of powers by avoiding judicial usurpation of the legislature's lawmaking functions. In making policy choices, the legislature can decide not to act and thus implicitly approve judicially created legal doctrines without fear that the courts will overturn this legislative policy choice.[100]

The justifications for the controlling case doctrine generally are the same as those supporting stare decisis. The controlling case doctrine furthers the institutional considerations of conserving litigant and judicial resources by encouraging certainty and predictability. Without the controlling case doctrine, some judges might refuse to follow appellate decisions even when the appellate court unquestionably would apply its earlier decision. Litigants and the judiciary would be forced to expend resources on unnecessary appeals. Some litigants might forego a successful appeal because they could not afford the cost of litigation. Uniformity would be undermined as litigation burdens are distributed unevenly, based on who is initially assigned as a trial judge.

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§§ 551-706 (1982), they are classified as "informal" adjudicatory proceedings and are not required to be handled by means of on-the-record proceedings under §§ 554-556. *Cf.* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). In most agencies, the bulk of "adjudicative" activity is comprised of informal proceedings. Agencies also perform a variety of actions that resemble prosecutorial or legislative functions more than traditional adjudicative functions. Many commentators have suggested that such functions can be performed more effectively by means of decisionmaking models that differ substantially from the judicial model associated with the controlling case doctrine. *See, e.g.* J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983). *Cf.* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

100. For a discussion of the policies underlying stare decisis, see MURPHY & RUETER, *supra* note 93, at 93-102.

In important respects the policy justifications underlying the controlling case doctrine apply to agencies as well as courts. Agency actions affect litigants who may need to rely on decisions of the agency.[101] Fairness concerns arise when agencies treat similarly situated litigants differently.[102] The need to relitigate an issue on appeal burdens litigants before an agency as much as litigants before a court.[103] The burden on the courts from relitigation also could be substantial, because judicial review of agency decisions already accounts for a high percentage of the judicial caseload.[104]

Compelling policy arguments against stare decisis and the controlling case doctrine also are available, however, both generally and as the doctrine would apply to administrative agencies. Flexibility and responsiveness to changed circumstances are important values in American culture. Those concerns often will counsel against strict adherence to precedent. At times, reaching a correct decision may seem more important than avoiding relitigation or a temporary inequality of result among individuals. In cases of administrative agency nonacquiescence, however, the agency ordinarily will be unable to justify its refusal to follow judicial precedent as a need for responsiveness to change. After all, the agency ordinarily seeks to adhere to a consistent position, notwithstanding

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101. American businesses make investment choices in a heavily regulated environment. Therefore, they must rely on court interpretation of applicable statutes in making their choices.

102. A recent comment on the SSA expressed concern that decisionmaking on social security and SSI disability claims is so unpredictable as to create fairness concerns. *See* Stewart, *The Limits of Administrative Law*, in THE COURTS: SEPARATION OF POWERS (B. Goulet ed. 1983).

103. In some cases, in fact, the burden may be greater for the litigant dealing with an agency. For instance, a high percentage of individuals claiming social security or SSI benefits are unrepresented and have limited knowledge and financial resources. Few claimants request an ALJ hearing to challenge an unfavorable decision. Even fewer seek judicial review of an adverse ALJ decision. *See* HEARINGS AND APPEALS, *supra* note 12, at 126-30. Yet the decision to appeal does not seem to correlate with the strength of a claimant's case. *See* J. MASHAW, *supra* note 63, at 134-39. Thus, failure to require agency adherence to judicial precedent may have the effect of denying benefits to many claimants who would win if they obtained judicial review.

104. *See* REPORTS OF THE PROCEEDING OF THE JUDICIAL CONFERENCE, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 104-111, 132 (1984) [hereinafter cited as ANNUAL REPORT]. The report notes that in 1984, 9.7% of cases filed in the courts of appeals involved direct review of administrative agency cases. *Id.* at 109. Additionally, appeals from district court decisions in social security matters constituted more than 4% of total filings, with appeals in tax and environmental cases adding another 2%. *Id.* at 111. Thus, challenges to agency action accounted for more than 15% of the total caseload of the courts of appeals. At the district court level, social security cases now constitute 11.4% of filings because of a tripling in the number of appeals since 1980. *Id.* at 110-11.

contrary judicial precedent. Depending on the issue, however, the agency may be able to make a compelling argument that correct resolution of the issue (that is, resolution along the lines proposed by the agency) is sufficiently important that the agency should not be treated as a court and should be allowed to disregard judicial precedent.

The agency also can counter the argument that the controlling case doctrine is necessary to avoid judicial usurpation of legislative powers. American legal theory currently recognizes that lawmaking is not limited to the legislature. In a common-law system, the courts necessarily make law. Thus, an agency performing quasi-judicial functions may intrude on the judicial prerogative by failing to follow the controlling case doctrine, but the agency does not necessarily interfere with legislative functions. In addition, the agency reasonably can argue that because the legislature delegated decisionmaking power to the agency, treating the agency as a court that must follow precedent is inconsistent with democratic decisionmaking and constitutes a breach of the separation of powers.[105] In sum, stare decisis and controlling case doctrine are not clearly applicable to administrative agencies, and the policies justifying those doctrines do not necessarily support their extension to agencies.

2. Which Courts' Decisions Are Controlling Cases?

In a judicial system with only one appellate court, application of the controlling case doctrine is straightforward. A trial court in the State of Rhode Island, for instance, must follow decisions by the Rhode Island Supreme Court.

Application of the doctrine becomes more difficult in judicial systems that contain multiple appellate courts. Two questions arise: first, which appellate court decisions should a trial court follow? and second, must one appellate court follow the precedents handed down earlier by another appellate court at the same level? In the federal court system, those questions have been answered largely by the development of the doctrine known as the "law of the circuit." Under that approach, precedents issued by the court of appeals for a particular circuit constitute controlling cases for the district courts within the circuit. District courts may, but need not, follow the law of other circuits. Similarly, the courts of appeals

105. The courts also could adopt the preceding arguments to justify imposing judicial precedents on agencies.

do not necessarily follow decisions issued in other circuits.[106]

In a court system with multiple appellate courts, the law of the circuit concept is not the only possible approach to deciding which cases are controlling. An alternative approach to the question of which appellate court decisions a trial court should follow would require lower courts to follow decisions by all courts at higher levels within the judicial system. Thus, the District Court for Hawaii would be required to follow First Circuit precedents as well as Ninth Circuit precedents. Similarly, the question of whether an appellate court must follow precedents from other appellate courts could be answered by requiring courts at one level of the hierarchy to follow decisions of other courts at the same level. The first case to decide a particular question would bind all courts at the same level of the judicial hierarchy. Thus, a decision by the First Circuit would be binding in a later case decided by the Tenth Circuit. At least one commentator has suggested that this "first-in-time" approach to the controlling case doctrine characterized American judicial practices during the nineteenth century and should be followed now.[107]

Under the version of controlling case doctrine implicit in the law of the circuit approach to stare decisis, agency intercircuit nonacquiescence would be proper if the doctrine treated agencies like courts. Agencies could not engage in intracircuit nonacquiescence, however. If a first-in-time approach to the controlling case doctrine were adopted, even intercircuit nonacquiescence would be forbidden.

The federal courts effectively have chosen to adopt a law of the circuit approach to controlling case doctrine, rather than a first-in-time approach.[108] This choice presumably reflects a value judgment favoring flexibility and thorough development of statutory interpretation over uniform treatment of litigants. Sound policy arguments can support either of these conflicting values in the case of administrative agencies. On the one hand, members of Congress and the public who favor creating a particular administrative agency often have argued that an agency can provide desirable flexibility and an opportunity for creative, experimental develop-

106. Vestal, *supra* note 10, contains a lengthy historical discussion of court of appeals practices regarding the precedential value of decisions from other circuits. *See also* Friendly, *The "Law of the Circuit" And All That*, 46 ST. JOHN'S L. REV. 406, 413 (1972); Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir. 1985).

107. *See* Vestal, *supra* note 10, at 130-35.

108. *See supra* note 106 and accompanying text.

ment of regulation.[109] A law of the circuit approach arguably should govern agencies because the agency should retain the flexibility to disregard judicial precedent after due consideration. This approach would permit intercircuit nonacquiescence. On the other hand, many agencies are established in part to administer national regulatory or benefit programs, which replace a patchwork of varying state programs.[110] Thus, uniform treatment of litigants arguably should be a primary value, and a first-in-time approach should govern, which would prohibit even intercircuit nonacquiescence.

3. The Position of the Agency/Court Within the Judicial Hierarchy

The controlling case doctrine is premised on a hierarchical arrangement of courts in which higher courts are by definition those that review decisions of lower courts, and the decisions of higher courts bind lower courts. In applying that scheme to the agency/court relationship, administrative agencies whose decisions are subject to review by district courts should be treated as courts occupying a level in the hierarchy below that of the district courts. Thus, district court decisions should be controlling cases for the SSA, for instance.

Binding an agency to the decisions of all ninety-six[111] district court judges potentially creates serious practical problems. If the agency followed a first-in-time rule, the agency would have to track all litigation carefully enough to create a satisfactory record for appeal and would have to litigate each case fully to avoid "freezing" the development of the law without full consideration of the issues.[112] Alternatively, if the agency followed only district court decisions from its own district (that is, if the agency engaged in interdistrict nonacquiescence), the agency would face the logistical

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109. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 782 (1948).

110. *See, e.g.*, Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383 (1982) (establishing the federally funded and administered SSI program to replace state administered programs funded in part); Title XIV of the Social Security Act, 42 U.S.C. §§ 1351-1355 (1982) (establishing grants to states for aid to disabled) *repealed by* Act of Oct. 30, 1972, Pub. L. No. 92-603, § 303(a), (b), 86 Stat. 1484, except as to Puerto Rico, Guam and the Virgin Islands.

