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# Social Insecurity: A Modest Proposal for Remediating Federal District Court Inconsistency in Social Security Cases

Jonah J. Horwitz\*†

## Introduction

Since its inception in 1935, Social Security has become an enormously important institution in American life.<sup>1</sup> Millions rely on its resources,<sup>2</sup> and the number is rapidly growing.<sup>3</sup> It is also an enormously troubled program,<sup>4</sup> and its problems are on the rise as well.<sup>5</sup>

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1. See, e.g., Nancy J. Altman, *Social Security and the Low-Income Worker*, 56 AM. U. L. REV. 1139, 1161 (2007) ("Social Security is important to all Americans . . .").

2. See Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 9 (2011) (calculating that "about fifty-three million people were receiving Social Security benefits at the end of 2009").

3. See *Number of Social Security Beneficiaries*, SOC. SEC. ADMIN., <http://www.ssa.gov/oact/progdata/icpGraph.html> (last visited Jan. 23, 2013) (indicating that the number of Social Security beneficiaries has grown from just over 25 million in 1970 to just over 55 million in 2012).

4. See, e.g., Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1939 (2011) (noting the "long, troubled history" of Social Security and other benefits programs).

5. See, e.g., Damian Paletta, *Stress Rises on Social Security*, WALL ST. J.

This Article addresses a relatively narrow but consequential problem in the system: the inadequacy of federal judicial resolution of appeals from the denial of Social Security disability benefits. It addresses the problem with an equally narrow, and hopefully equally consequential, solution: granting a published district court decision in such a case the power of binding precedent<sup>6</sup> with respect to the judicial district in which the opinion is issued. In so doing, greater uniformity, consistency, fairness, and efficiency would be brought to a process that is badly in need of all.<sup>7</sup>

The Article proceeds in five parts. Part I provides some brief background on binding precedent in the court system generally. With that background in mind, Part II surveys the Social Security disability process, summarizing its basic structure. Part III then transitions into a discussion of the federal courts' role in the process, focusing on the problems afflicting their decisions: inconsistency, lack of appellate guidance, unfairness, unpredictability, and inefficiency. To solve those problems, Part IV proposes imbuing all published federal district court opinions in Social Security appeals with the force of binding law with respect to all other judges in the district. Finally, Part V applies the proposal, demonstrating how this reform would help deal with each of the flaws in the process.

## I. Background on Binding Precedent

In order to understand the merits of the proposal, one

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(Apr. 24, 2012), <http://online.wsj.com/article/SB10001424052702303592404577362052094040414.html>.

6. For the sake of convenience, binding precedent will henceforth occasionally be referred to simply as “precedent,” or “case law.” It should be remembered that other commentators and courts sometimes use the term “precedent” more broadly to refer to any judicial decision, or any judicial decision that might possess persuasive value. See generally Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453 (2010) (using “precedent” in this way).

7. See, e.g., Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 754-55 (2003) (remarking on a perception of a “problem of inconsistent application of the law” in the Social Security disability system).

must first understand the status quo, both in terms of Social Security disability appeals in the federal courts and in terms of how and why certain federal judicial decisions acquire the power of binding precedent while others do not. We begin with the latter.

Beginning with the basics, and running the risk of stating the obvious, opinions by the U.S. Supreme Court are binding on all of the inferior federal courts.<sup>8</sup> Published opinions by three-judge panels of the federal circuit courts are binding on the district courts within the circuit<sup>9</sup> and, generally, on other panels of the circuit.<sup>10</sup> By contrast, district court opinions, whether published or unpublished, have no precedential power; they bind only the parties to the litigation.<sup>11</sup>

Historically, several rationales have been cited to justify the distinction between trial and appellate courts and their power to produce binding case law. For one thing, appellate courts tend to make decisions in multi-judge panels, thus ideally encouraging a more balanced, thoughtful, and correct final product than a single trial court judge might generate,<sup>12</sup>

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8. *See, e.g.*, *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970) (“The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court . . . have binding effect on all lower courts whether state or federal.”).

9. *See, e.g.*, *Yong v. Immigration & Naturalization Serv.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) (“[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it . . .”) (citation omitted).

10. *See, e.g.*, Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1179-80 (2006) (remarking that “all circuit courts provide that the decision of a panel is binding on every other panel, unless the decision is overturned en banc or by later Supreme Court action”) (footnote omitted). Slightly modifying the general rule, the Second and Seventh Circuits have procedures whereby one three-judge panel circulates a draft opinion overruling precedent from another to seek the approval of the court for the overruling. *See, e.g.*, Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 798 & n.83 (2012).

11. *See, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”) (internal citation and quotation marks omitted).

12. *See* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 177 (1921) (“The eccentricities of judges balance one another.”); Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics at Sentencing*,

or at the very least projecting to the public the message that the opinion has such qualities.<sup>13</sup> Similarly, because most losing parties in the trial courts do not pursue appeals,<sup>14</sup> and because appellate proceedings are typically regarded as less urgent than trial proceedings,<sup>15</sup> courts of appeals are thought to enjoy the peace and quiet necessary to ably direct the development of the law. In the same vein, appellate judges decide cases on the basis of paper records, formal briefs, and rigidly structured oral arguments, as opposed to the frequently chaotic and far more human and dynamic proceedings that trial judges must supervise.<sup>16</sup> Under the conventional wisdom, that formality and rigidity nurture a more scholarly comprehension of the law and its evolution, distanced from the more blinkered worm's eye view of the trial judge.<sup>17</sup> Furthermore, some have said that

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103 NW. U. L. REV. 1371, 1383 (2009) ("Three-judge panels will be less likely to reflect extreme views than a single judge."); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 552 (1969); Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1748 (2008).

13. Cf. Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 483 (2011) ("[T]he more judges that sign on to an opinion, the more likely court-watchers and the public will view it as the correct result.") (footnote omitted).

14. See Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1446 (2012) (referencing the fact that only approximately 15% of cases are appealed from the district courts to the circuit courts) (footnote omitted).

15. See, e.g., *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) ("This case reflects the difficulty of the time pressures of a trial judge who, because of the tide of events that could not be stopped, had to decide many of the critical policy and constitutional questions within minutes. We as an appellate court, on the other hand, have had the benefit of less urgent time constrains as well as the benefit of the work product of counsel on appeal who within this more relaxed time frame were able to thoughtfully research the issues, prepare briefs and articulate theories far more precisely than those presented to the trial court.").

16. See, e.g., Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 334 (2002) (acknowledging that appellate courts are divorced "from the dynamic setting of the trial courtroom, and restricted . . . to the paper record").

17. See, e.g., Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1479 n.211 (2010) (stating that a court of appeals "is in a different position because it must take a bird's-eye view with regard to questions of law").

appellate courts, by definition more prestigious than the courts they sit over, will tend to attract judges with the intellects and temperaments necessary to preside over the growth of the common law, whereas trial courts may not.<sup>18</sup> Finally, and perhaps implicit in all of the above, there is a more conceptual argument to be made that the creation of a tiered system in which higher courts craft precedent while lower courts do not is automatically preferable because it injects a dignity and a gravitas to the development of the common law by elevating it above the mundane vicissitudes and day-to-day theatrics of the trial courts.<sup>19</sup>

## II. The Social Security Disability Claims Process

On top of this background description of how the federal judiciary delegates the power to write precedential opinions one must template the basic process of the Social Security disability benefits system.

This Article is concerned with two Social Security programs: disability insurance benefits and supplemental security income.<sup>20</sup> With numerous nuances and qualifications not pertinent here, both programs disperse government funds to individuals suffering from impairments that prevent them from holding gainful employment.<sup>21</sup> In the interest of clarity, money distributed to individuals under either program will

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18. See Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 379 (1995) (“District judges are perceived by some to have lower status or prestige than circuit judges and typically will have less acumen regarding appellate practice.”) (footnote omitted).

19. See Nash & Pardo, *supra* note 12, at 1749-50. Although one commentator has interestingly argued that the distinction arose in part as the result of a historical accident, whereby appellate court decisions were published while trial courts’ were not. See Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 34 (2008).

20. The other major elements of the Social Security budget are the retirement and survivors’ programs. See generally *Budget Estimates and Related Information*, SOC. SEC. ADMIN., <http://www.ssa.gov/budget/> (last visited Jan. 23, 2012). Those programs are outside the scope of this Article.

21. *Barnhart v. Thomas*, 540 U.S. 20, 21-22 (2003).

henceforth be referred to as “benefits,” and appeals under both programs will occasionally be referred to as “disability” cases.

Briefly, the process begins when an individual files a claim with the Social Security Administration for benefits.<sup>22</sup> After various screening mechanisms and examinations are employed, none of which are relevant to this Article,<sup>23</sup> an Administrative Law Judge (ALJ), an official employed by the Social Security Administration and thus working for the executive branch, renders a decision on the claim, accompanied by a written explanation of her reasoning.<sup>24</sup> If the ALJ denies benefits, the claimant can appeal her decision to the Social Security Appeals Council, which has the discretion to select the claims it hears.<sup>25</sup> If the Appeals Council either declines to hear the claim or affirms the ALJ’s denial of benefits, the claimant<sup>26</sup> has the right to appeal to a federal district court.<sup>27</sup>

The district court has to answer two questions with respect to every such appeal: 1) whether the ALJ’s decision was supported by “substantial evidence”; and 2) whether it comported with the relevant legal standards.<sup>28</sup> In answering both questions, the district court is obliged to show considerable deference to the ALJ.<sup>29</sup> It cannot re-weigh the evidence or substitute its judgment for the ALJ’s, and factual conflicts in the record must be resolved by the ALJ, not the

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22. See SSA Federal Old—Age, Survivors and Disability Insurance, 20 C.F.R. § 404.610 (2004); SSA Supplemental Security Income for the Aged, Blind, and Disabled, 20 C.F.R. § 416.310 (1994). As with plaintiffs, the defendant in a Social Security appeal is referred to by different terms depending on the author, including “government,” “Social Security Administration,” “SSA,” “Administration,” and so on. For variety, this Article will use the nomenclature interchangeably.

23. See HARVEY L. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES §§ 1:2, 1:8 (West Group 5th ed. 1998), for an overview of that process.

24. SSA Federal Old—Age, Survivors and Disability Insurance, 20 C.F.R. § 404.953 (2010).

25. SSA Federal Old—Age, Survivors and Disability Insurance, 20 C.F.R. § 404.967.

26. Courts and commentators give plaintiffs different labels, most often simply “plaintiff” or “claimant.” For variety, this Article will use both interchangeably.

27. 42 U.S.C. § 405(g) (2010).

28. *Id.*

29. See *Barnhart v. Thomas*, 540 U.S. 20, 26-27 (2003).

court.<sup>30</sup> If the district court determines either that the ALJ's decision was not supported by substantial evidence in the record, or that it was inconsistent with the controlling legal standards (and that the error was not harmless<sup>31</sup>), the court can remand the claim for further administrative proceedings, such as a rehearing, or simply order the Social Security Administration to calculate and award benefits.<sup>32</sup> After the district court decision is handed down, either party can appeal to the circuit court<sup>33</sup> and, after that tribunal issues a decision, to the Supreme Court.<sup>34</sup>

### III. Judicial Problems with Social Security Cases

To properly evaluate the advantages and disadvantages of the proposal articulated here, one must understand the ills it is meant to address. They are as follows.

#### A. *Inconsistency*

There are different ways of ranking the severity of the various defects in the judicial oversight of Social Security disability programs, as there are of ranking the defects in any system. Some, for example, might see the most important objective to be that deserving individuals receive benefits, and thus might be more willing to overlook flaws that direct some taxpayer money to individuals unqualified for such benefits, so long as the rightful recipients get their share as well. Analogizing Blackstone's famous adage that it is "better that ten guilty persons escape, than that one innocent suffer"<sup>35</sup> to this context, one might say that it is better that ten

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30. See, e.g., *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002).

