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Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board

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TIME FOR A NEW APPROACH: WHY THE JUDICIARY SHOULD DISREGARD THE "LAW OF THE CIRCUIT" WHEN CONFRONTING NONACQUIESCENCE BY THE NATIONAL LABOR RELATIONS BOARD

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The National Labor Relations Board has been criticized for its nonacquiescence policy, under which the Board interprets the National Labor Relations Act, issues an order, and then defends this order before a circuit court that previously had rejected the Board's interpretation of the Act. In this Article, Professor Rebecca White begins by stating that the NLRB's nonacquiescence policy is both lawful and proper. From this basic premise, White then argues that courts of appeals should abandon the "law of the circuit" doctrine when confronting Board nonacquiescence. She contends the policy concerns that justify application of the "law of the circuit"—which include providing guidance and certainty to district courts, lawyers and parties—are not applicable when a court of appeals confronts a Board order that conflicts with a prior circuit decision. White concludes that a retreat from a rigid application of circuit law in this area would decrease forum shopping and increase uniformity of federal labor law.

In recent years, judicial tempers have flared over the National Labor Relations Board's (the "Board" or the "NLRB") "nonacquiescence" in the "law of the circuit."[1] Nonacquiescence occurs when the Board interprets the National

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1. *See* NLRB v. A. Duie Pyle, Inc., 730 F.2d 119 (3d Cir. 1984); Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); Enerhaul, Inc. v. NLRB, 710 F.2d 748 (11th Cir. 1983); NLRB v. Blackstone Co., Inc., 685 F.2d 102 (3d Cir. 1982), *vacated*, 462 U.S. 1127 (1983); PPG Indus. Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982); NLRB v. Jamaica Towing, Inc., 632 F.2d 208 (2d Cir. 1980); Ithaca College v. NLRB, 623 F.2d 224 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858 (7th Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965 (3d Cir. 1979); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978).

For a discussion of the trend of nonacquiescence by administrative agencies fueling judicial resentment, see Schwartz, *Nonacquiescence,* Crowell v. Benson, *and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989). Professor Schwartz recognizes that court decisions have demonstrated:

> palpable judicial *anger* over this conduct by administrative agencies. The reader is left with the unmistakable impression that the judges are responding not only to a perceived violation of the rights of private litigants but also to a perceived attack on their own prerogatives as members of the article III judiciary.

Id. at 1823.

Under the "law of the circuit" doctrine, a decision by one panel is binding on all subsequent panels within the circuit until overruled by the Supreme Court or the circuit court en banc. *See infra*

Labor Relations Act (the "NLRA"), issues a conforming order, and then defends it before a circuit court that previously had rejected the Board's interpretation. This nonacquiescence has been criticized despite the broad venue provisions governing review of NLRB orders, which make it impossible for the Board, when issuing an order, to know what circuit ultimately will review the order.[2] In the eyes of the appellate courts, the Board acts outside the law when it prefers its own view of the Act to that of the circuit that ultimately reviews the order.[3] The Board, however, has stood its ground, steadfastly maintaining that it, not the regional courts of appeals, has primary authority to say what the law is in matters involving national labor policy.[4]

Who is correct? Should the Board be required to conform its rulings to the law of a reviewing court? Or is the Board free to regard circuit court precedent as informative but not binding?

This Article addresses these questions by first noting that the occasions for Board nonacquiescence are inflated by the judiciary's unwillingness to accept its limited role in fashioning national labor law.[5] Were the judiciary to stay within its proper bounds, instances of nonacquiescence would be minimized.[6] Telling the judiciary to give greater deference to the Board, however, does not resolve the lawfulness of Board nonacquiescence.[7] This Article resolves this issue by concluding that nonacquiescence by the NLRB is lawful and proper, both at the level of agency decisionmaking and at the level of appellate review when the Board advocates its legal position.[8]

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notes 212-14 and accompanying text. The appeals courts themselves follow the law of the circuit when reviewing Board orders and thus become angry when the Board does not consider itself similarly bound by circuit law. *See infra* notes 19-22 and accompanying text.

2. 29 U.S.C. § 160(e)-(f) (1988). For a discussion of the NLRA's venue provisions and the uncertainty they provoke in predicting which court will review a particular Board order, see *infra* notes 53-63 and accompanying text.