111. 28 U.S.C. §§ 81-132 (1982). The figure includes Puerto Rico.

112. Proponents of current government nonacquiescence practices cite the need for thorough development of important issues as a justification for the practice. *See, e.g.*, Bator, *supra* note 8, at 80. *See also* Levin & Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 125 n.91 (1984) (discussing arguments by the United States that collateral estoppel should not apply against the government).

problems of distributing multiple sets of instructions to different offices.[113]

Those problems could be alleviated by treating these agencies like courts, but not courts located at the bottom of the pyramid. The SSA, for example, could be bound only to follow decisions of the courts of appeals. The agency thus would have to contend with fewer binding precedents.[114]

Such an approach has considerable practical appeal and has been adopted implicitly by many litigants challenging SSA nonacquiescence. It does not, however, seem justifiable under the controlling case doctrine, either conceptually or structurally. In effect, this approach would treat the agency like a court occupying the same level as the district courts for the purpose of applying precedent under the controlling case doctrine, even though the district courts have judicial review authority over individual decisions by the SSA.

4. Identifying the "Judge" Who Is "Controlled"

Stare decisis and the controlling case doctrine developed in the American judicial system as a method of channeling judicial discretion. Traditionally, lawyers and scholars have viewed judges as the key decisionmakers of legal issues arising in the system.[115] Perhaps as a result, the courts make no direct attempt to use the doctrine to limit the discretion of other participants in the system. Prosecutors, for example, may exercise their discretion to charge defendants with crimes or to seek penalties in situations in which a controlling case would not justify such a charge.[116] More commonly, prosecutors may choose to drop charges against potential defendants despite controlling case law that unquestionably criminalizes the behavior at issue.[117]

Administrative agencies operate somewhat like a mini-judicial

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113. *See supra* text accompanying notes 68-72.

114. Note, however, that the agency still would face the need to monitor district court litigation to make an adequate record for decisions by the court of appeals.

115. Robert L. Rabin discusses the deficiencies of this traditional bias in R. RABIN, PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 7-8 (1979).

116. In theory, at least, the Code of Professional Responsibility limits the discretion of prosecutors in making charging decisions. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103 (1979).

117. AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE §§ 3.1-.92 (relating to the prosecution function) and §§ 4.1-.117 (relating to the defense function) (Supp. 1986). *See generally* A. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA (1981).

system. ALJs or agency members act as judges. Other agency personnel perform different tasks. In the case of a regulatory agency, such as the NLRB, agency staff must prosecute suspected violators of the law.[118] The personnel of a benefits-awarding agency, such as the SSA, make initial determinations to grant or deny claims. Unless controlling case doctrine were applied to the prosecutorial or claim-deciding staff, the doctrine would require adherence to controlling decisions in only a fraction of the cases coming before the agency. After all, only a small portion of most agency business reaches the formal adjudicatory hearing stage.[119] Yet the Supreme Court recently held that the enforcement decisions of administrative agencies are presumptively immune from judicial review.[120]

Requiring all agency personnel to follow controlling cases would expand the doctrine well beyond its traditional confines. The doctrine developed in the context of controlling the behavior of judges, and not in the context of regulating the behavior of parties or other participants in the system.[121] Thus, controlling case doctrine has an important limit as applied to administrative agencies. The doctrine plausibly can be used only to analyze nonacquiescence by agency "judicial" personnel, such as ALJs.

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118. *See supra* note 18. The problem of the duty of agency prosecutorial staff to follow controlling case law arose in Teamsters Local 515, 248 N.L.R.B. 83 (1980), *rev'd sub nom.* Helton v. NLRB, 656 F.2d 883 (D.C. Cir. 1981). Charles Helton, a union member, filed unfair labor practice charges against his union for removing dissident literature from a union bulletin board. The regional director dismissed the charges (letter dated Oct. 11, 1983 on file with the author) and the general counsel refused to overrule the regional director's refusal to issue a complaint (letter dated Jan. 4, 1984 on file with the author). The union member previously had prevailed on a similar complaint in the D.C. Circuit Court of Appeals after proceedings in which the regional director did file charges, the ALJ found an unfair labor practice, and the Board reversed the ALJ, dismissing the complaint. Teamsters Local 515, 248 N.L.R.B. 83 (1980), *rev'd sub nom.* Helton v. NLRB, 656 F.2d 883 (D.C. Cir. 1981). The charging party argued that the court of appeals precedent constituted the law of the case and not merely controlling case precedent. Neither the regional director nor the General Counsel referred to the court of appeals decision, which apparently was the only judicial decision on point. *See,* Mattson, *supra* note 89.

119. *See* HEARINGS AND APPEALS, *supra* note 12, at 127. Presumably, informal agency decisions would be handled with a view toward the expected results on appeal. In an agency with low appeal rates or high incentives to iguore judicial precedent, this deterrent effect might be limited.

120. Heckler v. Chaney, 104 S. Ct. 3532 (1985).

121. Judges are trained in professional norms and have access to law books, unlike some administrative agency personnel. Lack of legal training or access to law books does not create an insuperable obstacle to compliance with judicial precedent by prosecutorial or claims processing staff, however. Claims processing staff members in particular are accustomed to receiving detailed instructions for their work. Someone within the agency would have to monitor case precedent and send appropriate instructions to such personnel.

5. Summary

Current versions of stare decisis, in its manifestations as controlling case doctrine and the law of the circuit, provide limited assistance in analyzing administrative agency nonacquiescence. The doctrine plausibly could be used to require some agency decisionmakers, such as ALJs, to follow judicial decisions in cases arising within the jurisdiction of the court rendering the decision. In conceptual terms, however, stare decisis simply does not seem relevant to the full range of agency nonacquiescence activity. In addition, one can raise strong practical objections to applying stare decisis concepts to forbid nonacquiescence even in this limited fashion.

B. Issue Preclusion (Collateral Estoppel)

A few litigants and courts have alluded to doctrines governing preclusion[122] in their analyses of administrative agency nonacquiescence. For reasons that will be elaborated below, preclusion doctrines do not fit the nonacquiescence problem well. The doctrine of issue preclusion, also known as collateral estoppel, prevents one party to a lawsuit from relitigating an issue that was actually and necessarily decided against it in an earlier lawsuit.[123] Administrative agencies function as parties to litigation in addition to acting as decisionmakers. Consequently, issue preclusion, a doctrine focused on parties, provides a slightly different approach to administrative agency nonacquiescence than the controlling case doctrine, which focuses on the behavior of courts as decisionmakers. Courts and litigants could use issue preclusion to affect agency nonacquiescence in two ways. An agency as a party could be precluded from relitigating before the agency as decisionmaker an issue that a court previously decided against the agency. Alternatively, the agency as a party could be precluded from relitigating in court an issue on which the agency earlier lost in court.

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122. *See* Hyatt v. Heckler, 579 F. Supp. 985, 988 (D.N.C. 1984) (Finding of Fact No. 7) *vacated and remanded*, 757 F.2d 1455 (4th Cir. 1985). The application of preclusion doctrines to nonacquiescence is addressed in Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847 (1986).

123. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS (1982).

1. Doctrinal Obstacles to Using Preclusion to Control Agency Nonacquiescence

The basic elements of issue preclusion ordinarily are present in a case of agency nonacquiescence: the question of statutory interpretation on which issue preclusion is sought was by definition actually litigated and determined by a valid final judgment in the earlier action. Two important exceptions to the application of issue preclusion potentially limit the usefulness of the doctrine in analyzing administrative agency nonacquiescence. First, the doctrine currently is applied against the government only in limited circumstances.[124] Second, preclusion on issues of law is disfavored.[125]

a. Precluding the Government

Forty-five years ago American courts almost uniformly applied mutuality requirements to collateral estoppel. A court would prevent a party from relitigating issues finally determined in a prior proceeding only if both the party seeking to preclude relitigation and the party seeking to relitigate the issue were parties to the prior litigation.[126] The mutuality requirement lives on in current limitations on precluding relitigation by the government. Two recent Supreme Court decisions define these limits.[127]

In *United States v. Stauffer Chemical Co.*,[128] the Supreme Court applied mutual defensive preclusion against the government. The Court held that the Environmental Protection Agency could not relitigate the issue of the permissibility of certain inspections of private contractor premises under the Clean Air Act when the government previously had litigated the same issue against the same party in a case involving essentially identical facts. The Court determined that no special circumstances were present that warranted an exception to normal rules of preclusion. In the companion case of *United States v. Mendoza*,[129] however, the Court held that the doctrine of nonmutual offensive preclusion may not be applied against the government in cases involving different plaintiffs. In reaching its decision in *Mendoza*, the Court relied

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124. *See id.* at § 27.

125. *See id.* at §§ 28(2), 29(7).

126. *E.g.*, Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912). *See also* RESTATEMENT OF JUDGMENTS § 43(b) (1942).

127. For an analysis of the problem of applying preclusion concepts against the government in light of these cases, see Levin & Leeson, *supra* note 112.

128. 465 U.S. 165 (1984).