31. See, e.g., *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012).

32. *Id.*

33. See John J. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds with One Stone or Pigeon-Holing Claimants?*, 42 MD. L. REV. 329, 335 (1983).

34. See, e.g., *Sims v. Apfel*, 530 U.S. 103 (2000) (deciding a case that arose through the process described above).

35. 4 WILLIAM BLACKSTONE, COMMENTARIES \*358.

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undeserving claimants receive unwarranted benefits, than that one truly disabled individual be denied them.

Nevertheless, in the view of the author, inconsistency, even if it can, at times, lead to greater generosity, is the most serious problem plaguing the system, the one most responsible for the other flaws, and the one most directly remedied by the proposal. So wherein lies the inconsistency?

It lies, quite simply, in the radically different odds of the claimant's success depending on which district judge is presiding over a given claim. It is important to note at the outset the distinction between what type of inconsistency is being addressed here, and what type is not. The inconsistency *between* judicial districts has been noted elsewhere,<sup>36</sup> and is no doubt an important issue for reformers to consider. However, it is not the issue under consideration here, because it would not be ameliorated by the proposal being advanced. If a district court decision has precedential weight in that judicial district, as this Article advocates, there would still be room for inconsistency across different districts, because the district court opinion would still not bind *other* districts.<sup>37</sup> The only remedy for that would be to accord precedential weight to every district court decision in *every* district. Such a regime would fly in the face of the entire federal judicial structure; indeed, it would destroy the very purpose of having judicial districts in the first place.<sup>38</sup>

The species of inconsistency at issue here, then, is between judges *within* judicial districts. That inconsistency has been recognized in other legal contexts,<sup>39</sup> but not in the context of Social Security appeals. It is a serious concern nonetheless. But does such inconsistency exist? As shown below, it unfortunately does.

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36. See, e.g., Verkuil & Lubbers, *supra* note 7, at 754-55.

37. See, e.g., *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in . . . a different judicial district . . .") (internal citation and quotation marks omitted).

38. See generally Martha Dragich, *Back to the Drawing Board: Re-Examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROCESS 201 (2011).

39. See, e.g., Mead, *supra* note 10, at 813-14 (examining the problem of "judge-shopping" within federal judicial districts).

## 1. The Research Methodology

The research methodology is simple and straightforward. A Westlaw search for the phrase “Social Security” was conducted for each district court judge<sup>40</sup> in the country, active or senior. Within those results, only cases listing a Commissioner of the Social Security Administration or a Secretary of the Department of Health and Human Services (either by name<sup>41</sup> or by title) were examined, as the former is the proper defendant in an appeal from the denial of benefits and the latter used to be.<sup>42</sup> The first ten dispositive decisions on appeals from the denial of Social Security benefits (starting with the most recent) were canvassed to determine whether the judge affirmed the denial of benefits or reversed.<sup>43</sup>

Decisions on recommendations submitted by magistrate judges were excluded from the sample,<sup>44</sup> on the assumption that such opinions might reflect as much about the magistrate

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40. This Article will refer generically to “district court judges” for the sake of simplicity, though it should not be forgotten that many Social Security appeals are managed in the district courts by magistrates, who either issue decisions on behalf of the district court with the consent of the parties or present recommendations to district court judges on the proper resolution of the case. See Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 759 (2010) (noting that magistrates often handle Social Security matters). See *Allen v. Astrue*, 869 F. Supp. 2d 924 (N.D. Ill. 2012), for an example of a magistrate releasing a final opinion on a Social Security case while acting for the district court and with the consent of the litigants. See *Proctor v. Astrue*, No. 3:11-2139-TLW-JRM, 2012 WL 5877439 (D.S.C. Nov. 1, 2012), *adopted by district court*, 2012 WL 5877416 (D.S.C. Nov. 20, 2012), for an example of a magistrate’s recommendation to a district court judge in a Social Security appeal.

41. Within the sample used here, the surnames of defendants that appear in cases are Astrue, Barnhart, Massanari, Halter, Apfel, Callahan, Chater, Shalala, Sullivan, and McMahon.

42. See Robert E. Rains, *The Advocate’s Conflicting Obligations Vis-a-Vis Adverse Medical Evidence in Social Security Proceedings*, 50 SOC. SEC. REP. 867, 870 n.35 (1996).

43. Where a decision affirmed in part and reversed in part the denial of benefits, it was classified as a reversal for purposes of the study, on the grounds that (at least some of) the case was sent back to the Social Security Administration. See, e.g., *Meinders v. Barnhart*, 195 F. Supp. 2d 1136 (S.D. Iowa 2002) (affirming the denial of disability insurance benefits but reversing the denial of supplemental security income benefits).

44. See, e.g., *Moore v. Astrue*, No. 07-204-HRW, 2008 WL 2051019 (E.D. Ky. May 12, 2008).

as the district court judge,<sup>45</sup> and might consequently distort the data. Also excluded were any cases that involved any procedural postures other than the final review on the merits of a denial of Social Security benefits.<sup>46</sup> In this category, to cite a few of the more numerous types, fall orders on motions for attorney fees,<sup>47</sup> decisions regarding only jurisdictional matters,<sup>48</sup> various preliminary matters,<sup>49</sup> orders in class actions,<sup>50</sup> motions to alter or amend judgment,<sup>51</sup> and so on. Note, however, that cases in which the survivors or guardians of a claimant representing his interests were included, on the grounds that the difference in whom the captioned plaintiff happens to be has no effect on the issues discussed here.<sup>52</sup>

If the judge had a particularly high percentage of either affirmances or reversals, all of the rest of the judge's Social Security decisions were consulted. After all of those statistics were compiled, the four judges with the most disproportionate numbers were selected. For each of those judges, a search was then conducted to find the judge in the same district, and ideally the same division, with the most extreme proclivities on the opposite side of the Social Security equation. For example,

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45. See, e.g., Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544, 590 (1996) ("It is widely-known that the magistrate judge's [report and recommendation] is accepted by the district court in the vast majority of circumstances . . .").

46. It goes without saying that the numerous cases in which the words "Social Security" appeared but which did not concern the appeal of the denial of benefits were also excluded. See, e.g., *United States v. Cunningham*, 866 F. Supp. 2d 1050 (S.D. Iowa 2012) (mentioning the Social Security Administration in a criminal garnishment case).

47. See, e.g., *Deines v. Astrue*, No. 11-CV-00127-WYD, 2012 WL 5430963 (D. Colo. Nov. 7, 2012).

48. See, e.g., *Donaldson v. Comm'r of Soc. Sec.*, No. 09-CV-6293L, 2009 WL 2045684 (W.D.N.Y. July 14, 2009).

49. See, e.g., *Sawyers v. Astrue*, No. 11-69-GWU, 2011 WL 5304093 (E.D. Ky. Nov. 3, 2011) (ruling on Commissioner's motion to dismiss on the ground that action was untimely filed in federal court).

50. See, e.g., *Hogan v. Astrue*, 859 F. Supp. 2d 543 (W.D.N.Y. 2012).

51. See, e.g., *Wells v. Astrue*, No. 09-32-GWU, 2009 WL 5214488 (E.D. Ky. Dec. 23, 2009).

52. See *Wood ex rel. Wood v. Barnhart*, No. Civ. 4-06-CV-00074, 2007 WL 98354 (S.D. Iowa Jan. 16, 2007) (dealing with a husband seeking to collect benefits purportedly due his deceased spouse); *Baldwin v. Astrue*, No. 11-CV-01553-WYD, 2012 WL 2190836 (D. Colo. June 14, 2012) (dealing with a mother seeking to collect benefits purportedly due her child).

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after Judge Pratt, in the Southern District of Iowa, had been discovered as a judge with one of the highest rates of reversals in the country, a search was conducted of other judges within the Southern District of Iowa to locate one with the highest rate of affirmances.<sup>53</sup>

## 2. The Raw Data

To get an idea as to the magnitude of the problem, consider four pairs of district court judges, two each from four different districts, four different states, and four different circuits. The differences within each pair in the disposition of Social Security appeals are nothing short of staggering.

Let us begin in the West. There we encounter Judge Daniel, now of senior status, who plies his trade in Denver, in the District of Colorado, within the Tenth Circuit. Of the 58 Social Security cases he reviewed between 2008 and 2012, Judge Daniel remanded all of them.<sup>54</sup> His easily-calculated affirmance rate is 0%. Within roughly the same time-frame, Judge Arguello, a mere four floors from Judge Daniel in their Denver courthouse, has pronounced on 36 Social Security claims. In 26 of them she affirmed the denial of benefits, and in 10 she reversed. Judge Arguello's affirmance rate is therefore 72%, which makes it 72% higher than that of her fellow Coloradan judge.

From the Rocky Mountains travel east to Appalachia and visit Senior District Court Judge Wilhoit. He works in the Northern Division of the Eastern District of Kentucky, which falls within the bailiwick of the United States Court of Appeals for the Sixth Circuit. According to Westlaw, between 2000 and 2010, Judge Wilhoit authored 76 opinions disposing of appeals

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53. The limitations of this research methodology are discussed *infra* Part III.A.3. A list of all the cases used in the Article is on file with the author.

54. All numbers, as well as all case citations and any other information contained in the Article, are current through January 23, 2013. Any search referenced herein for illustrative purposes was conducted on that day as well. *See, e.g., infra* note 84. Subsequent case history on discretionary review includes any action on a case that took place after January 23, 2011. All decisions on direct appeal from trial court rulings listed by Westlaw are included.

from the denial of Social Security benefits. Judge Wilhoit can be understood as something like the bizarro version of Judge Daniel. While Judge Daniel has never seen an ALJ decision that could not be sent back down, Judge Wilhoit appears never to have seen one that could not be vindicated for one reason or another. In every last one of Judge Wilhoit's 76 cases he affirmed, giving rise to an affirmance rate of 100%. Now take Judge Unthank, a former colleague of Judge Wilhoit's who is now retired. Judge Unthank also sat in the Northern Division of the Eastern District of Kentucky. From his chambers 140 miles from Judge Wilhoit's,<sup>55</sup> Judge Unthank produced very different results in Social Security cases. Over the course of the same decade in which Judge Wilhoit upheld every single denial of benefits that crossed his desk, Judge Unthank reversed 249 of the impressive 554 Social Security cases he ruled on. Thus, Judge Unthank's affirmance rate can be pegged at 55%, 45% lower than his peer in the same division.

Now head north, nearly as far as you can go while remaining within the jurisdiction of the U.S. courts. Once you reach the banks of Lake Ontario, drop in on Judge Siragusa, an active judge in Rochester, in the Western District of New York, subject to the appellate powers of the Second Circuit. Between 2000 and 2010, Judge Siragusa added 66 Social Security cases to Westlaw's collection. He reversed the Commissioner in 58 of them and affirmed in 8, leading to an affirmance rate of 12%. During the same period, and from the same courthouse, Judge Larimer took up 73 Social Security cases, reversing the ALJ 38 times and affirming him 35 times, for an affirmance rate of 48%, 36% higher than Judge Siragusa's.

Return westward for our final destination. Senior District Court Judge Pratt presides in the Central Division of the Southern District of Iowa, under the Eighth Circuit's watchful eye. According to Westlaw, Judge Pratt has written 100 decisions in Social Security cases of the sort analyzed here over the course of his career on the bench, which began in 1997 and continues to the present day.<sup>56</sup> He reversed the

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55. Judge Wilhoit sits in Ashland, Kentucky while Judge Unthank sat in Covington, Kentucky.

56. Westlaw gives one decision two separate entries, but they are identical in every respect and the case has therefore been counted only once.