3. See, for example, NLRB v. Blackstone Co., Inc., 685 F.2d 102, 106 n.5 (3d Cir. 1982), *vacated*, 462 U.S. 1127 (1983), in which the court considered the Board's failure to follow circuit law "to be completely improper and reflective of a bureaucratic arrogance which will not be tolerated." The Third Circuit's view is representative of the appellate courts as a whole. *See infra* notes 32-42 and accompanying text.

4. *See* Arvin Automotive, 285 N.L.R.B. 753, 757 (1987); *infra* notes 23-31 and accompanying text.

5. *See* Kafker, *Nonacquiescence by the NLRB: Combat Versus Collaboration*, 3 LAB. LAW. 137, 150 (1987); Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1115 (1987); *infra* notes 124-29 and accompanying text.

6. *See* sources cited *supra* note 5.

7. A court's impermissible step beyond the proper parameters of judicial review would not validate otherwise unlawful agency nonacquiescence. Schwartz, *supra* note 1, at 1902 n.352.

8. Much has been written about the lawfulness of agency nonacquiescence, and most commentators have been critical of the practice. *See, e.g.*, Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. __ (1991) (forthcoming) (manuscript on file with author); Diller & Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Dotson & Williamson, *NLRB v. The Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739 (1987); Ferguson & Bordoni, *The NLRB vs. The Courts: The Board's Refusal to Acquiesce in the Law of the Federal Circuit Courts of Appeals*, NYU 35TH ANNUAL NATIONAL CONFERENCE ON LABOR 195 (R. Adelman ed. 1982); Kafker, *supra* note 5; Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399 (1989); Mattson, *The United States Circuit Courts and the NLRB: "Stare Decisis" Only Applies if the Agency Wins*, 53

This conclusion leads to a difficult, and as yet unconfronted issue, which is the focal point of this Article. If the Board acts lawfully in pursuing its policy of nonacquiescence, how should the reviewing court respond? If nonacquiescence is lawful, punitive or "corrective" measures—such as circuit-wide injunctions restraining nonacquiescence or assessment of attorneys' fees against the Board—are not appropriate.[9] The more subtle question then becomes whether a court of appeals, which is bound to respect the Board's right to nonacquiesce, nonetheless acts properly in denying enforcement of the Board's orders in knee-jerk reliance on "the law of the circuit."

I conclude that it does not. Rather, the same principles that underlie limited judicial review of Board orders and that legitimate nonacquiescence call for the abandonment of the "law of the circuit" doctrine when confronting Board nonacquiescence. Policy concerns that drive "the law of the circuit" doctrine, such as providing guidance to district courts and certainty to lawyers and parties within the jurisdiction, simply are not implicated when a Board order is under review. The retreat from rigid application of circuit law, moreover, would promote other policies by decreasing forum shopping and increasing uniformity of federal labor law.[10]

OKLA. B.J. 2561 (1982); Silver & McAvoy, *The National Labor Relations Act at the Crossroads*, 56 FORDHAM L. REV. 181 (1987); Weis, *Agency Nonacquiescence—Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845 (1987); Comment, *Collateral Estoppel and Nonacquiescence: Precluding Government Litigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847 (1986); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985) [hereinafter Note, *Intracircuit Nonacquiescence*]; Note, *Executive Nonacquiescence: Problems of Statutory Interpretation and Separation of Powers*, 60 S. CAL. L. REV. 1143 (1987) [hereinafter Note, *Executive Nonacquiescence*]; Note, *Denying the Precedential Effect of Federal Circuit Court Decisions: Nonacquiescence by Administrative Agencies*, 32 WAYNE L. REV. 151 (1985) [hereinafter Note, *Denying Precedential Effect*]. One commentator, while critical of nonacquiescence, does recognize that the NLRB is not wholly at fault in the nonacquiescence debate. Kafker, *supra* note 5, at 158-59.