129. 464 U.S. 154 (1984).

primarily on the value of "permitting several courts of appeals to explore a difficult question"[130] before Supreme Court review. The Court also emphasized the prudential considerations that influence the Solicitor General in his decision whether to request certiorari and the effect of a change in executive administration on government litigation policy.[131]

Absent a change in the law, *Stauffer* and *Mendoza* severely limit the usefulness of issue preclusion as a device for controlling administrative agency nonacquiescence. In light of the mutuality requirement for the application of issue preclusion against an agency, only parties engaged in repeat litigation of the same issues (presumably with the same agency) can rely on the doctrine.[132]

b. Preclusion on Issues of Law

A second exception to issue preclusion governs preclusion on issues of law. Earlier in this century, courts held categorically that claim preclusion and issue preclusion doctrines applied only to questions of fact.[133] To the extent that courts applied a rigid version of stare decisis, application of preclusion concepts to issues of law was redundant.[134] More recently, courts and commentators have suggested that preclusion on issues of law is permitted in some circumstances.[135]

The use of defensive mutual issue preclusion that was approved in *United States v. Stauffer Chemical Co.*[136] involved an issue of law.[137] The Supreme Court acknowledged in *Stauffer* that

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130. *Id.* at 160.

131. *Id.* at 161.

132. Thus, after Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982), Juanita Patti could challenge a third effort by the SSA to terminate her benefits by forcing the SSA to show her condition had improved. Other social security claimants could not use issue preclusion to prevent the agency from relitigating the question whether the SSA may terminate a recipient's benefits without showing an improvement in the recipient's medical condition. Those recipients would be forced to litigate the question of disability on the merits to retain benefits. Note that the class action device provides a method of binding the agency in circumstances in which mutuality is lacking. A few courts have certified "nationwide" class actions to hind the agency and possible litigants in one proceeding. *See* Califano v. Yamasaki, 442 U.S. 682 (1979). Note also that in a class action on a nonacquiescence issue the court and litigants would face the question whether earlier judicial precedents should be considered controlling cases.

133. *See, e.g.*, United States v. Moser, 266 U.S. 236 (1924).

134. See Hazard, *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 89-90 (1984), for an historical perspective on preclusion on issues of law.

135. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1980).

136. 464 U.S. 165 (1984).

137. United States v. Mendoza, 464 U.S. 154 (1984), also involved an issue of law.

an exception to preclusion exists for issues of law. The Court expressed uncertainty about the scope and purposes of the exception but held that the exception did not prevent the application of issue preclusion in a case that involved the same parties and "an issue arising in both cases from virtually identical facts."[138]

Requiring mutuality to preclude the government from relitigating an issue renders preclusion concepts inapplicable to most instances of agency nonacquiescence. The legal issues exception to preclusion potentially limits the remaining usefulness that preclusion doctrines might have in later actions between the same parties. Administrative agency nonacquiescence by definition involves an issue of law. A subsequent lawsuit involving the same litigant against the same agency does not necessarily involve substantially similar facts. These cases involve claims falling at all points along the continuum of "relatedness."

As an example, two social security disability cases involving the same claimant might arise in any of the following contexts. Ms. Jones receives disability benefits for a heart condition. In 1982 the SSA terminates Ms. Jones' benefits. A reviewing court interprets the Social Security Act as requiring the SSA to show that Ms. Jones' medical condition has improved, which the SSA has not done. Therefore, the termination is reversed. The most closely related subsequent claim would be an immediate attempt by the SSA to terminate Ms. Jones' benefits based on an evaluation of her medical condition identical to that in the first claim. The relationship between the two cases would appear less closely related as time passed or as the medical basis for termination altered. For instance, suppose Ms. Jones' heart condition did improve and she stopped receiving disability benefits. If she later received benefits

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Petitioner asserted that "the [g]overnment's administration of the Nationality Act denied him due process of law." *Id.* at 155. The court resolved *Mendoza* on the broad ground that mutuality is required for application of issue preclusion against the government.

138. *Stauffer*, 464 U.S. at 172. In *Stauffer* the government argued that parties are not precluded from relitigating a legal issue in a "subsequent action upon a different demand." *Id.* at 172 n.5 (quoting United States v. Moser, 266 U.S. at 242). The government interpreted the "same demand" requirement as requiring that "two cases presenting the same legal issue . . . arise from the very same facts or transactions." 464 U.S. at 172 n.5. The court rejected the "general applicability" of that requirement outside the tax context. The court approved the language of comment b to § 28 of the Restatement (Second) of Judgments that would allow preclusion when claims are "closely related," regardless of the characterization of the issue as one of law or fact. *Id.* at 171. The court did not address the Restatement's phrasing of the issues of law exception to preclusion, which would require that "the two actions involve claims that are substantially unrelated." RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(a) (1980).

for a psychiatric disability and the SSA again attempted to terminate her benefits, an appeal of the new termination would appear substantially unrelated to the original case. Under *Stauffer* the agency would be precluded from relitigating the question of whether it must show medical improvement under some variations of the first example, but probably would not be precluded in the second example.

2. Policy Justifications for Issue Preclusion As Applied to Agency Nonacquiescence

Current approaches to the preclusion doctrine would not limit agency nonacquiescence materially. The doctrine could be expanded to prohibit nonacquiescence if the courts deemed such an expansion desirable. The question thus arises: Should preclusion concepts be applied to prevent nonacquiescence?

Three policy considerations usually are advanced to justify preclusion doctrines. Preclusion protects litigants against the costs and harassment associated with relitigation of claims. Preclusion similarly protects the judicial system by conserving resources. Finally, the doctrine prevents inconsistency in the law and thereby encourages reliance on judicial decisions.[139] The overriding concern of the doctrine is the desire to encourage repose. Countervailing concerns, however, must be accommodated. The court's decision in the previous case may be "wrong." If that is true, then the emphasis on repose causes both the individual and society to suffer. The "error" may result from an inadequate presentation in the original case, perhaps because the parties lacked sufficient incentive to litigate. Alternatively, the "error" may reflect changes in the law and differing perceptions about what the law ought to be. Finally, the decision simply may be "wrong" in the sense that a later court would decide the issue differently. These concerns operate differently at the agency level and at the judicial level.

a. Precluding the Agency from Relitigating Issues in the Courts

Agency relitigation practices raise the same policy concerns as agency nonacquiescence, but the two are not identical. The courts could rebuff an agency's attempts to relitigate issues on judicial

139. *See* Mogel, *Res Judicata and Collateral Estoppel in Administrative Proceedings*, 30 BAYLOR L. REV. 463 (1978). Note the similarity of the policy justifications for preclusion and for stare decisis.

review. That judicial action would not necessarily force the agency either as party or as decisionmaker at the agency level to follow the position of the first reviewing court. As with the controlling case doctrine, applying issue preclusion to agency relitigation practices would affect agency nonacquiescence only to the extent that the agency experiences a high appeal rate and has limited incentive to delay the effective date of the court's interpretation on an issue. Thus, in practical terms, applying issue preclusion to government relitigation practices would not necessarily resolve the question of nonacquiescence.

Courts and commentators who have addressed the applicability of preclusion concepts to administrative agencies have focused primarily on agency relitigation practices in the courts.[140] Identifying the problem as agency relitigation results in an emphasis on the agency's behavior in its role as a party before the courts. Traditional preclusion concerns thus seem directly implicated in the following issue: Should the courts apply nonmutual preclusion, either offensive or defensive, to prevent the government from relitigating a question if a court previously has rejected the agency's position on that issue?

The policy concerns that support and oppose preclusion do not lead to an easy assessment of the desirability of administrative agency relitigation. In the case of nonmutual preclusion against the government, the party seeking to preclude relitigation by definition has not litigated the issue previously. Therefore, concerns about protecting the individual litigant from the cost and annoyance of repetitive litigation are inapplicable.

Precluding government relitigation, however, could conserve judicial resources because the government could not raise the same issue repeatedly in successive lawsuits. The extent of these savings would depend on several factors. First, for savings to occur, a court must expend fewer resources in applying preclusion concepts than a court that decides the merits of both the relitigated lawsuit and any additional lawsuits that would be brought only if the preclusion concepts were not applied.[141] Second, any conservation of judicial resources would depend on how broadly a court interpreted

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140. *See, e.g.*, United States v. Stauffer Chem. Co., 464 U.S. 165 (1984); United States v. Mendoza, 464 U.S. 154 (1984); Vestal, *supra* note 10; Levin & Leeson, *supra* note 112, at 127-29.

141. We must necessarily rely on a rough prediction to determine how much additional litigation would he generated by failure to apply preclusion concepts. Empirical data would be difficult to obtain.

preclusion concepts. For instance, preclusion might apply only to issues litigated at the court of appeals level, on the ground that the government has insufficient incentive (or insufficient logistical capabilities) to litigate each issue fully in the district courts. This approach still might allow some relitigation and consequent drain of judicial resources at the district court level. Third, savings would depend on whether preclusion concepts were applied across circuit boundaries. Professor Vestal argued strenuously in favor of preclusion across circuit boundaries, relying on the unitary nature of the federal court system.[142] Justice White, on the other hand, suggested in *Stauffer* that preclusion applied only to "conclusive resolution of disputes *within* their [courts'] *jurisdictions*," and defined the courts of different circuits as having separate jurisdictions.[143] Fourth, conservation of judicial resources would depend on the ease with which agencies could argue successfully that circumstances had changed enough that preclusion should not apply. Potential cost savings to the judicial system from applying issue preclusion to government agencies thus are extremely dependent on circumstances.

Precluding relitigation would promote consistency and reliance if it discouraged government relitigation and eliminated nonacquiescence. If agencies continued to engage in nonacquiescence, however, the results in decisions at the agency level would be inconsistent with the results of cases in which the litigants sought judicial review. Once again one cannot predict any clear-cut results from applying preclusion concepts.

Arguments against applying preclusion concepts to government agencies are also fact dependent. Courts would be more concerned that erroneous legal interpretations might bind agency litigants unfairly when the agency operated in circumstances that predictably might result in such unfairness. The agency often may have insufficient incentive, opportunity, or ability to litigate an issue fully if the agency handles a high volume of cases or has insufficient legal staff to manage the workload. The urgency of each factor will vary among agencies and will vary over time with each agency. The SSA, for instance, may face more serious problems than the NLRB in these areas.[144]

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142. Vestal, *supra* note 10, at 170-74.