Administration's denial of benefits in 86 of them. Without resort to a calculator we can determine that his affirmance rate is 14%. Compare Judge Pratt's numbers to those of his colleague, Judge Longstaff. Judge Longstaff, like Judge Pratt, is a Senior District Court Judge serving in the Central Division of the Southern District of Iowa. Despite these similarities, however, the two judges diverge sharply in their approach to Social Security cases. Judge Longstaff has issued 37 Social Security opinions from when he first received his commission in 1991 until today. In 22 of them he reversed the Administration's determination not to award benefits, and in 15 he affirmed that determination. Judge Longstaff's reversal rate is therefore 59%, 27% lower than Judge Pratt's.

### 3. Caveats

Before we embark on a more detailed consideration of these rather striking numbers, consider first the limitations of the data and the caveats that must accompany them. Most importantly, it is not an exhaustive sample. The methodology employed was not designed to reveal *all* of the judges with the *most* disproportionate numbers in Social Security cases. Perhaps most obviously, the data does not cover every district, nor even every circuit. Additionally, the search identified judges by a relatively small (and possibly misrepresentative) initial sample.<sup>57</sup> That is, it could be that a judge whose first ten Social Security cases revealed a substantial discrepancy actually had a more balanced overall total than a judge whose first ten indicated relative parity. Finally, Westlaw, the search engine used to conduct the research, does not contain all decisions.<sup>58</sup> Indeed, it is particularly likely to omit the kind of short, unpublished opinions that are often issued by district

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*Compare* Pinault v. Apfel, No. 3-99-CV-90162, 2000 WL 33362000 (S.D. Iowa Nov. 13, 2000), *with* Pinault v. Apfel, No. 3-99-CV-90162, 2000 WL 35639960 (S.D. Iowa Nov. 13, 2000).

57. *See supra* text accompanying note 43.

58. *See, e.g.*, Martin H. Redish, et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 652 n.163 (2010).

courts in Social Security cases.<sup>59</sup>

Even so, these issues counsel only against extrapolating any over-broad lessons from the data, not against using them for present purposes. A problem with four districts, in four circuits, is surely a problem to be reckoned with, and there is no reason to suppose all the other districts are free from the infirmity. Additionally, the research methodology was designed not to delineate with any precision the extent of the problem of inconsistency in Social Security adjudications in district court, but rather only to establish that there is in fact such a problem and that it needs attending to. Consequently, it is sufficient that the searches reveal *some* judges with *fairly* disproportionate numbers, and to find judges in the same districts with substantially different numbers.

Relatedly, the research method employed is far from exact. For ease of research, the relatively few cases in which the government did not oppose a remand<sup>60</sup> (or actually sought one<sup>61</sup>) were counted alongside the far more numerous cases in which it did register its opposition, as were claims that had already been remanded by the court to the Social Security Administration at least once before.<sup>62</sup> Such distinctions undoubtedly alter the likelihood of a particular result.<sup>63</sup> Likewise, to facilitate the speediest possible research, decisions that were amended on reconsideration were still counted with reference to the original disposition, even if that disposition

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59. See generally Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107 (2007) (commenting on the absence from legal search engines of many unpublished opinions); Stephen L. Wasby, *Publication (or Not) of Appellate Rulings: An Evaluation of Guidelines*, 2 SETON HALL CIRCUIT REV. 41, 87 (2005) (maintaining that Social Security cases are “prime candidates” for being unpublished) (footnote and internal quotation marks omitted).

60. See, e.g., *Green v. Astrue*, No. 11-CV-01141-CMA, 2011 WL 4632570 (D. Colo. Oct. 6, 2011).

61. See, e.g., *Petersen v. Apfel*, No. 3-00-CV-90143, 2001 WL 741735 (S.D. Iowa Feb. 7, 2001).

62. See, e.g., *Scott v. Barnhart*, 592 F. Supp. 2d 360 (W.D.N.Y. 2009).

63. See, e.g., Toni M. Fine, *Agency Requests for “Voluntary” Remand: A Proposal for the Development of Judicial Standards*, 28 ARIZ. ST. L.J. 1079, 1081 (1996) (commenting on “a greater [judicial] willingness to allow an agency to reconsider a final order that is already pending judicial review”).

changed later on.<sup>64</sup> Regardless, because all of these types of cases represent a small minority of the sample, because they roughly equalize across all of the judges and, most importantly, because the data reveals such large margins, this slight inexactitude does not undermine the validity of the numbers.

In addition to being inexact, the sample paints with a broad brush. Most significantly, it ignores the distinction between the two types of remands available to district courts: remands for further administrative proceedings and remands with instructions to calculate and award benefits.<sup>65</sup> Obviously this is not a trivial distinction. Nevertheless, for purposes of the present task, it suffices to call attention to the simpler and more basic inconsistency in the system—that between remands and affirmances—before delving into the subtler inconsistencies within the remands themselves. Such an approach is recommended by the fact that a remand, even if only for a rehearing, still constitutes a reversal of the ALJ, and thus still represents a sharp divergence from an affirmance, and further recommended by the fact that most remands for rehearings do still lead to the ultimate award of benefits.<sup>66</sup> Hopefully future commentators will explore some of the issues regarding district court decisions about which type of remand to order.<sup>67</sup>

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64. See, e.g., *Bayer v. Astrue*, No. 08-CV-02389-WYD, 2010 WL 2035540 (D. Colo. May 21, 2010) (amending a previous order in a Social Security case).

65. See 42 U.S.C. § 405(g) (2010). Compare *Rose v. Astrue*, 888 F. Supp. 2d 936 (S.D. Iowa 2012) (remanding for further proceedings) with *Boertje v. Astrue*, 848 F. Supp. 2d 952 (S.D. Iowa 2012) (remanding for the immediate award of benefits), for examples of either type of order taken from the sample used here.

66. See Verkuil & Lubbers, *supra* note 7, at 783 n.241 (averring that “claimants are ultimately awarded benefits in the majority of remands” for rehearing).

67. Indeed, there are some interesting questions raised by the sample under consideration here. Of Judge Pratt’s 86 reversals (out of 100 cases), 66 of them were for the award of benefits, representing 66% of his total opinions and 77% of his reversals. By contrast, Judge Daniel decided 58 cases, reversed all of them, and only remanded 10 for the award of benefits and the other 48 for further proceedings. Thus, although Judges Pratt and Daniel have comparable reversal rates, they have radically different rates of awarding benefits, with the latter doing so in only 17% of both his cases and his reversals. Such a difference is nearly as striking as the more fundamental difference between affirmers and reversers, and could be a fruitful area of

Lastly, the undeniably erratic nature of Westlaw poses no impediment to the conclusions drawn from the data, because there is no reason to suppose that Westlaw stores more district court opinions reversing the Social Security Administration than those affirming it, or vice versa, the only type of inconsistency that would potentially prevent us from drawing the conclusions presented below.<sup>68</sup> Indeed, the very fact that several judges have been found on either side of the ledger through Westlaw searches, and in the same districts to boot, strongly suggests that the engine is not meaningfully skewing the results for any individual judge.

It must also be remembered that the data here has not been assembled to cast aspersions on the record of any judge. Although the existence of such large differences between judges in the same districts is certainly cause for concern, it remains to be seen where exactly those concerns should be directed. For a disparity between two judges on a given issue says nothing about which judge is in the right, if either. In Rochester, New York, for example, Judge Siragusa affirmed 12% of Social Security appeals while his colleague in the same city, Judge Larimer, affirmed 48%. The gap demonstrates a problem with divergent results, but it does not point us to a percentage, or even a range, that we could confidently deem desirable or acceptable. It could be the case that 88% of appeals in the division are meritless, thus justifying Judge Siragusa's data. Or it could be the case that 38% of claimants did not receive, at the very least, the process they were entitled to, thus validating Judge Larimer.<sup>69</sup> In either event, however, there is a

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study for others to pick up on.

68. See, e.g., Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 1993 n.63 (2009) (noting that selection bias should not be an issue with Westlaw or Lexis) (citation omitted); but see Redish, et al., *supra* note 58, at 652 n.163 ("Quantitative legal research from databases such as Westlaw and Lexis may have inherent selection biases because they do not include every case, nor are the available cases randomly selected.").

69. With respect to the judges with more one-sided statistics, such an argument may be harder to press. Nevertheless, it should be observed that certain Social Security offices have been accused of widespread incompetence or abuse. See *Calloway v. Mathews*, CCH Unempl. Ins. Rpts. ¶ 14,879 (S.D. Cal. 1976) (remanding several Social Security appeals for rehearing before new ALJs because ALJ decisions contained analysis composed entirely of boilerplate and devoid of independent reasoning and application of the law to

problem, and that is the point of the study.

#### 4. Significance of the Data

What, then, does the data mean? This is not a question that need detain us long, for the presentation of the numbers alone conveys their significance. Ultimately, the only research findings that matter for present purposes are the margins between the affirmance rates<sup>70</sup> between judges in the same division. Those margins are: 1) 74% between Judges Daniel and Arguello; 2) 45% between Judges Wilhoit and Unthank; 3) 36% between Judges Siragusa and Larimer; and 4) 27% between Judges Pratt and Longstaff. By any estimation, these are substantial and troubling discrepancies. One way to understand the numbers is to imagine two individuals who seek benefits at the same agency, under the same laws and regulations, suffer the same fate (a loss) before the ALJ, appeal to the same court, in the same division of the same district of the same state, bound by the same appellate case law. After following such remarkably similar paths, however, the two individuals have drastically different chances of obtaining benefits, purely by virtue of the random assignment of judges.

It is not too hyperbolic to declare that such inconsistency

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the facts); Sam Dolnick, *Suit Alleges Bias in Disability Denials by Queens Judges*, N.Y. TIMES, Apr. 12, 2011, available at [http://www.nytimes.com/2011/04/13/nyregion/13disability.html?\\_r=0](http://www.nytimes.com/2011/04/13/nyregion/13disability.html?_r=0) (reporting on a class action lawsuit against a Social Security office for excessive denials and inappropriate conduct); Damian Paletta, *Disability-Claim Judge has Trouble Saying 'No'*, WALL ST. J., May 19, 2011, available at <http://online.wsj.com/article/SB10001424052748704681904576319163605918524.html> (reporting on an ALJ who awarded benefits in all but four of 1284 cases for one fiscal year and in all 729 cases in the first six months of another). Thus, even where a district court judge has an overwhelming propensity to reverse determinations by the Administration, that propensity could, in theory, be chalked up to an office that performs particularly poorly. Contrariwise, a district court judge with the opposite propensity might be operating in an area with especially diligent and accurate ALJs. At any rate, though, these arguments fall outside the scope of the Article and will not be discussed further.

70. For ease of comparison, the margins are presented in terms of affirmance rates. Obviously, the contrast between reversal rates is equally meaningful and equally striking.

tears at the very fabric of our legal system.<sup>71</sup>

To see this enormous inconsistency in perspective, query how distressing it would be if some other type of decision, commonly recurring and crucially important to the individual involved, were vulnerable to the same vicissitudes. For instance, what if Judge A granted 0% of Fourth Amendment motions to suppress while Judge B, in the adjoining courtroom, granted 74% of them. The liberty of the defendants who came before such judges would be inextricably tied, not to the law but, to the personal predilections of the adjudicators. Although Social Security benefits cannot compete in importance with freedom from imprisonment, they are exceptionally significant to the individual claimants and, in the aggregate, to all American taxpayers.<sup>72</sup> In sum, there is tremendous inconsistency within judicial districts in the resolution of Social Security appeals and it is an inconsistency with grave ramifications for the legal system as a whole.

#### B. *Lack of Appellate Guidance*

The second overarching problem, which, in conjunction with the inconsistency noted above, gives rise to the rest of the problems, is that there is very little useful guidance from the circuit courts. In an ideal world, the circuit courts would take the lead in ensuring the same uniformity in Social Security results that they are supposed to generate in all areas of law, at least within their respective circuits.<sup>73</sup> Unfortunately,

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71. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (reminding that we have embraced “the concept of a government of laws and not men”).