Several recent commentators, however, have gone further and recognized that nonacquiescence by the NLRB is generally lawful. *See* Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) [hereinafter Estreicher & Revesz, *Nonacquiescence*]; Estreicher & Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L. J. 831 (1990) [hereinafter Estreicher & Revesz, *Reply*]; Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399 (1988); Schwartz, *supra* note 1; Recent Developments, *Administrative Nonacquiescence in Judicial Decisions*, 53 GEO. WASH. L. REV. 147 (1984). Commentators, however, do not fully distinguish between nonacquiescence at the agency and appellate court levels. *See infra* note 137 and accompanying text.

For further discussion of the lawfulness of nonacquiescence, see Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986); *infra* notes 137-202 and accompanying text.

9. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 753. Attorneys' fees were assessed against the Board under the Equal Access to Justice Act when the NLRB's General Counsel issued a complaint that was unsupported by the law of the circuit that ultimately reviewed the case. Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983). More recently, other courts have threatened to take remedial action against the Board if nonacquiescence continues, but to date, none has done so. *See, e.g.*, NLRB v. Ashkenazy Prop. Mgt. Corp., 817 F.2d 74, 75 (9th Cir. 1987); *see also* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 712 n.174 (discussing the recent judicial threats against the Board).

Outside the NLRB context, the Ninth Circuit has upheld a circuit-wide injunction prohibiting nonacquiescence by the Social Security Administration. Lopez v. Heckler, 725 F.2d 1489, 1503 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984).

10. *See infra* notes 224-68 and accompanying text.

This proposal is not without drawbacks. The most prominent and obvious drawback is a potential increase in judicial workload. This Article questions, however, how great that increase would be. It also concludes that the benefits of this proposal outweigh any harms.[11] The abandonment of the "law of the circuit" doctrine in the distinctive field of labor law is a step toward achieving a coherent national labor policy, unmarred by needless bickering between the Board and the courts of appeals.

I. UNDERSTANDING THE NONACQUIESCENCE ISSUE

Orders of the National Labor Relations Board are not self-enforcing. The circuit courts of appeals are empowered to review Board orders, either on a petition for enforcement by the Board or on a petition by the aggrieved party (typically either a union or an employer) to set aside the order.[12] Unless the order is enforced by the reviewing court, parties need not comply with it. This method for judicial review of Board orders has been in place since Congress enacted the National Labor Relations Act in its original form in 1935.[13]

Nonacquiescence, as the term is used in this Article, occurs when the Board refuses to conform its rulings to the law of a reviewing circuit. The Board acknowledges that circuit court decisions are controlling for purposes of the individual cases in which they are issued but gives them no broader effect. It regards the decisions simply as "the law of the case."[14] When the same issue arises in future cases, the Board decides those cases in adherence to its previous view of the statute, even if that view has been rejected by a circuit court likely to review the case.[15] Nonacquiescence continues when the Board refuses to fold up its tent after its ruling is brought before a circuit that previously has rejected the Board's view. At this level, the Board insists during the review proceeding upon its right to "respectfully disagree" with the prior circuit decision.[16] This nonac-

11. *See infra* notes 224-78 and accompanying text.

12. 29 U.S.C. § 160(e)-(f) (1982).

13. 49 Stat. 449 (1935) (codified at 29 U.S.C. § 160(e)-(f) (1982)).

14. *See, e.g.*, Carpenters, Local 720, 127 L.R.R.M. (BNA) 1166, 1167 (NLRB 1987). The Board's practice, accordingly, is to apply the law of the case in any remand of the decision but not to consider the precedent binding in any other case. *But see* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 706 n.148 (acknowledging that the Board "typically" treats circuit decisions as the law of the case but unearthing a few cases in which the Board did not accord even that respect to circuit law).

15. *See, e.g.*, Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), *cert denied*, 449 U.S. 975 (1980). Because the case arose in the Second Circuit and because the Second Circuit previously had rejected the approach the Board applied in *Ithaca College*, a strong likelihood of review in the Second Circuit was apparent at the time of the Board's decision. Kafker, *supra* note 5, at 141. The Board, however, could not have been certain where review would occur. *See infra* notes 53-59, 142-47 and accompanying texts.