143. 464 U.S. at 176 (White, J., concurring) (quoting Montana v. United States, 440 U.S. 147, 153 (1979)) (emphasis added by Justice White).

144. Of the regulatory agencies, the NLRB last year handled the highest number of new judicial appeals—557 case filings. The SSA had 29,985 new filings in the district courts

Likewise, courts would vary in their concern over "errors" that resulted from changes in the law or from differing perceptions of what the law ought to be, according to the importance they place on the underlying issues. Courts might be more willing to preclude agency relitigation if they believed that a settled answer was more important than a "right" answer. Thus, preclusion concepts provide limited assistance in understanding agency nonacquiescence, even when the focus is strictly on the agency's role as a party in relitigation before the courts.

b. Precluding the Agency-Party From Relitigating Issues Before the Agency-Decisionmaker

The courts could discourage nonacquiescence indirectly by precluding agency relitigation before the courts, or they could attempt to apply issue preclusion concepts directly to activity at the agency level. Two doctrinal steps are necessary before issue preclusion can be used as a method to prevent the agency from disregarding prior judicial decisions when the agency acts on later cases arising in the administrative process. First, the agency must be treated as a party to its own administrative proceedings. Second, a court must find that the agency is engaging in "relitigation."

The term "party" most commonly applies to those persons who sue and are sued in adversary proceedings and who therefore are entitled to appear and present evidence and arguments in support of a position.[145] Procedural rules that govern necessary parties in civil actions and the right to intervene in civil or administrative proceedings suggest that a person whose rights may be affected by a proceeding may become a party.[146]

In the traditional sense, an administrative agency has no "rights" that will be affected by an agency adjudicative hearing. Practically speaking, however, the decision resulting from an administrative hearing may affect substantially the parameters within which the agency must operate. In that sense, administrative proceedings may affect the agency's right to take certain actions. Furthermore, many agencies function as "parties" in their

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and 992 in the courts of appeals. *See* ANNUAL REPORT, *supra* note 104, at 109, 112, 133. *See also* 46 NLRB ANN. REP. 23-24 (1981). The number of cases seeking judicial review of SSA decisions has risen dramatically in recent years. As of December 1985 there were 52,795 such cases pending in the district courts. N.Y. Times, Mar. 9, 1986, § 1, at 1, col. 5.

145. *See* BLACK'S LAW DICTIONARY 1010 (5th ed. 1979).

146. *See* FED. R. CIV. P. 19, 24; Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

own administrative hearings in that agency personnel appear at the proceedings to present evidence and arguments.[147] Other administrative hearings, such as the SSA's, are considered nonadversarial because the agency is not separately represented.[148] One no doubt would still consider a person claiming benefits in such a hearing to be a "party." The agency's position, however, is less clear. In adversarial adjudications, treating the agency as a party to its own proceedings seems plausible. Such treatment seems less plausible in nonadversarial hearings.

Similarly, applying the term "relitigation" to agency efforts to present arguments in adversarial administrative hearings does no violence to our current understanding of the term. The agency as party seems to engage in relitigation when it pursues arguments before the agency as decisionmaker that a court previously rejected.

By contrast, applying issue preclusion concepts to informal agency actions preceding a formal adjudicatory hearing would require transforming our understanding of both the term "party" and the term "relitigation." In these informal proceedings[149] one ordinarily views the agency as a regulator, licenser, or dispenser of benefits—but not as a party. Nor can the grant or denial of a license or disability benefits readily be defined as an act of litigation, even though in *acting* the agency may interpret a statute previously considered by a court. Exempting informal action from the reach of issue preclusion might limit substantially the doctrine's practical usefulness in establishing parameters for nonacquiescence.

The courts, nonetheless, plausibly could decide to apply issue preclusion in adversary hearings. Should they do so? The effect of applying issue preclusion to prevent nonacquiescence in administrative hearings would be similar to the effect of adopting a first-in-time version of the controlling case doctrine. Once again, the agency would find itself at the bottom of the pyramid. The agency potentially would be bound to follow the first judicial decision on a

147. *See* B. SCHWARTZ, *supra* note 96, at 13-14.

148. *See* HEARINGS AND APPEALS, *supra* note 12, at 64-74, 97-98.

149. Under the Administrative Procedure Act, "informal" adjudication is a residual category, covering proceedings that (1) are not defined as rulemaking under 5 U.S.C. § 551(4) and (5); and (2) do not involve adjudication "on the record after opportunity for agency hearing." 5 U.S.C. § 554(a) (1982). I use the term "informal" to refer to such actions taken outside the context of on the record hearings.

given issue, a result that gives rise to problems discussed above.[150]

C. Due Process

The due process clause of the fifth amendment to the United States Constitution limits the power of the federal government by providing: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."[151] Due process analysis provides a third method for analyzing administrative agency nonacquiescence when agency nonacquiescence would deprive the litigant of life, liberty, or property.[152] At least one court has given preliminary approval to this approach.[153]

The controlling case doctrine focuses on the agency as court and preclusion analysis deals with the agency as party. The due process argument builds on the agency's role as government decisionmaker—that is, as the state. The due process analysis thus applies to decisionmaking within the agency, rather than the agency's relitigation policy before the courts. Because agency decisionmaking takes place in different contexts, one can identify at least two versions of the analysis.

The first argument applies to agency decisionmaking in constitutionally required administrative hearings. That argument is as follows: A key element of due process is the right to be heard.[154] Although due process is flexible, the right to be heard must occur in a meaningful time and manner.[155] Courts currently determine whether a decisionmaking process comports with due process requirements by balancing the accuracy of decisionmaking under a given procedure, the incremental increase in accuracy that results from a different procedure, and the costs of imposing the new procedure.[156] A decision is accurate only if it applies controlling law. When an agency decision is based on interpretation of a statute, a

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150. *See supra* text accompanying note 36.

151. U.S. CONST. amend. V.

152. Most nonacquiescence situations would fall into one of these categories. The due process clause certainly applies to much of the work of agencies that dispense benefits. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (termination of Social Security benefits). The business of regulatory agencies is similarly affected by due process requirements. The NLRB operates under statutorily required hearing procedures, 29 U.S.C. § 160 (1982), which presumably are required under the due process clause in order to avoid impermissible deprivations of liberty or property.

153. Lopez v. Heckler, 572 F. Supp. 26 (C.D. Cal. 1983), *aff'd in part*, 725 F.2d 1489 (9th Cir.), *vacated and remanded*, 105 S. Ct. 583 (mem. 1984).

154. *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

155. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

156. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

prior judicial interpretation of the statute qualifies as controlling law. Therefore, due process prohibits an agency from engaging in nonacquiescence by ignoring prior judicial precedent.

The second due process argument applies to agency decisionmaking leading up to a due process hearing in which the claimant posits a due process right to reasonably fair and accurate agency determinations *before* the hearing stage. Again, the due process argument would contend that reasonably fair and accurate decisions mean decisions that follow controlling law, and judicial precedent is controlling law. A preliminary problem arises when a claimant attempts a due process analysis at the prehearing stage. Due process applies at the prehearing stage only to the extent that the effect of an agency action can be characterized as a deprivation of an interest protected by due process.[157] In one sense, the agency decision that triggers a request for a due process hearing does not work a deprivation of "life, liberty, or property" because the decision becomes final only after the hearing.[158] On the other hand, such a decision ordinarily acts as a final determination of a person's rights, absent a request for a hearing. Even if he or she does request a hearing, the person dealing with the agency suffers a temporary deprivation unless the hearing takes place before the agency has effectuated its action.

Unlike the analyses considered previously, this second due process argument would affect all cases handled by an agency, and not merely those cases reaching the administrative hearing or judicial review stages. The argument thus has considerable appeal to an opponent of nonacquiescence, particularly as applied to an agency like the SSA. The argument is appealing because the bulk of final agency action in determining SSA claims takes place before the formal adjudicatory hearing stage.[159] Prohibiting nonacquiescence at the hearing and judicial review stages would affect relatively few claimants and a small percentage of the agency's work. Yet most of the individuals affected by the SSA are unrepresented and suffer from serious limitations in their legal sophistication and their physical and mental abilities to pursue their claims. Consequently, those who appeal are not necessarily the ones whose claims are the strongest.[160] Accurate agency decisionmaking at the initial stage of processing claims, therefore, is much more signifi-

157. *Cf.* O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980).
158. *See* FTC v. Standard Oil Co., 449 U.S. 232 (1980).
159. *See* HEARINGS AND APPEALS, *supra* note 12, at 49.
160. *See* J. MASHAW, *supra* note 63, at 134-39.

cant in the overall system than accurate decisionmaking at adjudicatory hearings.

Strong arguments also can be marshalled in opposition to applying due process analysis to initial agency decisionmaking that precedes formal adjudicatory hearings. Requiring accurate agency decisionmaking as a matter of due process potentially has the effect of "constitutionalizing" lower level agency procedures. Each time a party claims that an agency's procedures did not lead to reasonably accurate decisionmaking, the party could contend that the agency violated due process requirements. This prospect raises a parade of horribles. The courts could find themselves involved in detailed analyses of agency decisionmaking processes to resolve constitutional claims.[161] Yet these internal decisionmaking processes are matters that traditionally are deemed to be within the special province and expertise of the administrative agency.[162]

If one accepts the premises of the due process argument, nonacquiescence provides a relatively compelling context for applying due process to the prehearing stages of the administrative process. Assuming that judicial precedent controls, administrative decisions that ignore those precedents are per se wrong. On an issue crucial to the decision, the risk of erroneous deprivation will be 100 percent. The probable value of requiring the agency to follow precedent also will be 100 percent, but the probable cost of requiring acquiescence will be limited to the cost of distributing appropriate instructions. In addition, decisions as to what law governs administrative agencies—whether agencies must follow judicial decisions—arguably do not require special expertise and appear to be the traditional business of the courts.[163]

Even if one resolves the preliminary question whether due process safeguards apply to initial agency actions, a more serious problem must be addressed. The due process argument is circular. Both versions of the due process analysis simply assume that a judicial decision on an issue of law controls over a conflicting agency interpretation. The due process analysis therefore does not stand on its own. Rather, the analysis requires adopting either the con-

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161. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1277-79 (1975).