72. See Thomas P. Smith & Patrick M. Fahey, *Some Points on Litigating Title II and Title XVI Social Security Disability Claims in United States District Court*, 14 QUINNIPIAC L. REV. 243, 272 (1994) (“Social Security disability cases are among the most important matters litigated in U.S. District Courts, for they generally involve claims made by ordinary people in desperate circumstances.”).

73. See, e.g., *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513, 1525 (10th Cir. 1997) (“[U]niform decisionmaking within each circuit is essential.”); see also Morton Denlow, *Substantial Evidence Review in Social Security Cases as an Issue of Fact*, 2 FED. CTS. L. REV. 99, 121 (2007) (“No one contends that the Supreme Court or circuit courts should not establish the broader legal principles governing the Social Security Act that affect all, or a majority of, the social security cases.”).

however, they do not appear to be doing the job. Not only have the circuits failed to establish consistency between the sister courts,<sup>74</sup> more to the point of this Article they have not created anything remotely resembling uniformity *within* each circuit. To see this is so, one need not look further than the data presented here.<sup>75</sup> If two judges in the same building generate such disparate results, there is no reason to believe two judges sitting hundreds of miles away are on the same page. Nor is the Supreme Court filling the gap, as it rarely grants certiorari on Social Security disability appeals and almost never does so in order to clarify the actual standards that apply to awarding benefits.<sup>76</sup>

The reasons for the lack of appellate guidance in Social Security cases are several. Perhaps the most obvious is the decision by many losing litigants not to appeal unfavorable dispositions in district court. An examination of the cases under consideration here discloses the miniscule percentage of appeals from around the country, regardless of the outcome in district court. Consider the three judges with the most lopsided rates in the sample: Judge Daniel, with his 100% reverse rate, Judge Wilhoit with his 100% affirmance rate, and Judge Pratt, with his 86% reverse rate.<sup>77</sup> Of Judge Daniel's 58 remands, Westlaw does not reflect a single one undergoing review by the Tenth Circuit.<sup>78</sup> On the opposite pole, of Judge Wilhoit's 76 affirmances, only three made it to the Sixth Circuit.<sup>79</sup> As with

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74. See generally Susan Haire & Stefanie Lindquist, *An Agency and 12 Courts: Social Security Disability Cases in the U.S. Courts of Appeals*, 80 JUDICATURE 230 (1997) (examining the lack of uniformity among the circuits in Social Security cases).

75. See *supra* Part III.A.2.

76. See generally Frederick Schauer, *Foreword: The Court's Agenda -- And the Nation's*, 120 HARV. L. REV. 4 (2006) (noting throughout the discrepancy between the importance Americans place on the Social Security program and the attention it receives at the Supreme Court).

77. See *supra* Part III.A.2.

78. To estimate the number of appeals, Westlaw's direct history function was employed. While that function does not list every appeal, it does list most, and can thus be used with some degree of accuracy. See, e.g., Elise Borochoff, Comment, *Lower Court Compliance with Supreme Court Remands*, 24 TOURO L. REV. 849, 883 n.104 (2008) (describing use of direct history function for legal research).

79. See *Louden v. Comm'r of Soc. Sec.*, 507 F. App'x 497 (6th Cir. 2012) (per curiam) (unanimously affirming Judge Wilhoit's decision upholding the

Judge Daniel's rulings, the government declined to challenge any of Judge Pratt's 86 remands at the Eighth Circuit.<sup>80</sup> It is fair to say that the vast majority of Social Security appeals begin and end their time in the Article III courts without advancing from the first rung to the second.<sup>81</sup>

In the case of claimants, it is not difficult to guess why many decline to pursue their appellate rights: most do not possess the resources to do so.<sup>82</sup> This is especially true in Kentucky, one of the poorest states in the union.<sup>83</sup> It is less clear why the government appeals so few adverse decisions in the district courts, given that it has far deeper pockets and given the eagerness with which other federal agencies file appeals.<sup>84</sup> In its Social Security track record with Judges Daniel and Pratt, the federal government has lost its case a staggering 91% of the time, and has not once sought to reverse its fate in a higher tribunal.<sup>85</sup> For a litigant that is not

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Commissioner's denial of benefits); *Mitchell v. Comm'r of Soc. Sec.*, 330 F. App'x 563 (6th Cir. 2009) (same); *Deaton v. Comm'r of Soc. Sec.*, 315 F. App'x 595 (6th Cir. 2009) (same).

80. Interestingly, the only Social Security appeal of Judge Pratt's that found its way to the court of appeals was one of the few cases in which he affirmed the denial of benefits, and that decision was in turn reversed by the Eighth Circuit. *See Tang v. Apfel*, 205 F.3d 1084 (8th Cir. 2000).

81. *Cf. Verkuil & Lubbers, supra* note 7, at 739 ("Social Security cases represented 5.86 percent of all civil district court cases, but only 2.5 percent of all civil cases in the courts of appeals.") (footnote omitted).

82. *See, e.g., Webb v. Richardson*, 472 F.2d 529, 538 (6th Cir. 1972) (noting that "most [Social Security] claimants are poor and not well educated").

83. *See Income of Households by State Ranked from Highest to Lowest Using 3-Year Average Medians*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/income/data/statemedian/> (last visited Jan. 23, 2013) (ranking Kentucky the seventh poorest state in the country by median household income).

84. For instance, a search of "Department of Labor, Appellant" among circuit court decisions yields 270 hits, a fairly impressive tally for an agency involved in far less litigation than the Social Security Administration. *See supra* note 54 (referring to the currency of search results).

85. One recourse the government has to challenge an adverse decision short of a full-fledged appeal is to file a motion to alter or amend with the district court itself, an option it appears to periodically take in Social Security cases. *See, e.g., Davis v. Callahan*, 985 F. Supp. 913 (S.D. Iowa 1997). This mechanism does not compensate for the paucity of appeals to circuit court, however, first and foremost because the Social Security Administration does not use it nearly enough for it to fulfill that role. Plus, there is no true

accustomed to losing,<sup>86</sup> and one that would have to be blind not to absorb the magnitude of its failure, the refusal of the U.S. Attorney's Offices in the District of Colorado and the Southern District of Iowa to pursue appellate satisfaction is nothing short of inexplicable. Indeed, the Eighth and Tenth Circuits are hardly known as excessively liberal courts,<sup>87</sup> and the likelihood of prevailing on appeal in such cases would seem that much greater. At the risk of hyperbole, one wonders why the government would bother to contest a claim at all, including in district court, if it remains perfectly willing to accept sky-high remand rates. Certainly the decision to refrain from filing an appeal could not be plausibly grounded on concern for the public fisc, as a remand for further administrative proceedings burns up substantial taxpayer funds,<sup>88</sup> as, of course, does a

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substitute for fresh appellate review, particularly in cases, like the ones at issue here, where the higher court owes no deference to the district court, *see, e.g.,* *White v. Barnhart*, 415 F.3d 654, 658 (7th Cir. 2005), and particularly where the lower court judge has already demonstrated a propensity to favor one side over another. *See generally* Jonah J. Horwitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 ROGER WILLIAMS U. L. REV. 695 (2012) (questioning the ability of trial courts to searchingly examine their own rulings).

86. *See, e.g.,* Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 732 n.354 (2009) (referring to a study that found "that the federal government, as an appellant, tended to win more often than other appellants").

87. *See* Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative than Others?*, 45 LAW & SOC'Y REV. 171, 172 (2011) (reciting the "standard lore" that the Eighth Circuit is one "of the most conservative" circuits) (citation and internal quotation marks omitted); Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 246 (2008) (characterizing the Tenth Circuit as "a fairly conservative court on criminal procedure issues"); Calvin TerBeek, *A Call for Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with the Empirical Reality*, 31 LAW & PSYCHOL. REV. 21, 50 (2007) (listing "the more liberal circuits" as the Second and the Ninth) (footnotes omitted).

88. *See, e.g.,* *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) (observing the costs associated with administrative hearings). It also bears mention that attorney fees are available for prevailing parties in Social Security appeals. *See* 28 U.S.C. § 2412(d)(1)(A) (2011). Thus, when the U.S. Attorney's Office declines to appeal a loss at the district court it also makes it likely that the government will later pay the claimant's attorney fees, imposing an even greater expense upon the taxpayer. *See, e.g.,* *Zapfen v. Astrue*, No. 09-CV-00951-WYD, 2011 WL 4808175 (D. Colo. Oct. 11, 2011) (awarding attorney fees to the claimant after a remand for further administrative proceedings).

reward.

Whatever the reasons for the government's overwhelming inactivity, though, the consequences are troubling. And they are compounded by the fact that the circuit courts resolve a substantial majority of the Social Security appeals that *are* filed in unpublished, and often summary or very brief, opinions,<sup>89</sup> thus failing to promote uniformity even with the tools that are at their disposal.

### C. *Unfairness*

The inconsistency at the district court level, in combination with the lack of guidance from higher courts, damages the system in a number of ways. First, fairness. It requires no sophisticated legal analysis to see the inequity of one individual receiving benefits while another with the same infirmity goes without them.<sup>90</sup> The discrepancy is particularly distressing where the two individuals live within the same geographical area (i.e., judicial district). For with divergent

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Unsurprisingly, the government routinely declines to oppose such motions. A search on Westlaw among district court cases for "social security" & unopposed /s motion /s "attorney! fees" retrieved 184 opinions. *See supra* note 54 (referring to the currency of search results).

89. *See* Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 496 (2004) (categorizing appeals from disability denials among the "entire classes of appeals deemed routine" and thus less likely to result in reported opinions) (footnote omitted); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 295 (1996) ("A court is far less likely to hear oral argument or issue a published opinion in a social security" case versus another type of case.); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 952-53 (1989) (including Social Security cases in a list of "subject-matter areas where unpublished opinions predominate" in the U.S. courts of appeal) (footnotes omitted); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1693 n.95 (2005) (proposing that "unpublished opinions dispose disproportionately of cases brought by . . . social security recipients," among others) (citation omitted); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS 175, 195 (2001) (counting Social Security cases among those where courts are less likely to publish the opinion).

90. *See generally* Capowski, *supra* note 33.

outcomes between different judicial districts one can at least make the argument, though not incontrovertibly, that different regions might have different needs, and that the judiciary should be sensitive to such differences.<sup>91</sup> No such argument is available with respect to two individuals in the same area. It is beyond cavil that two individuals, living in the same area, taking their cases to the same courthouses, should be treated equally.<sup>92</sup>

#### D. *Unpredictability*

The problem with the lack of predictability is closely related to the lack of consistency and fairness, but it presents additional concerns as well. To start with the overlap, predictability is a virtue in itself, one of the paramount values nurtured by a well-functioning common law system.<sup>93</sup> If different judges within the same district treat equal claims differently, no one involved in the process can make an educated decision as to how to proceed. The whole thing becomes a crapshoot, quite literally the luck of the draw. As a result, the individual, quite likely of modest means, has no idea whether it makes sense to appeal the ALJ's adverse decision. Indeed, the ALJ himself will find it difficult to decide the claim in the first place, faced with erratic rulings from different district court judges. With uniformity, claimants, typically advised by attorneys with some expertise in Social Security

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91. See, e.g., David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 319 (1977) (proposing a "local option" plan for diversity cases to reflect "the likelihood that the need for diversity jurisdiction is greater in some districts than in others and would allow an opportunity for local experimentation").

92. See *Pope & Talbot v. Hawn*, 346 U.S. 406, 411 (1953) (rejecting a theory that would result in the rights of parties fluctuating depending "on which 'side' of the same courthouse" the case was heard).