162. *See* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974). *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

163. See the discussion of agency versus judicial expertise in Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1334-50 (1984).

trolling case doctrine or institutional competence analysis to establish the key point.

D. Separation of Powers, Institutional Competence, and Congressional Intent

1. Separation of Powers

Administrative agencies are complex institutions. Each of the previous doctrinal approaches to nonacquiescence proved inadequate because the doctrine focused on one narrow aspect of the agency's activities—the agency as decisionmaker, the agency as party-litigant, and the agency as government actor.

The limits of the previous approaches provide a ready framework for analyzing the remaining approach to nonacquiescence and indicate the key question to be answered: Can concepts of separation of powers help with an analysis of nonacquiescence in a way that avoids the oversimplification that characterizes the other doctrinal approaches to the problem?

As a cliche of both high school civics and constitutional law classes, "separation of powers" carries with it considerable baggage. Separation of powers seems more fundamental than the doctrinal approaches discussed earlier, which may explain why courts have invoked separation of powers concerns almost reflexively in their discussions of nonacquiescence. In the purest and most famous treatment of separation of powers, Montesquieu theorized that a properly structured government should separate the legislative, executive, and judicial branches.[164] Each branch of government would exercise the power allocated to it.[165] Implicit in Montesquieu's theory is the view that each of the three branches of government exercises different, clearly identifiable powers. Despite the popularity of Montesquieu's views, the United States Constitution embodies a checks and balances structure rather than a pure separation of powers approach.[166] Thus, reflexive invocation of separation of powers concepts does not readily resolve the problem of allocation among the branches of government.

Simplistic separation of powers concepts provide little assistance with administrative nonacquiescence because the Constitution does not expressly provide for administrative agencies. If courts are to rely on separation of powers concepts, they cannot

164. MONTESQUIEU, THE SPIRIT OF THE LAW 182 (T. Nugent trans. 1900).
165. *Id.* at 182-86.
166. GUNTHER, CONSTITUTIONAL LAW 336 (11th ed. 1985).

focus readily on the constitutionally mandated or limited role of the agencies. Instead, the courts must concentrate on the constitutional role of the judiciary. Thus, we customarily find that an automatic reference to *Marbury v. Madison*[167] accompanies the separation of powers approach to nonacquiescence. *Marbury* often is cited for the assertion that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is."[168] From this statement courts derive the proposition that a statement by the judiciary regarding "what the law is" must bind administrative agencies in a way that makes nonacquiescence impermissible.

The leap from *Marbury* to a conclusion about nonacquiescence, however, is a long one. *Marbury* says only that in deciding a particular case, the judiciary may refuse to enforce a statute that, in the view of the court, violates the Constitution. Though an answer may be implicit in the opinion, *Marbury* does not not directly address the question whether Congress or the President must adhere to Supreme Court interpretations of the Constitution in later cases that raise similar issues.[169] Still less does *Marbury* attempt to specify whether or when administrative agencies are bound by lower court interpretations of statutes. Further, a candid acknowledgement that the separation of powers doctrine is based on a system of checks and balances leads to the view that the problem of controlling the respective branches of government cannot be resolved definitively. A simple reference to separation of powers therefore will not suffice as a response to administrative agency nonacquiescence.

2. Institutional Competence and Congressional Intent

An analysis based on separation of powers concerns need not be limited to a brief reference to *Marbury v. Madison*. The analysis can move from a general concern with separation of powers to an attempt to delineate the particular functions best performed by a given institution. Such a move characterizes the institutional competence analysis favored by advocates of the "legal process" approach to legal problems.[170] An institutional competence analy-

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167. 5 U.S. (1 Cranch) 137 (1803).

168. *Id.* at 176.

169. Nor does *Marbury* address the reverse side of the problem: may the courts defer to agency interpretations of governing statutes? That question is discussed in Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

170. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tent ed. 1958) (available from author).

sis would attempt to evaluate the propriety of agency nonacquiescence first by viewing agencies and courts as entities with distinct areas of expertise and then by deciding whether Congress intended the administrative agency's interpretation or a lower reviewing court's interpretation on an issue to control subsequent agency decisionmaking. This institutional competence approach to legal problems has been enormously influential in both academic circles and the judiciary over the past thirty-five years. It still retains many adherents.[171] Institutional competence analysis suffers from serious weaknesses, however.

Four assumptions are implicit in institutional competence analysis. First, under the structure of the United States Constitution, Congress appropriately controls the allocation of decisionmaking between the judiciary and administrative agencies.[172] Second, careful analysis usually will reveal congressional intent regarding allocation of authority. Third, each institution in our governmental scheme has unique competence in dealing with particular types of problems, but lacks the necessary competence to handle others. Last, these areas of competence can be identified, and the business of administrative agencies and courts should be allocated accordingly. Neither the second nor third assumption seems justifiable as applied to the specific circumstances of administrative agency nonacquiescence.

The structure of the Constitution and traditional concepts of agency law form the basis for the view that Congress controls allocation of decisionmaking between administrative agencies and the judiciary. The constitutional structure does not provide expressly for administrative agencies.[173] Congress creates administrative

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171. Current approaches to institutional competence analysis include Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984) (arguing for a comparative analysis of the capacities of institutions before allocating issues to a particular institution).

172. There is an extensive body of scholarship on a related topic—the legitimacy of judicial review and the proper distribution of work between the legislature and the judiciary. *E.g., Symposium: Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981). Those who favor congressional control of decisionmaking justify their preference on the ground that our system of government is a democratic one, and Congress is the most democratic branch of government. The ongoing dispute over the legitimacy of judicial review has attacked hoth prongs of this justification. On the one hand, the Constitution established a representative form of government, not a pure democracy. Arguably, furthering democracy is not the relevant criterion for determining the proper decisionmaker. Alternatively, even if democratic decisionmaking should be furthered, Congress may not be significantly more representative than other branches of government. *See* Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981).

173. Article II, §§ 2 and 3 do contemplate heads of departments (and presumably de-

agencies and thereby controls the extent of their jurisdiction. Under the traditional view, administrative agency power is founded on a delegation of power by the legislature.[174] That is, Congress delegates to an administrative agency its Article I authority to legislate; from this delegation the agency derives its authority to engage in rulemaking. This analysis does not explain how the agency derives its authority to engage in adjudication, which is the activity giving rise to nonacquiescence. Other constitutional provisions do provide some assistance with that question. Under the constitutional structure, Congress has extensive authority over jurisdiction of the federal courts.[175] In addition, Congress has the authority under the necessary and proper clause to establish special, non-Article III courts and presumably to establish administrative agencies to adjudicate.[176] Furthermore, Congress apparently has the authority to make administrative agencies the exclusive decisionmakers, even on issues of law, by precluding judicial review of agency decisions.[177]

Establishing that Congress has the authority to allocate decisionmaking between agency and court does not resolve the problem of nonacquiescence unless Congress actually has allocated such authority.[178] The assumption that courts ordinarily can determine which institution Congress intended to resolve a particular issue has spawned extensive commentary. A large and complicated doctrine has evolved that sets out the considerations appropriate for

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partments under them), as well as officers of the United States. U.S. CONST. art. II, §§ 2, 3. Article I, § 8 refers to post offices and Article I, § 6 to the Treasury of the United States. U.S. CONST. art. I, §§ 6, 8.

174. For a summary of the traditional view see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671-76 (1975).

175. U.S. CONST. art. I, § 8, cl. 9; art. III, § 1.

176. U.S. CONST. art. I, § 8. Cases upholding Congress' authority to establish "legislative" courts include *Ex parte* Bakelite Corp., 279 U.S. 438 (1929) (Court of Customs and Patents Appeals) and Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636 (5th Cir.) (Tax Court), *cert. denied*, 385 U.S. 918 (1966).

177. *See* Dismuke v. United States, 297 U.S. 167, 171-72 (1936). The court stated in dictum that "[t]he United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive." *Id.* at 171-72. Note that the current expansive reading of the due process clause undermines the rationale for *Dismuke*. *See also* United States v. Wunderlich, 342 U.S. 98 (1951).

178. In cases involving administrative agency nonacquiescence, neither decisionmaking by the agency nor by the courts is particularly democratic. By showing that Congress intended it to make the decision, however, either institution may claim that it is "closer to God" (i.e., democracy) and thus is the more appropriate decisionmaker.

evaluating congressional intent on such questions.[179]

Attacks on courts' ability to locate Congress' intent operate on varying levels.[180] The most telling attack questions whether the concept of congressional intent has meaning. Even individuals desire to effectuate a variety of goals, many of which are inconsistent. A singular intent for an individual often will be lacking. To speak of Congress' intent is even more complicated. Congress is a group composed of many individuals who individually experience internal conflict and who disagree with each other. To identify a congressional intent, the analyst must create an abstraction by disregarding the intention of some members of Congress while crediting others. Even if he or she concludes that Congress on some occasions may have intended certain results, the analyst still faces difficulties discerning a congressional intent in particular cases. In some instances, problems will arise that few or no members of Congress anticipated. Congressional intent in these circumstances is strictly a fiction, and any analysis results in speculation regarding what most members of Congress would have thought about the subject had they considered it. In other instances, the legislative history may demonstrate that many members of Congress considered a problem. Yet that history may fail to demonstrate that Congress resolved the issue explicitly because the art of compromise sometimes consists of the ability of conflicting parties to stick their heads in the proverbial sand.

The problem of discerning Congress' intent regarding administrative agency nonacquiescence can be approached from two directions: (1) which institution did Congress intend should resolve the underlying issue initially? and (2) which institution's decision did Congress intend should control in the event that the agency and the court continued to disagree after each institution expressed its view?

Until recently Congress apparently had not considered explicitly the problem of administrative agency nonacquiescence, either generally or with respect to particular agencies. Statutes governing judicial review of agency decisions, therefore, do not address the

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179. *See, e.g.*, Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329 (1979). *See generally* Abrams, *The Place of Procedural Control in Determining Who May Sue or Be Sued: Lessons in Statutory Interpretation from Civil RICO and Sedima*, 38 VAND. L. REV. 1477 (1985).

180. *See, e.g.*, T. LOWI, *supra* note 85, at 307-09; R. MELNICK, *supra* note 78, at 373-75. *Cf.* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

precedential effect of the court's decisions.[181] Thus, an attempt to resolve the problem of nonacquiescence by relying on Congress' intent faces immediate difficulties. Neither language nor legislative history assists in the effort.

The problem of administrative agency nonacquiescence, however, did generate congressional attention in the context of the SSA's recent program for reviewing the continuing eligibility of recipients of SSA disability benefits. These CDI reviews resulted in large numbers of individuals losing their benefits in part because the agency ignored several judicial precedents.[182] In response, Congress considered two proposals. One proposal altered the substantive law over which the SSA and the courts disagreed;[183] the other specified the agency's obligation to abide by judicial precedent.[184] To date Congress has coped with the SSA's nonacquiescence by resolving the substantive issue—in this case by amending the Social Security Act to require that the SSA demonstrate medical improvement before terminating a claimant's benefits.[185] In effect, Congress sided with the judiciary rather than with the agency on the issue that generated the nonacquiescence ruling. Faced with proposals to limit nonacquiescence,[186] however, Congress carefully sidestepped the problem. House and Senate conferees refused to require the SSA to follow circuit court decisions in subsequent cases arising within the circuit. At the same time, the conferees included language in their conference report that expressed concern about the constitutionality of nonacquiescence and urged the SSA to obtain Supreme Court review of the practice.[187] To the extent that one can infer any congressional intent as to nonacquiescence, therefore, it appears that Congress intends to avoid passing judgment on the issue.

In the absence of the traditional indicia of congressional intent

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181. *See, e.g*, 15 U.S.C. §§ 21, 45; 29 U.S.C. § 160; 42 U.S.C. § 405 (1982).

182. *See* Lopez v. Heckler, 713 F.2d 1432, 1433-34 (9th Cir. 1983).

183. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (amending 42 U.S.C. §§ 401, 1381).

184. *See* H.R. 3755, 98th Cong., 2d Sess., § 302, 130 CONG. REC. 1990-91 (1984). This House proposal would have required intracircuit acquiescence unless the agency obtained review by the Supreme Court. *Cf.* S. 476, 98th Cong., 2d Sess. § 7, 130 CONG. REC. 6204 (1984). The Senate bill simply would have required the SSA to publish in the Federal Register a statement of reasons for acquiescence or nonacquiescence and to forward that information to Congress.

185. *See supra* note 183.

186. *See supra* note 184.

187. H.R. REP. No. 1034, 98th Cong., 2d Sess. 38, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3038, 3096.

as to the propriety of nonacquiescence, a decisionmaker could attempt a slightly different institutional competence analysis. He or she could sanction nonacquiescence to the extent that Congress intended the agency rather than the courts to resolve the underlying substantive issue and prohibit nonacquiescence to the extent that Congress intended the courts to resolve the issue.

The agency statutes and legislative history available for determining Congress' intent inevitably are characterized by a certain schizophrenia, however. That Congress established an administrative agency to handle a matter, rather than delegating authority to the judiciary, suggests that members of Congress were relying on the agency to make decisions on administrative matters. Yet Congress' provision for judicial review of agency decisions suggests that Congress intended the courts to have the final word on some issues in individual cases. This recurrent tension is visible in efforts to define congressional intent and is reflected in the courts' decisions on the scope of judicial review of agency decisions. The judiciary fluctuates between deferring to the agency as decisionmaker and asserting that the courts properly decide questions raised on judicial review.[188] A reference to congressional intent can justify either approach.

A solution to the problem of conflicting congressional intent may be found if decisionmakers can identify distinct areas of competence for the agency and the reviewing court. The third assumption characterizing institutional competence analysis suggests this solution. Both the administrative agency and the judiciary can claim that a topic on which the agency has engaged in nonacquiescence lies within the institution's specific expertise and competence. The court can rely on its special expertise in interpreting statutes and resolving issues of law. The agency can counter by noting its familiarity with the particular statute at issue and with the way in which the statute operates in practice. Neither claim can be peremptorily dismissed.

We lack a method for resolving conflicting claims of competence because our limits on such claims operate in a circular fashion. As Professor Frug has noted, each institution defines its area of competence as limited only by standards of expertise that experts must define, that is, those experts identified with the institu-

188. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 185-373 (2d ed. 1985); Frug, *supra* note 163, at 1337-45.

tion itself.[189] Thus, just as only the agency and its personnel properly can define the limits of agency expertise, only judges and lawyers properly can define the limits of judicial expertise. Yet nonacquiescence occurs because the boundaries of judicial and agency expertise conflict. A court does not defer to the views of an agency in resolving an issue presumably because the judge believes that the issue falls within the competence of the judiciary. The agency is unwilling to defer to the court by following the court's contrary resolution of an issue presumably because the agency believes that the issue falls within the scope of agency expertise as defined by institutional competence.

E. Summary

This section has discussed four doctrinal solutions to nonacquiescence that litigants and the judiciary have argued. None of these doctrines legitimize administrative agency nonacquiescence, yet none suggests satisfactory limits to the problem. Of the four doctrines considered, due process may be discarded because it necessarily assumes the applicability of one of the other arguments. Issue preclusion fails to solve the nonacquiescence problem because nonacquiescence falls readily within exceptions to the doctrine. Stare decisis concepts might provide limited solutions to the nonacquiescence problem, but the bulk of agency business—informal agency action—is not governed readily by stare decisis and thus falls outside its scope. Separation of powers concerns seem to be a powerful way to approach nonacquiescence. Yet application of the separation of powers doctrine is undercut by the absence of a neutral vantage point for applying those concepts. In engaging in separation of powers analysis, the decisionmaker necessarily must adopt the perspective either of the agency or of the court.

V. Alternative Responses To Nonacquiescence

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

189. *See* Frug, *supra* note 163, at 1337-38.

not been resolved in other contexts, it is unlikely to be resolved generally or permanently in the context of nonacquiescence.

Nonetheless, both litigants and decisionmakers—agencies, the judiciary, and Congress—must develop a practical response to nonacquiescence, even if the response is simply to ignore the problem.[190] The possible responses fall into four basic categories. The judiciary could decide whether or to what extent agencies are bound by judicial precedent.[191] Alternatively, Congress could intervene to resolve the question.[192] Absent external direction, administrative agencies currently engaging in nonacquiescence could decide voluntarily to follow judicial precedent in specified circumstances.[193] Finally, litigants and any of the three potential decisionmakers could ignore the question whether nonacquiescence itself is permissible and could focus their attention on prompt resolution of the substantive issues triggering agency-court disagreements.[194] In choosing among these options, litigants and decisionmakers should take into account certain practical concerns.

A. Likelihood of Obtaining the Response

A primary concern for litigants will be the search for a decisionmaker who can and will respond in a satisfactory fashion. Each of the available options has advantages and disadvantages in that regard. Absent a satisfactory doctrinal analysis for nonacquiescence, the judiciary seems unlikely to decide the issue definitively. Even the judiciary has not resolved uniformly the underlying value conflict between rule of law and bureaucratic values. Although the courts initially responded to nonacquiescence by adopting the judicial perspective, more recently the courts have waffled when faced with direct challenges to the practice.[195] Because substantial judicial sympathy exists for deference to agency decisions,[196] litigation

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190. The appoach of ignoring the problem has been referred to as the Moscow option. Moscow was an Under Secretary of the Labor Department in the Ford Administration. In his option papers to the Executive he invariably suggested doing nothing about the problem. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, LEGISLATIVE VETO OF AGENCY RULES AFTER INS v. Chadha 28-29 (1983) (statement of Antonin Scalia).

191. *See* cases cited *supra* note 55.

192. *See* proposals cited *supra* note 184.

193. *See infra* note 199.

194. *See, e.g.*, Siedlecki v. Schweiker, 563 F. Supp. 43 (W.D. Wash. 1983); Morrison v. Heckler, 582 F. Supp. 321 (W.D. Wash. 1983).

195. *See, e.g.*, cases cited *supra* note 54.

196. *See, e.g.*, Yellow Taxi Co. v. NLRB, 721 F.2d 366, 384-85 (D.C. Cir. 1983) (Wright, J., concurring).

is likely to be protracted and the ultimate outcome in doubt.

Although Congress does not require a doctrinal framework for addressing nonacquiescence, legislators would have to resolve the underlying value conflict to adopt general limits on nonacquiescence. In its response to proposed limits on SSA nonacquiescence, Congress has already demonstrated its reluctance to make that choice.[197] Additional factors may reinforce this position. Because informal nonacquiescence operates at a submerged level, the true extent of the problem remains murky. Some reason exists for believing that the current uproar over nonacquiescence is in part a product of unique historical circumstances.[198] Thus, both Congress

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197. *See supra* note 184.