93. See *Fleeger v. Wyeth*, 771 N.W.2d 524, 529 (Minn. 2009) ("[F]ollowing precedent promotes stability, order, and predictability in the law.") (citation omitted); Mary Garvey Algero, *Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretation with the Tradition of Flexibility and Adaptability*, 58 LOY. L. REV. 113, 114 (2012) (concluding that civil law jurisdictions "have come to value the predictability and certainty that come with the common law doctrine").

cases,<sup>94</sup> will have a sense as to when a claim is potentially meritorious, and when it is doomed to failure. They will avoid the latter, and the government will thereby avoid the expense of litigating the claim with taxpayer funds. Everyone benefits.

### E. *Inefficiency*

As with some of the other issues listed, the efficiency concerns overlap with other concerns. For present purposes, they are best understood in terms of the smooth functioning of the judiciary itself. In the current system, a district court judge reviewing a Social Security appeal could locate a decision by a judge working in the same district, resolving a highly similar case, and still have to ask: how persuasive is this opinion?<sup>95</sup> In the world envisioned by this Article, the same judge poses a very different question: how do I faithfully apply the rule of the previous case? And, if the two are on all fours, there is little inquiry to conduct at all. The judge's only duty at that point is to declare that the prior precedent controls the outcome, and that is that.<sup>96</sup> Living as we do in an era with large and ever-increasing backlogs in district court dockets,<sup>97</sup> there is great

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94. Frank S. Bloch, et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 7 (2003) (acknowledging that “most [Social Security] claimants are now represented by an attorney”) (citation and internal quotation marks omitted).

95. See *Stewart v. Astrue*, No. 10-CV-02231-RBJ, 2012 WL 694320, at \*6 n.1 (D. Colo. Mar. 1, 2012) (pointing out that “*persuasive* precedent from this District[.]” including a published opinion, offered guidance in resolving a Social Security issue) (emphasis added) (citation omitted); *Smith v. Astrue*, No. 3:09CV488, 2011 WL 1303637, at \*6 (W.D.N.C. Mar. 31, 2011) (“[T]he court believes the collective decisions of this district [regarding Social Security claims] are most *persuasive* . . .”) (emphasis added), *aff'd*, 457 F. App'x 326 (4th Cir. 2011) (per curiam).

96. See *Agnew-Currie v. Astrue*, 875 F. Supp. 2d 967, 972 (D. Ariz. 2012) (recognizing in a Social Security case that the district court is bound by published decisions of the circuit court “and cannot simply declare it all overruled”) (footnote omitted); *Ridings v. Apfel*, 76 F. Supp. 2d 707, 709 (W.D. Va. 1999) (noting that the district court's disagreement with the circuit court's decisions regarding an issue of Social Security law was irrelevant as the district court was “bound by its precedent”).

97. See Carl Tobias, *Filling Federal Appellate Vacancies*, 41 ARIZ. ST. L.J. 829, 864 (2009) (making note of “the civil backlogs of district courts”); Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005

appeal in a model that will further expedite the disposition of a large number of cases. Indeed, the appeal is enhanced by the fact that meritorious Social Security claimants in particular should not be forced to wait long periods before receiving their deserved benefits, as they currently do.<sup>98</sup>

To a lesser but still noteworthy extent, uniformity in the district courts can also be expected to facilitate efficiency in the administrative process. As noted, that process is as plagued with delays as the one that unfolds in the judiciary.<sup>99</sup> Were the district courts to begin acting in a more unified fashion, the Administration would presumably follow along to some degree, if grudgingly. Add “grudgingly” only because the Administration has already demonstrated a somewhat alarming tendency to overtly flout judicial precedent, even that set by the circuit courts.<sup>100</sup> Despite that history, it is not too naïve to expect at least *some* ALJs to follow in the footsteps of more consistent and predictable district courts, if only out of fear of reversal.<sup>101</sup>

#### IV. The Solution

The proposal is simple: when a district court issues a published opinion resolving the appeal of a denial of Social Security disability benefits, that decision is binding precedent for the judicial district as a whole. A district court judge would make the decision whether to publish or not to publish, much

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UTAH L. REV. 743, 761 (2005) (“[N]umerous district courts experience substantial civil backlogs . . .”) (footnote omitted).

98. See Drew A. Swank, *The Social Security Administration’s Condoning of and Colluding with Attorney Misconduct*, 64 ADMIN. L. REV. 507, 517-19 (2012) (noting the huge backlog in Social Security cases in recent years).

99. See *id.*

100. See generally Angela M. Johnson, Note, *The Social Security Administration’s Policy of Nonacquiescence*, 62 IND. L.J. 1101 (1987).

101. Cf. *Ass’n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1139 (D.D.C. 1984) (finding it reasonable that the parties believed ALJs might seek “to avoid reversal or remand by the Appeals Council”); Sidney A. Shapiro, *Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA’s Public Board of Inquiry*, 1986 DUKE L.J. 288, 333 n.347 (1986) (asserting that ALJs working for the Food and Drug Administration “commonly allow most types of evidence to be admitted to avoid possible reversal”).

as circuit court panels do.<sup>102</sup> If a majority of judges in the district disagree with the decision, they can, sitting en banc, overrule it, a power they already enjoy,<sup>103</sup> though one they rarely employ.<sup>104</sup>

To be sure, there would be kinks to work out. Perhaps the most pressing issue to resolve would be establishing a clear, consistent practice for when to publish opinions and when not to. As it stands, the guidelines under which district court judges are *supposed* to operate when deciding whether to release a decision in the federal supplement are, at best, rather vague,<sup>105</sup> and are either ignored or applied quite differently by different judges.<sup>106</sup> In fact, the opinions under consideration here offer a perfect example of the inconsistency in publication decisions. Judge Pratt has issued 122 opinions containing the words “Social Security;” 110 of them are reported in the federal supplement. Judge Wilhoit has 121 cases on Westlaw where the words “Social Security” appear in the text; four of them are published. These are discrepancies on the same order of magnitude as the difference in dispositions between the two judges’ cases.<sup>107</sup> Needless to say, different district court judges have very different considerations in mind when deciding whether to publish a given opinion.

The obstacles are eminently surmountable. District court judges are likely so inconsistent, at least in part, because so little rides on the outcome. An opinion in the federal supplement may attract more attention from scholars and

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102. See generally Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325 (2001).

103. See generally John R. Bartels, *United States District Courts En Banc - Resolving the Ambiguities*, 73 JUDICATURE 40 (1989).

104. See Mead, *supra* note 10, at 809 (“Currently, district court en banc proceedings are extremely rare . . .”).

105. See Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 121 (2004) (noting that the “formal rules governing publication” in the district courts “are quite broad”).

106. See *id.* at 123 (arguing that judges make decisions about what to publish based on a wide variety of reasons, including “to make good law, to advance policy, . . . to enhance their prestige among their reference group[.]” as well as for purposes of “easing their day-to-day work life” and to “strive for good relations with those with whom they work regularly”).

107. See *supra* Part III.A.2.

other judges,<sup>108</sup> but that is still a far different thing than an opinion either having or not having the force of law.<sup>109</sup> Once district courts become accustomed to publishing binding decisions, they can be expected to treat the question of whether or not to publish with the care it demands.

As mentioned, this Article is primarily dedicated to the practicalities of the proposal, not potential conceptual challenges that might be raised in opposition to it. Nevertheless, it is worth pausing to briefly address the weightiest of those challenges. Recall the main advantages ascribed to the current distribution of precedent-making authority. To reiterate, they are 1) the balance that comes with multi-judge panels; 2) less urgency at the appellate courts and so more time to study the development of the law; 3) greater formality and structure at the courts of appeals; 4) the prestige of the appellate courts and its capacity for attracting cerebral jurists; and 5) the purifying effect of elevating the common law to the rarified air of the appellate courts.<sup>110</sup>

Two of these rationales either support the proposed reform, or at least do not cut against it. To the extent that appellate proceedings are less urgent or more formal than trial proceedings, Social Security cases offer the same advantages to

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108. *Compare* Pinault v. Apfel, No. 3-99-CV-90162, 2000 WL 33362000 (S.D. Iowa, Nov. 13, 2000) (deciding a Social Security appeal in a thirteen-page unpublished opinion that has never been cited by a case, secondary source, or appellate brief), *with* Strong v. Apfel, 122 F. Supp. 2d 1025 (S.D. Iowa 2000) (deciding a Social Security appeal in a seven-page published opinion that has been cited by two courts, three secondary sources, and four appellate briefs).

109. Indeed, even in terms of attracting citations, the difference between a published and unpublished circuit court decision is far greater than that between a published and unpublished district court opinion, thus underscoring the pivotal importance of whether an opinion constitutes binding precedent—rather than what court it emerges from—in the amount of influence it has. Take the only Social Security opinion of Judge Pratt's to be reviewed by the Eighth Circuit. It resulted in a published opinion that has been cited in 50 cases and 13 secondary sources. Tang v. Apfel, 205 F.3d 1084 (8th Cir. 2000); *see supra* note 54 (referring to the currency of search results). Contrast that with an unpublished Social Security decision from the Eighth Circuit released around the same time, which has been cited in one case and by no secondary sources. Schach v. Apfel, 210 F.3d 379 (8th Cir. 2000) (*per curiam*); *see supra* note 54 (referring to the currency of search results).

110. *See supra* notes 12-19 and accompanying text.

the district courts that they do the circuit courts. After all, Social Security cases *are* appeals at the district court level. This is not to say that claimants have no right to a speedy determination regarding the merits of their claims. Nor is it to say that society has no interest in expediting the smooth functioning of such an important government program. Plainly, both claimants and the country at large do have those interests.<sup>111</sup> It is only to say that neither justification can plausibly be used as a reason for denying district courts the power to issue binding decisions in the Social Security context, as they are already acting in an appellate capacity.

The remaining rationales for the current regime do militate against the proposal. But two of those rationales—numbers 4 and 5—are based on the assumption that judges on the courts of appeals enjoy such greater stature than their colleagues below that it meaningfully improves the quality of their work. That assumption is far from beyond doubt, as district court judges wield substantial powers, indeed, in some respects, *more* power than circuit court judges, as they resolve many more disputes.<sup>112</sup> District court judges also possess comparable prestige because, in large measure, they share many qualities with circuit judges: nomination by the president, confirmation by the Senate, life tenure, protection against pay decreases, assistance from top law school graduates serving as clerks, and involvement in high-profile controversies.<sup>113</sup>

Ultimately, then, the only significant conceptual impediment to the proposal is the multi-judge nature of the

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111. See *Mills v. Heckler*, 595 F. Supp. 952, 953 (S.D.N.Y. 1984) (discussing a Social Security claimant's right to a speedy resolution of his request for benefits); see also *Wolfe v. Barnhart*, 446 F.3d 1096, 1104 (10th Cir. 2006) (examining the public's interest in having an efficient Social Security system).

112. See David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 139 n.116 (2012) (calculating that only 20% of the cases filed in federal district courts between 2010 and 2011 were appealed to circuit courts).

113. Cf. Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1397 (1991) (commenting on the "highly prestigious office" occupied by district court judges and attributing the prestige to some of the qualities mentioned above).

circuit court panel versus the solitary district court judge deciding the Social Security appeal. As an initial matter, this theory too is not on the solidest ground. It is open to question whether circuit courts do in fact produce more balanced, thoughtful work as the result of their collaborative approach. For starters, “balance” is not necessarily an unadulterated good. It is a cliché with some truth that government committees often sacrifice decisive, tough-minded action for ponderous, platitudinous waffling, and a circuit court panel is a government committee of a sort, and vulnerable to the same charge.<sup>114</sup> Further, in low-profile cases, as the Social Security cases under consideration most certainly are, the members of the panel may not pay a great deal of attention to the opinion, let alone engage in any meaningful debate over the result.<sup>115</sup> Additionally, many panels may be so ideologically homogenous that the tempering effect of revising to appease other perspectives is largely absent.<sup>116</sup> All of these are reasons to keep an open mind to the prospect of altering the traditional conception of law-making authority as exclusively in the province of multi-judge panels. One of them—the hands-off, conveyor-belt approach often taken by the circuit courts to mundane everyday matters—has particular force here, as it indicates that the utility of the multi-judge model is especially

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114. See Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 662 (2008) (determining that U.S. Supreme Court majority opinions often become longer and longer as the author of the majority opinion seeks to accommodate the views of his colleagues); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 827 n.13 (1985) (describing a transition from three-judge to single-judge trial courts in civil law countries and explaining it partly as a reaction to the slowness of the former).