198. The IRS and the NLRB have engaged in nonacquiescence for decades. Although those agencies' practices have heen attacked in law journals, litigants against the NLRB and the IRS have not pursued the issue in the courts. The recent direct attacks involving the SSA probably can be attributed to two factors. Litigants faced with agency nonacquiescence can appeal the agency decision on its merits or they can attack the agency's nonacquiescence. If the litigant's position on the merits is strong, an appeal is easier. The litigant and the court can address the case on the comparatively narrow question of statutory interpretation, rather than struggling with the broad and complicated issues involved in nonacquiescence. A court faced with both questions thus is likely to resolve the issue on the merits. The individual litigant may be reluctant to attack only the agency's practice of nonacquiescence, apart from the merits of the agency's decision. Such an approach implicitly might concede that the agency's substantive position is correct and thereby would remove much of the reviewing court's incentive to find the nonacquiescence impermissible.

Additionally, the structure of traditional litigation provides little incentive for the litigant to challenge nonacquiescence. Most individual litigants will not encounter again the issue on which the agency refused to follow precedent. If the issue might arise again because the litigant regularly encounters the administrative agency, collateral estoppel may provide a measure of protection. In any event, as long as the litigant has the resources to obtain a lawyer and challenge future agency action, a broadside attack on nonacquiescence will seem either unnecessary or unlikely to be cost effective.

Recent attacks on nonacquiescence, however, have grown out of a very different litigation setting. These attacks, which challenge nonacquiescence by the SSA, were part of a response to SSA actions in its review of the continuing eligibility of large numbers of social security and SSI disability recipients. *See supra* note 56.

As a result of the CDI reviews, legal services attorneys and other advocates for indigents were overwhelmed with requests for assistance by disability recipients seeking to retain their benefits. Explanations for agency actions that were mailed to claimants often suggested widespread state agency disregard of disability criteria imposed by judicial interpretation of the Social Security Act, including disregard of decisions imposing on the agency the burden of showing that the claimant's medical condition had improved.

This large influx of cases occurred during a period of limited and sharply declining availability of legal representation for the poor. Thus, lawyers faced with disability termination cases had considerable incentive to prevent the terminations or to attack them on a class-wide basis. The attorneys otherwise would be faced with too many individual cases to handle. The individual cases, all raising similar legal issues, were winnable ultimately on the merits if the attorneys invested substantial time in making a record at the ALJ hearing level, exhausting agency appeals, and obtaining federal district court review. No easy basis existed for deciding which individual claims to handle. Even if the demand for representa-

and the judiciary may prefer to respond to the problem in limited fashion, perhaps by focusing on the particular agencies whose practices are under attack.

At first glance, the strategy of obtaining voluntary limits on nonacquiescence through the agency does not seem promising because that approach requires the agency to concede voluntarily the prerogatives it currently claims. Substantial external pressure, however, may in fact lead to agency concessions on the issue.[199] These concessions are likely to be limited in nature unless the agency is widely imbued with rule of law values, or agency personnel believe that the access to Congress on substantive issues will result ultimately in victory for agency views.[200]

Responses to nonacquiescence need not be limited to attempts to resolve the procedural question of who decides—agency or court. An alternative approach is to obtain a definitive resolution of the underlying issue that created the dispute, either by shifting the decisionmaking to Congress or the Supreme Court, or by adopting a procedure such as the class action, which concededly binds the agency on a larger scale. Until recently, litigants consistently have addressed the substantive issue rather than attack the practice of nonacquiescence itself.[201] It is unclear whether that problem was due to a lack of awareness that the agency was engag-

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tion could be met, handling cases on an individual basis was not wholly satisfactory. Those claimants represented by attorneys would do without disability benefits from the time of the unfavorable agency hearing decision until the judicial vindication. The stakes involved in avoiding the initial terminations—claimants' health, means of support, and even lives—were obviously high.

199. In response to public uproar, adverse press, and repeated attacks on SSA nonacquiescence in the courts, the SSA announced that it would modify its policy on nonacquiescence. Department of Health and Human Services Press Release (June 3, 1984).

200. For example, the changes in SSA policy, announced with considerable fanfare, are in fact extremely limited. The SSA apparently will follow judicial precedent only partially and only at the formal adjudicatory hearing stage. If the ALJ must follow judicial precedent from within the circuit in order to award benefits, the ALJ will write a recommended decision and will refer the case to the Appeals Council. That body will award benefits unless, after consulting with counsel, it decides that the case would make a good test case for seeking reversal of the applicable precedent. Thus, the new policy will not affect the bulk of agency decisionmaking. As to those claimants for benefits who actually can seek review of initial agency determinations, the result may be long delays in obtaining payment. *See* Office of Hearings and Appeals Interim Circular No. 185; National Senior Citizens Law Center Informational Mailing #85-8 (June 4, 1985). The limited nature of these changes in SSA policy is discussed in Stieberger v. Heckler, 615 F. Supp. 1315, 1367-74 (S.D.N.Y. 1985). The SSA apparently justified its limited acquiescence policy on the grounds that (1) 90% of claimants terminated under the CDI program appealed to the ALJ level; and (2) low level agency personnel lacked the necessary legal training to apply court precedents.

201. *See supra* note 198.

ing in nonacquiescence or due to a conscious strategy.

Because this strategy of concentrating on the underlying issue has potential advantages, it has not been displaced completely by recent direct attacks on nonacquiescence.[202] Mounting a judicial challenge to nonacquiescence potentially requires substantial resources because the litigant must address novel and complex issues of law. Yet, as is often true with procedural litigation, these lawsuits are likely to be protracted efforts, which may take years before they reach a final resolution. By contrast, a lawsuit focused on the underlying dispute deals with a comparatively narrow issue that already has been resolved at least once in favor of the litigant. Therefore, a litigant may have more success in obtaining a favorable response from the court in a narrowly drawn challenge. The usefulness of this approach in affecting agency decisionmaking depends on the availability of a class action procedure to cover all persons affected by agency refusal to follow precedent. To the extent that courts create jurisdictional and other barriers that limit the coverage of lawsuits focusing on the substantive issues,[203] litigants may prefer direct attacks on nonacquiescence in order to affect agency action in cases that are not appealed. Rules that require exhaustion of administrative remedies may make this a serious problem in nonacquiescence-related litigation.[204]

B. The Context of Nonacquiescence: Agency Function and Structure

Administrative agencies differ substantially in function and structure. The effects of nonacquiescence vary accordingly. Key

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202. *See, e.g.*, Morrison v. Heckler, 582 F. Supp. 321 (W.D. Wash. 1983). Many of the cases challenging SSA nonacquiescence seem to combine both strategies. Typically, those cases have challenged SSA failure to follow judicial precedent in specific instances, and injunctive relief has been framed in terms of specific issues, rather than the SSA's duty to follow precedent generally.

203. In social security litigation, for instance, claimants must show that each class member satisfies the requirements of 42 U.S.C. § 405(g) (1982), as interpreted by Weinberger v. Salfi, 422 U.S. 749, 763-64 (1975). Under *Salfi*, the statute imposes a nonwaivable, jurisdictional requirement that each claimant must have presented a claim to the Secretary. Additionally, each plaintiff must have exhausted the agency's prescribed administrative review procedures, but this element may be waived by the Secretary either expressly or impliedly. Some courts also have refused to certify class actions against the government on the ground that such actions are unnecessary because the government will apply the court's ruling to other cases, *see* 4 H. NEWBURG, NEWBURG ON CLASS ACTION 215 n.72 (2d ed. 1985), a patently unwarranted assumption in light of the data on nonacquiescence.

204. *See, e.g.*, Wheeler v. Schweiker, 547 F. Supp. 599 (D. Vt. 1982), *aff'd in part, rev'd in part, sub nom.* Wheeler v. Heckler, 719 F.2d 598 (2d Cir. 1983); Smith v. Schweiker, 709 F.2d 777 (2d Cir. 1983).

parameters in evaluating the problem include: (1) whether the agency handles primarily agency versus single party disputes in which nonacquiescence consistently will disfavor the party opposing the agency, or multiparty disputes in which nonacquiescence can favor opposing interests according to the circumstances; (2) whether the disfavored party generally will have the resources to obtain judicial review in the event of nonacquiescence; (3) the extent to which the agency and opposing parties have ready access to Congress for resolution of the underlying dispute; and (4) the extent to which parties may suffer irreparable harm because of delays in resolving the underlying issue.

For example, nonacquiescence by the SSA almost invariably disfavors persons who seek benefits under programs administered by the agency.[205] As a class, the individuals affected by nonacquiescence tend to be poor, ill-educated, and likely to suffer from mental or physical illness.[206] They often lack legal representation. As a consequence, many persons affected by nonacquiescence will fail to seek judicial review despite the serious consequences of failing to appeal and their almost certain success if they were to seek review. Thus, the problem of nonacquiescence is readily painted as a practice that pits defenseless individuals against a large and powerful bureaucracy. Because lawyers representing members of that group have a special interest in challenging nonacquiescence,[207] the problem is unlikely to fade away. In addition, class members in many instances may have comparatively restricted access to Congress for purposes of resolving the underlying substantive issues.[208]

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205. *See supra* note 75.

206. *See, e.g.* Lando, *The Interaction Between Health and Education*, 38 SOC. SEC. BULL. Dec. 1975, at 16; Levy, *Demographic Factors in the Disability Determination Process: A Logistic Approach*, 73 SOC. SECURITY BULL. Mar. 1980, at 11.