115. See Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 699 (2001) (discovering that staff attorneys at the circuit courts do much of the work on Social Security appeals); Wasby, *supra* note 59, at 87 (suggesting that Social Security cases are “prime candidates” for being unpublished); cf. Richman & Reynolds, *supra* note 89, at 279 n.15 (“Complaints about lack of oral argument, unpublished opinions, and ‘one-judge’ opinions go back many decades.”) (citation omitted).

116. See, e.g., Bradley W. Joondeph, *The Partisan Dimensions of Federal Preemption in the United States Courts of Appeals*, 2011 UTAH L. REV. 223, 246 (2011) (discussing “ideological ‘panel effects’—the tendency of like-minded individuals, when deliberating in an ideologically homogenous group, to reinforce one another’s biases”).

limited in the Social Security context. The same could be said of the desire for institutional legitimacy, the view that the signature of three judges at the bottom of an order *appears* more authoritative to the public than does a single name.<sup>117</sup> We need only take into account the public perception where the public is paying attention;<sup>118</sup> it would be fanciful, to say the least, to imagine that many citizens are impatiently waiting for the latest pronouncement from the federal courts on, say, the proper formulation of a question from an ALJ to a vocational expert regarding the amount of time a claimant is able to perform sedentary work.<sup>119</sup>

Even granting that there is at least *some* benefit to the old practice, as there undoubtedly is, one must still balance that benefit against the gains to be achieved by the suggested new practice. If granting precedent-forming power to the district courts in Social Security cases would in fact bring uniformity, efficiency, and fairness to an essential program that profoundly affects the lives of millions of people, perhaps that might be enough to outweigh the advantages that come from multi-judge deliberations. At this juncture, it bears reiterating that the category of cases that would be implicated by the change constitute a quite discrete group, bounded by a firm and easily-demarcated line. There is thus no need to fear any inadvertent spill-over effect on other areas of law.<sup>120</sup> The long-running ambiguity surrounding the power *vel non* of bankruptcy appellate panels to create binding precedent<sup>121</sup> gives us good

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117. Cf. Douglas, *supra* note 13, at 483 (“[T]he more judges that sign on to an opinion, the more likely court-watchers and the public will view it as the correct result.”) (footnote omitted).

118. See Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 127 (1996) (“To the extent that anyone, inside or outside the legal community, really pays attention, there is perhaps some added value to having three judges” decide a case for purposes of institutional legitimacy.).

119. See, e.g., Griffith v. Astrue, 839 F. Supp. 2d 771, 783-85 (D. Del. 2012).

120. Cf. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990) (“Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”).

121. See *In re Farmland Indus., Inc.*, 397 F.3d 647, 653 (8th Cir. 2005) (mentioning in passing “the unsettled question whether [Bankruptcy Appellate Panel] decisions are binding precedent”) (citation omitted); see

reason to believe that such experiments can be conducted without opening Pandora's Box or exposing the federal courts to chaos and uncertainty.<sup>122</sup> Remember too that the custom of discriminating between appellate courts and trial courts in terms of the authority to establish precedent is just that: a custom.<sup>123</sup> Tradition is important in the law, but unlike constitutional commandments, it should yield when a new practice emerges that is better-suited to conditions on the ground.<sup>124</sup>

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generally Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063 (1994).

122. To digress slightly, some state and federal jurisdictions allow for single-judge decisions from their intermediate appellate courts under certain limited circumstances, such as in simple, routine matters or, in the federal system, in decisions regarding certificates of appealability in habeas cases and decisions regarding emergency injunctive relief. *See* *Hodges v. Att'y Gen. of Florida*, 506 F.3d 1337, 1339 (11th Cir. 2007) (mentioning such a decision in the federal system); *State v. Nelson*, 807 N.W.2d 769 (Neb. 2011) (reviewing such a decision in the Nebraska courts); *In re Tyler T.*, 814 N.W.2d 192 (Wis. 2012) (reviewing such a decision in the Wisconsin courts). Currently, such opinions do not constitute binding precedent. *See* *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 230 (6th Cir. 2005); *State v. Chambers*, 493 N.W.2d 328, 329 (Neb. 1992) (per curiam); *State v. List*, 691 N.W.2d 366, 367 (Wis. Ct. App. 2004). Given the close connection between the multi-judge decision-making model of appellate courts and their power to shape precedent, *see supra* note 12 and accompanying text, the fact that courts of appeals do sometimes operate through single judges insulated from their colleagues' approval or disapproval supplies yet another reason why the present division of precedential power merits reexamination. For similar reasons, it might also be worth reconsidering whether such single-judge opinions *should* be given precedential effect.

123. *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 518 (2000) ("For reasons that are hard to identify (and that are virtually impossible to tie to the Constitution), the federal district courts regard their own precedents as persuasive authority only.") (footnote omitted). Even those scholars who have linked the current precedential regime to constitutional provisions do not claim that anything in the Constitution requires that *district courts* possess no power to bind *themselves*. Rather, they focus, in some form or another, on whether the Constitution compels lower courts to follow higher courts, i.e., "vertical stare decisis." *E.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); *see also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

124. *See* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) ("The life of the law has not been logic: it has been experience.").

## V. Application

To test the merits of the proposal, consider its salutary effect on the five problems with the Social Security system set forth above. Because this Article is focused on the pragmatic benefits to this area of law offered by the suggested change, the discussion that follows will not examine the various other more general advantages that may accrue but which are not specifically related to Social Security appeals.<sup>125</sup>

## A. Consistency

Precedent fosters consistency.<sup>126</sup> It may do so to a greater or lesser extent, as, for example, when a lower court either explicitly defies binding case law<sup>127</sup> or, more commonly, when it evades it through flimsy distinctions<sup>128</sup> or willful blindness.<sup>129</sup> Still, the basic phenomenon is unquestionable: precedent does

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125. For a thoughtful and comprehensive exploration of those advantages, see generally *id.*

126. See Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 128 (1997) (“[B]inding appellate precedents foster consistency.”); see also David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 68-69 (2009) (“There is an inherent human desire for stability and continuity in decision-making. Looking to the past for guidance and direction is thus inherent in an institutionalized justice system.”) (footnote omitted); Martin, *supra* note 19, at 1 (“Adherence to the ‘rule of law’ entails a strong commitment to consistency--a belief that throughout a jurisdiction and across time judges and other public officials should treat like cases alike. Within American jurisprudence, explicit doctrines of precedent serve as important means to that end.”) (footnotes omitted).

127. See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 70-72 (1994) (commenting on the practice of “anticipatory overruling,” where district courts decline to follow binding precedent on the grounds that it will likely be overruled).

128. See, e.g., Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 122 n.133 (2010) (“Judges find ways to avoid [a binding] holding . . . by distinguishing the facts or circumstances and thereby limiting the reach of precedents.”) (citations omitted).

129. See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 572 (2008) (finding that lower courts routinely ignore Supreme Court precedent on fair use doctrine in copyright cases).

foster consistency. It stands to reason, therefore, that a regime in which published district court opinions acquire precedential weight is a regime with greater consistency.<sup>130</sup> This is especially true in Social Security cases, first because there are so many of them at the district courts<sup>131</sup> and so few binding decisions from the circuit courts<sup>132</sup> (and there will thus be a new, robust body of precedent on various issues), and second because the area of law lends itself to relatively clear rules. For although disability appeals are, in some senses, fact-specific,<sup>133</sup> they are also conducive to the formulation of meaningful guideposts. That is because they involve both extensive data and highly specific legal questions. At what point on an IQ scale does mental impairment begin for Social Security purposes?<sup>134</sup> How many hours must a claimant be able to devote to her occupation in order to support a finding that she can return to her past relevant work and thus does not deserve disability benefits?<sup>135</sup> These and similar questions confront district courts in Social Security cases routinely.<sup>136</sup>

Other questions do not involve the application of legal rules to evidence, but instead give rise to even more easily applied bright-line rules. What types of procedures can be permissibly used to establish that a claimant suffers from a

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130. See Mead, *supra* note 10, at 821-26.

131. See, e.g., Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 769 (1983) ("The greatest burden of the growing caseload is probably on the federal district courts, which face a flood of . . . social security appeals . . ."); *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2011*, UNITED STATES COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C03Mar11.pdf> (last visited Jan. 23, 2013) (estimating that roughly 15,000 Social Security cases were filed in district court in the last recorded year).

132. See *supra* notes 78-81, 89 and accompanying text.

133. See Wasby, *supra* note 59, at 87; see also *Kusilek v. Barnhart*, No. 04-C-310-C, 2005 WL 567816, at \*5 (W.D. Wis. 2005), *aff'd*, 175 F. App'x 68 (7th Cir. 2006) (per curiam).

134. See, e.g., *Kliment v. Astrue*, 710 F. Supp. 2d 831, 847-48 (N.D. Iowa. 2010).

135. See, e.g., *Patterson ex rel. Patterson v. Astrue*, 664 F. Supp. 2d 525, 528 (E.D.N.C. 2009).

136. See, e.g., cases cited *supra* notes 46-47.

particular condition?<sup>137</sup> What kind of credentials must an individual have in order to qualify as a treating physician?<sup>138</sup> Moreover, all such questions, both the bright-line type and the evidence-driven type, are especially suited to benefit from an influx of precedent. For all involve questions that judicial officers, who are, after all, promoted attorneys, are ill-equipped to answer. A J.D. does not prepare one to understand the nuances of deep vein thrombosis<sup>139</sup> or splenectomies.<sup>140</sup> Once one judge has done the laborious work of digesting such complex and non-legal information, it is best for everyone if her answer binds the others, lest they all have to replicate the extensive undertaking.

One objection that might be raised to the proposal is one grounded in a legal realist-style cynicism. Why, such an objector might ask, would we expect a judge under such a regime to bend to the views of his peers, when he might just as easily come up with fanciful distinctions to justify contrary results? Surely, a judge apt to reverse nearly a hundred percent of ALJ decisions<sup>141</sup> can find a flaw in the proceedings below, no matter how much case law there may be. Indeed, a judge apt to affirm nearly a hundred percent<sup>142</sup> can simply recite the deferential standard of review<sup>143</sup> and find a reason to withhold benefits.

It is not a trifling concern, particularly in the Social Security context, where voluminous and highly technical medical records,<sup>144</sup> in concert with torturous administrative

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137. *See, e.g., Cruz ex rel. Vega v. Barnhart*, No. 04 Civ.9794(DLC), 2005 WL 2010152, at \*10 (S.D.N.Y. Aug. 23, 2005) (evaluating the reliability of the Stanford-Binet test as a method for ascertaining a Social Security claimant's IQ).

138. *See, e.g., Sherman ex rel. CES v. Astrue*, No. CV-10-0343-JPH, 2012 WL 588810, at \*8 (E.D. Wash. Feb. 22, 2012).

139. *See, e.g., Tate v. Astrue*, 853 F. Supp. 2d 937, 942 (W.D. Mo. 2012).

140. *See, e.g., Sanchez-Wentz v. Barnhart*, 216 F. Supp. 2d 967, 971 (D. Neb. 2002).

141. *See supra* Part III.A.2.

142. *See id.*

143. *See supra* notes 29-30 and accompanying text.