207. Additional factors may encourage attorneys representing social security or SSI claimants to challenge agency nonacquiescence. Individuals initially seeking benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433 (1982), can often obtain legal representation on a contingent fee basis. The attorney's fee is paid from retroactive benefits payable for a period of up to one year before the date of application. In most cases private representation will not be available to persons seeking benefits under Title XVII, 42 U.S.C. §§ 1393-1394 (1982), a need-based welfare program administered by the SSA. Benefits are payable only from the date of application, or to current recipients who are threatened with termination of their benefits, because no comparable fund of retroactive benefits exists. In such cases, legal representation, if at all available, is likely to come from legal services programs. Many of those programs train their staffs to seek class-wide solutions to problems in order to provide cost effective legal representation. Recent severe funding cutbacks may encourage that approach, although funding cutbacks have been accompanied by efforts to restrict the use of class actions. 42 U.S.C. § 2996e(d)(5) (1982).

208. Restrictions under the Legal Services Corporation Act limit use of federal funds

Decisionmakers, therefore, may choose to limit nonacquiescence because requiring the agency to follow judicial precedent, at least within the circuit of issue, places the burden of resorting to Congress to resolve the underlying substantive issues on the agency rather than on affected individuals.[209] Such an approach will be truly significant, however, only if the direction to follow precedent reaches the informal decisionmaking process of the agency, and not merely the formal adjudicatory process.[210]

Nonacquiescence by the NLRB, by contrast, takes place in a multiparty context. The practice will have a consistent substantive effect of favoring unions or management only if the NLRB and the judiciary have consistent and opposing predilections. Many, though certainly not all, of the affected unions and employees will have substantial resources for obtaining judicial relief or for approaching Congress on the merits of underlying issues. Thus, all parties affected by NLRB nonacquiescence benefit from the practice on occasion, and the need for resolution of the issue may seem less pressing than in the case of the SSA.

C. Enforcement

The usefulness of any of the available responses to nonacquiescence will depend both on the agency response—will the agency voluntarily comply with externally imposed limits to nonacquiescence?—and on enforcement mechanisms available in the event of noncompliance.

1. Voluntary Compliance

To the extent that Congress or the judiciary imposes limits on administrative agency nonacquiescence, agencies are likely to abandon most formal nonacquiescence that obviously is inconsistent with those limits. Only an agency that actively seeks confiict with the other branches of government could be expected intentionally to alert Congress or the judiciary to agency noncompli-

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for lobbying by legal services programs. 29 U.S.C. § 2996e(c) (1982); 45 C.F.R. § 1612 (1985). Low income groups can be successful before Congress when more powerful interests support their goals, as evidenced by the congressional response to the Continuing Disability Investigation program described *supra* note 56. Mental health professionals mobilized on behalf of their clients and joined forces with state officials, who saw the cost of supporting the individuals terminated in the CDI reviews shift from the federal government to the state governments. *See* Wyrick & Owens, *supra* note 56.

209. *See supra* text accompanying notes 78-83.

210. *See supra* text accompanying notes 115-21.

ance. Thus, the significant test of an attempt to limit nonacquiescence will appear in the area of informal nonacquiescence because an agency often can disregard a requirement that it follow precedent by distinguishing or ignoring applicable judicial decisions.

A successful response to nonacquiescence will be one that induces the maximum voluntary compliance by administrative agencies. Which institution sets the limits on nonacquiescence may affect voluntary agency compliance. An agency that is subject to close and continuing oversight by Congress, but a relatively limited incidence of judicial supervision, may comply more readily with a congressional response to the problem than with judicially imposed limits. If voluntarily adopted agency limits on nonacquiescence are real, and not mere window dressing, agency limits have obvious advantages in inducing voluntary compliance.

Additionally, voluntary compliance may be affected by the extent to which limits on nonacquiescence acknowledge and respond sensitively to legitimate agency concerns. For instance, imposing on the SSA a requirement that it follow district court precedent seems to be universally acknowledged as unworkable, though in some respects such a requirement is consistent with attempted doctrinal resolutions of the problem. Similarly, any attempt to limit nonacquiescence by the NLRB, the FTC, or the IRS should resolve the difficulties that arise from multiple venue options for judicial review.[211]

2. Remedies and Sanctions

The traditional remedy for illegal agency behavior is judicial review of individual agency decisions.[212] That remedy would be available in the event of agency failure to comply with externally imposed limits on nonacquiescence. The courts could reverse summarily all individual agency decisions in which the agency refused to follow judicial precedent. This remedy would add little to existing options, however, because a court now can reverse agency decisions summarily based on its view of the merits of the underlying issues. The courts will not necessarily alter agency nonacquiescence practices by consistently reversing those agency decisions that come before the court on judicial review.[213] In the case of internal agency-imposed limits on nonacquiescence, agency viola-

211. *See supra* note 73.

212. *See supra* text accompanying notes 140-44.

213. *See, e.g.*, the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982).

tions would be subject to sanction or judicial review only if those limits were treated as having the force of law. Thus, absent promulgation of the limits as binding rules under the Administrative Procedure Act, compliance might depend completely on agency goodwill.[214]

The other major judicial remedy for agency noncompliance is the action for declaratory and injunctive relief.[215] Some agencies may choose to ignore limits on nonacquiescence even when the courts specifically order them to follow such limits. If agencies behave in this fashion, declaratory and injunctive relief will have no force unless a court can impose sanctions for violation of previously ordered relief. The traditional penalty for violation of an injunction is the contempt proceeding, which can result in imprisonment of the offending party.[216] The dispersion of authority within an agency, however, makes imposition of contempt sanctions awkward.[217] Few judges will be comfortable with the prospect of imprisoning members of an independent agency, much less a cabinet level department head. Yet imposing contempt sanctions on low level officials may seem unfair because of the limited authority exercised by an individual within the bureaucracy. Additionally, the task of identifying and sanctioning agency noncompliance may be complicated because of difficulty in determining the actual agency practice.[218]

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214. *Cf.* Schweiker v. Hansen, 450 U.S. 785 (1981). The *Hansen* Court refused to estop the SSA from relying on a requirement that a claimant file a written application to meet applicable time limitations. The SSA claims representative who handled the claimant's oral inquiry regarding eligibility failed to advise the claimant to file a written application, despite explicit internal agency operating instructions to do so.

215. Actions for declaratory judgment under 28 U.S.C. § 2201 and for injunctive relief have taken on added significance in light of the removal of the amount in controversy requirements for federal question jurisdiction, 28 U.S.C. § 1331 (1982), *as amended by* Pub. L. No. 96-406, § 2(a), 94 Stat. 2369 (1980).

216. *See generally* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971) (critical survey of basic concepts central to an understanding of contempt power and suggestions for legislative restructuring to avoid extreme results).

217. As a result, the courts tend to be very reluctant to impose contempt sanctions on agency heads. *See, e.g.*, Morrison v. Heckler, 582 F. Supp. 321 (W.D. Wash. 1983) (denying plaintiffs' request for contempt sanctions, despite a finding that the agency had failed to comply with the court's earlier order).

218. In *Morrison v. Heckler*, for instance, the agency filed a Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment or for Preliminary Injunction, in which agency attorneys asserted that the agency's regulations and practices are in accordance with the requirements set out in Day v. Weinberger, 522 F.2d 1154 (9th Cir. 1975). 582 F. Supp. at 323. SSA Program Circular No. 13-85, issued by the Region X SSA office and dated June 14, 1985, however, stated that *Day* "was not a class action suit. SSA did not acquiesce in the court's decision." *Id.* at 3.

A third remedy for illegal agency action is the action for damages from individual agency personnel based on an implied right of action under the Constitution. Absent a definitive judicial ruling that nonacquiescence is unconstitutional, such actions are likely to founder on the doctrine of official immunity.[219]

In recent years an additional tool has been added to the traditional remedies for agency noncompliance with judicial precedent: imposition of attorney's fees against the agency[220] or the attorney[221] when the agency's position was not justified. If the underlying issues concerning legality of nonacquiescence are resolved against the agency, the threat of an attorney's fee award may have some deterrent effect. The impact of the threat, however, may depend somewhat on the nature of the agency budget process and on the relationship of the agency to those who represent the agency in court.

Congressional remedies through oversight proceedings or informal pressures do not have to struggle with the doctrinal limits imposed on contempt proceedings. With congressional remedies, the ability to identify noncompliance with established limits on nonacquiescence will be crucial to enforcement efforts.

Attempts to circumvent these problems by focusing on underlying substantive issues will not be problem free. In those cases, the difficulty descends to a more specific level—that of identifying substantive requirements and agency practices regarding compliance with those requirements. These potential enforcement problems reinforce both the desirability of obtaining voluntary compliance with limits on nonacquiescence and the need for careful attention initially to the structure of any such limits.

VI. Conclusion

Administrative agency nonacquiescence is a widespread practice in the American governmental system. Nonacquiescence is a problem with substantial impact on litigants and important implications for allocation of power in American government, but is one that is not readily susceptible to permanent or value-neutral solutions. Therefore, increased knowledge of the problem brings power, but is not a panacea. A greater awareness and a deeper under-

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219. Chilieky v. Schweiker, 55 U.S.L.W. 1033 (9th Cir. August 12, 1986) (in action for damages against Secretary of HHS and officials based on nonacquiescence policy, official entitled to immunity).

220. Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980).

221. Fed. R. Civ. P. 11.

standing of the phenomenon of nonacquiescence may not lead to a consensus on its legitimacy. Such knowledge, however, may help participants in the system recognize the problem when it arises and may assist researchers in identifying the pervasiveness of the practice. More importantly, that knowledge may focus the attention of decisionmakers on the real costs of nonacquiescence and may encourage litigants to choose intelligently among the options for addressing the problem, recognizing that their choices simply will be the prelude to an ongoing struggle.