144. *See Miller v. Comm'r of Soc. Sec.*, 848 F. Supp. 2d 694, 698 (E.D. Mich. 2011) (noting "the voluminous medical records" in a Social Security appeal); Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 160 (2009)

histories,<sup>145</sup> allow a creative and persistent judge to generally be able to find some facts to pin his hat on, regardless of the desired outcome. Two responses should placate the critic. First, consistency will come not only from the expansive growth of case law, but also from the fear of being overruled by one's colleagues. After their opinions begin to take on precedential weight, district courts will be forced to employ their en banc procedures more often. This is so because a judge who adamantly disagrees with the ruling of a peer will have greater incentives to seek the nullification of that ruling, rather than simply evading it, knowing that it binds not only him but everyone else in the district.<sup>146</sup>

Second, consistency is a spectrum, not a black-and-white proposition.<sup>147</sup> That the proposal would not engender one hundred percent uniformity across a district is not a fatal flaw, but simply a fact of life and of the law, in any context. Without doubt, *some* judges will draw tenuous distinctions to escape the holdings of *some* decisions, as they do in all areas of law.<sup>148</sup> Just as surely, though, *some*—hopefully most—judges will follow the new precedents. Perhaps more importantly, no judge will simply decline to observe a bright line drawn in a binding decision. Even a judge intent on distinguishing a case has no choice but to comply with its unambiguous rules of law, and will instead have to work with its more flexible components. To return to a previous example, the courts might establish a range of IQ scores that help substantiate a finding of mental

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(remarking on “large social security files with medical records”).

145. See, e.g., *Setian v. Callahan*, 973 F. Supp. 46, 51 (D. Mass. 1997) (referring to “the tortured procedural history” of a Social Security action).

146. Cf. Mead, *supra* note 10, at 809-10 (“A natural complement to a strong stare decisis policy is an en banc procedure that would allow all judges of the court to announce the entire court’s position on an issue[,]” which would “also provide[] a ‘credible threat’ to reverse a decision that strays from the law of the district.”) (footnotes omitted).

147. See Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 604-05 (2010) (evaluating consistency along a spectrum).

148. See, e.g., Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 981 (1977) (noting an area of law in which “[t]he lower courts had . . . been compelled to indulge in tenuous distinctions to avoid [the] harsh requirements” of a binding precedent) (footnotes omitted).

impairment, while inviting consideration of other facts as well.<sup>149</sup> A judge determined to find disability could not ignore that range, but he could point to other factors cutting in favor of his desired conclusion, such as illiteracy.<sup>150</sup> Future courts might then clarify the standards for what tests are permissible to measure illiteracy, what scores on those tests tend to establish the condition, and so forth.<sup>151</sup> In this way, the issues open to manipulation shrink over time, the parties have easily-discernible guideposts around which they can construct their arguments, and consistency grows slowly but surely over time.

Concededly, some issues will always be resistant to bright-line rules, no matter how much binding precedent exists. A prominent example is the sufficiency of the ALJ's evaluation of the credibility of the claimant's account of his impairments, an important issue in many Social Security cases and an especially important one with respect to particular ailments, such as chronic pain.<sup>152</sup> Decisions on such issues will always struggle against uniformity, as credibility is a deeply subjective concept that does not lend itself to universal principles.<sup>153</sup> Again, there are types of issues in almost every area of law that will remain hostile to uniformity. Indeed, credibility determinations must be made by adjudicators in any number of situations.<sup>154</sup> Inevitable inconsistency in one area does not compel voluntary inconsistency in another.

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149. *Cf.* Justice v. Barnhart, 431 F. Supp. 2d 617, 620 (W.D. Va. 2006) (“Low IQ can support a finding of manifestation of deficits in adaptive functioning before age 22 but it does [not] conclusively establish it.”).

150. *Id.*

151. *See, e.g.*, Campbell v. Astrue, 713 F. Supp. 2d 129, 136 (N.D.N.Y. 2010) (elaborating on what constitutes illiteracy for Social Security purposes).

152. *See, e.g.*, Kokal v. Massanari, 163 F. Supp. 2d 1122, 1134 (N.D. Cal. 2001).

153. *See* James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 113 (2000) (characterizing credibility as “a highly subjective concept”).

154. *See, e.g.*, United States v. Merlino, 523 F. Supp. 2d 66, 70 (D. Mass. 2007) (noting that ineffective assistance of counsel claims often involve credibility issues), *aff'd in part, rev'd in part, and remanded*, 592 F.3d 22 (1st Cir. 2010).

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B. *Appellate Guidance*

It requires no extensive analysis to demonstrate how the proposal made here would remedy the dearth of appellate guidance in Social Security law. Simply put, it would create a robust new body of appellate precedent in an area that now sorely lacks it. As noted, district courts generate a substantial majority of opinions on Social Security benefits appeals,<sup>155</sup> and the federal courts of appeals produce, in comparative terms, a paltry few number of published decisions on the subject.<sup>156</sup> To endow reported district court decisions with the power of binding law would, therefore, go a long way toward filling the gap.

As an aside, it should be noted that circuit courts will, of course, retain their authority to shape Social Security jurisprudence as they see fit, a power they enjoy in every area of law. Thus there would be no grounds to worry, as there might otherwise be, that the district courts would produce a discordant or inconsistent body of cases. Quite to the contrary, the circuit courts would likely benefit from the exchanges and disagreements between the district courts over doctrine, much as the U.S. Supreme Court benefits from dialogue and debate between the circuits.<sup>157</sup>

It could be argued that circuit courts already reap the benefits of such dialogue, as district court judges of course routinely disagree with one another as to the proper application of circuit court precedent,<sup>158</sup> or as to the appropriate resolution of an issue of first impression.<sup>159</sup> But it is a different thing for district court opinions to temporarily diverge within a framework where each district court judge

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155. *See generally* Verkuil & Lubbers, *supra* note 7.

156. *See supra* notes 78-81, 89 and accompanying text.

157. *Cf.* Mead, *supra* note 10, at 825 (noting that “the Supreme Court benefits from having a split of authority among circuit courts”).

158. *See, e.g.*, Vestax Sec. Corp. v. Desmond, 919 F. Supp. 1061, 1069 (E.D. Mich. 1995) (noting such a disagreement).

159. *See, e.g.*, Huddleston v. United States, No. 3-11-0223, 2011 WL 2489995, at \*2 (M.D. Tenn. June 22, 2011) (disagreeing with a decision from a fellow judge in the same district on an issue the circuit had not yet addressed), *aff'd*, 485 F. App'x 744 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 859 (2013).

speaks for himself, as opposed to a framework where the first judge binds the district court and the district court then diverges from its sister courts. It is the difference between disorganized dissension and organized dissension. The current state of affairs in the district courts can be analogized to a crowded cocktail party full of intellectuals from disparate schools of thought. They disagree with one another, but they do so in a loud, cacophonous, chaotic environment. If district court opinions bound the district, however, the situation would become more akin to a formal academic conference, at which each presenter stakes out a position, explains it fully, and defends that position against its critics. The battle lines are clearly drawn, and the higher authority can survey each point of view to assess its strengths and weaknesses, its practical implications, and its role to play, if any, in the future development of the law.<sup>160</sup>

These benefits would be especially helpful to the world of Social Security law, because that world constitutes a self-contained, complex system of interrelated rules that must be applied to an infinite variety of often highly technical facts.<sup>161</sup> Federal judges, lacking in medical or scientific training and not immersed in the unique administrative universe of the Social Security Administration, are peculiarly in need of outside opinions, be it from the lawyers, the ALJ, or the witnesses who testified at the administrative hearing. When those outside opinions come *only* from parties invested, in some form or another, in the case at bar, as they currently do, the judicial

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160. See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 331-32 (1998) (defending the advantages that come from “percolation,” whereby the Supreme Court refrains from granting certiorari on a question “until several circuit courts have considered” it, so that arguments and opinions become better developed before the court enters the arena); see also Martin, *supra* note 19, at 37 (“Including trial opinions in the pool of available precedent . . . affords appellate courts a broader view of individual appeals by enabling them to see how trial courts collectively have dealt with vexing issues.”).

161. See, e.g., Barbara A. Sheehy, *An Analysis of the Honorable Richard A. Posner’s Social Security Law*, 7 CONN. INS. L.J. 103, 116 (2001) (“Without a doubt, social security cases seem unappealing because they are overly technical or unduly complex and involve an unbelievable bureaucratic maze.”) (footnote omitted).

analysis suffers from an absence of more generalized, objective, *legal* reasoning. The lawyers are advocating for their clients, the ALJ is concerned only with the claim before him and is likely overworked and hasty,<sup>162</sup> and the witnesses typically have no legal background.<sup>163</sup> A federal judge operating under such conditions drafts his opinion in something of a vacuum. He would benefit enormously from the clear lines drawn by a large body of binding case law, which would direct and illuminate his inquiry in an otherwise cloudy and esoteric area of law.

Another, perhaps simpler point warrants mention on this question. Much as the Supreme Court is far more likely to grant review of cases that have divided the circuits,<sup>164</sup> circuit courts themselves can be reasonably expected to devote more care and attention to resolving issues upon which the district courts are in conflict.<sup>165</sup> In a world in which such conflicts are explicit and fully developed, thereby engendering the judicial and scholarly notice currently reserved for circuit court splits,<sup>166</sup> circuit courts would hopefully take more notice of Social Security cases and develop and unify the law. As a consequence, the proposal put forward here would lead to more

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162. See Steven A. Glazer, *Toward a Model Code of Judicial Conduct for Federal Administrative Law Judges*, 64 ADMIN. L. REV. 337, 348 (2012) (noting the Social Security Administration's "overworked corps of ALJs").

163. See Jonathan P. Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N.C. L. REV. 719, 778 (2012) (describing how disability hearings generally have few witnesses); see also Nathaniel O. Hubley, Note, *The Untouchables: Why a Vocational Expert's Testimony in Social Security Disability Hearings Cannot be Touched*, 43 VAL. U. L. REV. 353, 355 (2008) (noting that vocational experts, the most important witnesses at administrative hearings, have "no training, no supervision, and no credential requirements") (footnote and internal quotation marks omitted).

164. See, e.g., Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1721 n.445 (2000) ("Conflict between circuits is probably the single most important factor in granting certiorari . . .") (citation omitted).

165. See, e.g., *Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411, 412 (3d Cir. 2010) ("We are asked on this appeal to resolve a conflict among the district courts in our circuit . . ."), *cert. denied*, 131 S. Ct. 1507 (2011).

166. See Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1139 (2012) (acknowledging that "circuit splits have been the subject of frequent scholarly attention").

appellate guidance *both* from the district courts and from the courts of appeals. Whether there is the possibility of generating too much binding precedent in this area is a question that will have to wait for another day. Suffice it to say for the time being that it would take quite some time for Social Security jurisprudence, as undeveloped as it currently is, to become excessive.

An objection that might be raised to the proposal is that it would create, if not too much precedent, too many *sources* of precedent. We already have twelve circuit courts,<sup>167</sup> which lends itself to enough confusion and disarray.<sup>168</sup> A critic might submit that we do not need ninety-four more jurisdictions adding to the din. Two responses are adequate to rebut the challenge. First, we do not live in a world of thirteen jurisdictions. In addition to the circuit courts, we must reckon with the appellate judicial power of fifty state high courts, eighty-nine intermediate state appellate courts,<sup>169</sup> and (even if they may not directly exert their authority over Americans) the influence of courts in hundreds of other countries and various international tribunals.<sup>170</sup> We are already awash in appellate

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167. The United States Court of Appeals for the Federal Circuit constitutes a thirteenth circuit court, in addition to Circuits One through Eleven and the D.C. Circuit, but unlike the others, it hears no Social Security disability appeals. See, Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399, 430 (1989) (“Perhaps the primary reason that [the Social Security Administration] favors a uniform administration of the social security program is that it is a cheaper and more efficient way to operate than to decide claims differently in each of the twelve circuits.”) (emphasis added); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1126 (1990).

168. See, e.g., Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619, 1624 (2007) (observing, with respect to patent law, that there were “[t]oo many circuits” involved in developing the jurisprudence in the past).

169. Hon. Edwin H. Stern, *The 2008 Chief Justice Joseph Weintraub Lecture: Frustrations of an Intermediate Appellate Judge (and the Benefits of Being One in New Jersey)*, 60 RUTGERS L. REV. 971, 973 n.14 (2008) (citing the Council of Chief Judges of Courts of Appeal, Directory of Judges of State Courts of Appeal (2006)).

170. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 535 (2005) (summarizing an author who “predicts that international courts are likely to exert an important influence even as the national courts retain formal

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law, and the entrance of the district courts will not bring the sky down upon us.

In the Social Security context, the fear of unduly splintering precedent by introducing it to the district courts is particularly baseless. Though scholarly and judicial discussions might suggest otherwise,<sup>171</sup> consensus between circuit courts is more common than conflict.<sup>172</sup> District courts considering Social Security appeals are even more likely to defer to this norm, not only because they are unaccustomed to setting precedent and thus will proceed more gingerly than the sometimes hubristic circuit courts, but also because Social Security cases involve dense, obscure material, and a judge is considerably more apt to welcome a previous judge's interpretation as a reason to follow the same path than as a reason to strike out on his own.<sup>173</sup> To summarize, ascribing to published district court opinions in Social Security cases the power of binding law would remedy a troubling absence of appellate guidance, and would do so with little foreseeable downside.

### C. *Fairness*

The unfairness of the current regime has already been demonstrated: it is the unfairness that results when two people in the same location and the same circumstances are treated differently.<sup>174</sup> It requires no great leap of the imagination to understand how the proposal urged here would provide an antidote for that unfairness. When a district court judge is

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independence . . .") (footnote omitted).

171. A search on Westlaw for legal scholarship with "circuit split!" in the title yielded 192 hits.

172. See, e.g., Lance D. Cassak, *Hearing the Cries of Prisoners: The Third Circuit's Treatment of Prisoners' Rights Litigation*, 19 SETON HALL L. REV. 526, 603 n.377 (1989) (citation omitted).

173. Cf. *Cook ex rel. Cook v. Sec'y of Health & Human Servs.*, 745 F. Supp. 1248, 1256 (E.D. Mich. 1990) (agreeing with and adopting the analysis of another district court in a Social Security matter), *vacated and remanded on other grounds*, 940 F.2d 659 (6th Cir. 1991) (per curiam) (table).

174. See *Walter v. United States*, 969 F.2d 814, 817 (9th Cir. 1992) ("Fundamental fairness requires that like cases be treated alike.") (citing *Griffith v. Kentucky*, 479 U.S. 314, 322-24 (1987)); Alexandra D. Lahav, *The Case for "Trial by Formula"*, 90 TEX. L. REV. 571, 617 (2012) ("Fairness requires that like cases be treated alike . . .").

constrained by the previous decisions of the court, he is compelled, to some degree at least, to treat like claims alike. Indeed, that tendency toward uniformity, though not always perfectly realized in practice, is one of the chief virtues of the common law system.<sup>175</sup> The point has been amply made, and there is no need to belabor it.

#### D. *Predictability*

More can be said about how exactly the proposal encourages the predictability of Social Security law, and why we should welcome such a change. Beginning with first principles, one of the most indispensable fictions upon which the American legal system operates is that regular citizens stay abreast of the innumerable laws governing their conduct.<sup>176</sup> It is a fiction that, in many aspects of the modern state, borders on the absurd.<sup>177</sup> With respect to Social Security law in the federal courts, however, it is a fiction that can and should be brought closer to reality. There is a large and growing corps of representatives specializing in Social Security practice.<sup>178</sup> Much more so than most areas of law, Social

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175. See Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 96 (2012) (“[T]he legitimacy of the common law process was grounded in equality, its imperative that like cases be treated alike and unlike cases be treated differently.”) (footnote omitted).

176. See *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment) (“It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, . . . albeit one required in any system of law . . .”) (internal citation omitted); see also Tahirih V. Lee, *Media Products as Law: The Mass Media as Enforcers and Sources of Law in China*, 39 DENV. J. INT’L L. & POL’Y 437, 455 (2011) (“In the American paradigm of positive law, with its emphasis on transparency and the fiction that its subjects are on notice about what the law contains, law is a kind of information.”).

177. See, e.g., Jessica A. Roth, *Alternative Elements*, 59 UCLA L. REV. 170, 176 (2011) (complaining that we live in a country where “the criminal law is too big and disorganized for anyone to be able to print it in a single volume,” turning “the idea that the average citizen has notice of what the law prohibits” into “an untenable fiction”) (footnote omitted).

178. See Swank, *supra* note 98, at 520 (estimating that there are 31,000 attorney and non-attorney representatives of Social Security claimants) (footnote omitted).

Security appeals frequently implicate highly specific questions involving distinct terms or facts, such as the name of a medical condition, or an IQ number. Given the expertise of a Social Security attorney, and the accessibility and efficiency of modern legal search engines, it is not so unreasonable for a claimant to expect his lawyer to be able to figure out how courts have dealt with similar cases. Under the current system, where the vast majority of cases are district court opinions that have no binding weight, a lawyer can indeed determine what other courts have done, but that determination is of limited utility to her client. Will the judge be aware of other district court opinions on point? Will he care? Will he agree? The lawyer simply cannot answer these questions with any confidence. Instead, the best she can offer is an educated guess, likely based as much on the temperament of the judge she will have to convince as on the cases.

To illustrate the deficiencies of the current system, imagine a claimant—call her Dorothy—suffering from Sjögren’s Syndrome, a systemic autoimmune disease<sup>179</sup> and a relatively common ailment affecting Social Security plaintiffs.<sup>180</sup> Say Dorothy lives in Kansas City (where else would she live?) and unsuccessfully seeks disability benefits from the Social Security Administration, by order of a local ALJ. Dorothy visits an attorney, and asks whether it would be worth it to appeal. Diligently looking into his potential client’s question, the attorney searches for controlling law. He finds none. Neither the Tenth Circuit nor the Supreme Court has issued a published decision discussing a Social Security claim filed by someone with Sjögren’s. Expanding his search, the attorney looks for decisions from the District of Kansas involving Social Security claimants suffering from Sjögren’s. He finds two published opinions.<sup>181</sup> The first is by Chief Judge Vratil, who reversed and remanded for further proceedings,

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179. See SJÖGREN’S SYNDROME FOUNDATION, <http://www.sjogrens.org> (last visited Jan. 23, 2013), for a fuller description of Sjögren’s.

180. A search on Westlaw among all federal cases for “Social Security” & Sjögren’s came up with 118 hits. *See supra* note 54 (referring to the currency of search results).

181. *Harkins v. Barnhart*, 359 F. Supp. 2d 1153 (D. Kan. 2005); *Busby v. Barnhart*, 325 F. Supp. 2d 1221 (D. Kan. 2004).

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thus handing the plaintiff a victory.<sup>182</sup> The second is by Judge Lungstrum, who affirmed the denial of benefits, thus handing the plaintiff a defeat.<sup>183</sup> Both judges are still in the Kansas City courthouse, but so is another. Will Chief Judge Vratil get the case? Will she follow her previous decision? Will Judge Lungstrum get it? Will he follow *his* previous decision? Will Judge Murguia get it? Will he follow Chief Judge Vratil? Judge Lungstrum? Neither? A world of uncertainty awaits the attorney and Dorothy; the former cannot offer much in the way of intelligent counsel, and the latter cannot make much of an informed decision.

Now place the attorney and Dorothy in the legal environment hypothesized by this Article. The absence of case law from the Supreme Court and the Tenth Circuit is tolerable, because the two published decisions from the District of Kansas must be followed. It does not matter which judge gets the assignment, she will have to apply the settled law. The attorney can carefully read and parse the two decisions, and can explain to Dorothy how they weigh on her potential action and its likely fate. Dorothy can make up her mind in light of that advice.

Obviously this is a greatly oversimplified hypothetical, not least because the fact that two individuals suffer from the same condition does not necessarily mean that either case, let alone both, will be applicable to the case of a third individual with the disease. No matter. Though somewhat crude, the example underscores a true and important fact: the absence of any meaningful predictability in this area, an absence that can easily and reasonably be filled.

#### E. *Efficiency*

The benefits in efficiency that would be garnered from the proposal under consideration should already be clear. To see them, one might return to Dorothy and her Sjögren's-based claim. As it stands at present, Dorothy's decision whether or not to file an appeal in federal court hinges on a highly

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182. *Harkins*, 359 F. Supp. 2d at 1163.

183. *Busby*, 325 F. Supp. 2d at 1230-31.

speculative exercise, because there is no binding precedent on point and her lawyer has no firm idea as to how much weight, if any, the judge will give to the published district court cases discussing her condition. The decision to pursue satisfaction in court, with its associated costs in time and money to the claimant, his attorney, and the executive and judicial branches, should not rest on so tenuous a ground. In contrast, if those district court cases carry the force of law, Dorothy will be far better-equipped to intelligently deliberate over her choice. If she has a decent shot, she will press forward for the benefits she arguably deserves; if she does not, she can save everyone the energy and expense. An enormous backlog of cases is reduced, and everyone benefits from the improved efficiency.

### Conclusion

We dwell in a vast, and vastly complex, administrative state, in which many problems require equally complex solutions that take into account the interconnections between myriad finely-tuned components.<sup>184</sup> Other problems are less formidable, and they should be tackled in a more straightforward fashion. A prime example is the inconsistency between federal district court judges in the resolution of Social Security appeals. It is a simple problem, but one with sweeping and deleterious consequences for the fairness, efficiency, and efficacy of one of the country's most important programs. And it has an equally simple solution: make published district court decisions in Social Security appeals binding law on all judges within the district. Unlike many administrative reforms, this one would necessitate no rancorous legislative debate, no interminable implementation process, and no expensive expansions of staff, services, etc.<sup>185</sup> All it would take would be a

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184. See generally J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996) (exploring the complicated relationship between law and society in the current administrative environment).

185. See generally the Patient Protection and Affordable Care Act, 124 Stat. 119 (2010), for an example of administrative change that carried with it all of these ills, each likely necessary given the complexity of the area and the breadth of the reforms.

decision by the courts themselves to imbue their own decisions with more authority.<sup>186</sup> Given the many daunting issues facing federal entitlement programs,<sup>187</sup> such a modest and commonsense step does not seem too much to ask.

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186. Interesting questions could be raised about just what entities might legally order this change. It seems beyond dispute that the circuit courts or U.S. Supreme Court would be authorized to, given their supervisory powers over the district courts. *Cf. Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.10 (1996) (“If there is a federal district court standard, it must come from the Court of Appeals, not from the over 40 district court judges in the Southern District of New York, each of whom sits alone and renders decisions not binding on the others.”). If the higher courts can withhold the force of binding law to district court decisions, surely they can grant that force as well. It is more open to debate whether the district courts themselves could, consistent with their role in the judicial hierarchy, begin treating their own opinions as precedential without instruction from the courts of appeals, though it would likely become a moot point, as the circuit courts would no doubt review that alteration on appeal eventually. Other challenges could be raised to an act of Congress that purported to alter the status of district court opinions, presumably on separation of powers grounds. *See Nash & Pardo, supra* note 12, at 1750-51 (“Commentators debate whether Congress can statutorily alter or abrogate the traditional rules of stare decisis, as well as the normative question of whether it should.”) (footnote omitted). Since this Article explores only the benefits of the proposed change, it will leave to other commentators the task of spelling out the legitimate mechanisms for bringing about that change.

187. *See, e.g.,* Robert E. Moffit, *Expanding Choice Through Defined Contributions: Overcoming a Non-Participatory Health Care Economy*, 40 J.L. MED. & ETHICS 558, 562 (2012) (lamenting the “huge and financially troubled federal entitlement programs”).