16. In each case cited below, the Board stood by its decision after the case had been brought before a circuit with adverse precedent. *See* NLRB v. A. Duie Pyle, Inc., 730 F.2d 119, 127-28 (3d Cir. 1984); Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382 (D.C. Cir. 1983); Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983); NLRB v. Blackstone Co., Inc., 685 F.2d 102, 106 n.5 (3d Cir. 1982), *vacated*, 462 U.S. 1127 (1983); PPG Indus. Inc. v. NLRB, 671 F.2d 817, 822-23 (4th Cir. 1982); NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 215-16 (2d Cir. 1980); Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 863-64 (7th Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965,

quiescence, both at the agency level and during judicial review, is referred to herein as "intracircuit nonacquiescence."[17]

Nonacquiescence, moreover, arises from disputed questions of law or mixed questions of law and fact. When a circuit court disagrees with the Board's factual determinations in a particular case and refuses to enforce the Board's order, that decision provokes no opportunity for nonacquiescence. There has been no fundamental disagreement between the Board and court on the meaning of the statute or on how the statute's underlying policies are best effectuated. Opportunity for nonacquiescence arises only when the reviewing court and the Board disagree on the statute's meaning or, more commonly, on the policies the Board has adopted in implementing the Act.[18] Intracircuit nonacquiescence occurs when the Board then adheres to its view in cases reviewed by (or arising in) a circuit that previously rejected the Board's position.

*Intra*circuit nonacquiescence must be distinguished from *inter*circuit nonacquiescence, which occurs when one circuit has rejected the Board's view and the Board subsequently presses its view before another circuit.[19] Intercircuit nonac-

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968 (3d Cir. 1979); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978). This posture is viewed as nonacquiescence at the appeals level by the circuit courts.

Former General Counsel Rosemary Collyer has stated the Board often will submit to entry of judgment against it in a circuit with adverse precedent. *See* Remarks of Rosemary M. Collyer before Southwestern Legal Foundation, October 18, 1983, *reprinted in* DAILY LAB. REP. No. 206, October 24, 1985, at E-1, and discussed in Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 708. [hereinafter Remarks of Rosemary M. Collyer] Collyer's remarks are inconsistent with the Board's actions in reported cases and with its subsequently articulated position in Arvin Automotive, 285 N.L.R.B. 753, 757 (1987). For a discussion of *Arvin Automotive*, see *infra* notes 48-68 and accompanying text.

Additionally, in McElrath Poultry Co., Inc. v. NLRB, 494 F.2d 518, 518 (5th Cir. 1974), the case Collyer cited in support of her proposition, the Board petitioned for enforcement in a circuit with adverse precedent and, though acknowledging that circuit law would control disposition of the case, formally adhered to its position in the face of circuit law. The case does not reflect a consent to entry of judgment.

17. Courts criticizing the Board for nonacquiescence have expected the Board to conform its position to circuit rulings even when the case did not arise within the circuit. *See, e.g.*, *Yellow Taxi Co.*, 721 F.2d at 382 (case arose in Minnesota but review was sought in the D.C. circuit). In essence, the courts seem to contend that once the Board is before the appeals court, it knows that court's law will apply, and it should withdraw its enforcement petition in the face of adverse precedent. *See* Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 605. For a discussion of the differences between nonacquiescence at the agency level and nonacquiescence at the appellate review level, see *infra* notes 137, 173-202 and accompanying texts.

18. Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 599 (recognizing that fact-oriented reversals do not create a situation in which nonacquiescence is possible). "A court creates precedent in which agency nonacquiescence is possible 'when it sets forth a statutory interpretation contrary to that of the agency.'" *Id.* (quoting H.R. REP. No. 618, 98th Cong., 2d Sess., at 23 (1984)).

Professor Maranville distinguishes between what she refers to as "formal" and "informal" nonacquiescence. Maranville, *supra* note 8, at 480-84. In situations of informal nonacquiescence, the Board either fails to acknowledge the existence of circuit precedents, or tries, unconvincingly, to make factual distinctions between the precedent and the case at hand. *Id.* at 480. These cases, too, involve differing views of the law, not simply differences in the application of agreed-upon law to disagreed-upon facts. But informal nonacquiescence, Maranville points out, engenders less hostility in the judiciary. *Id.* at 483. Formal nonacquiescence, in which the Board freely admits to its "respectful disagreements" with circuit law, "simply may be perceived as too blatant a threat to judicial status." *Id.* at 484.

19. For a discussion of the differences between intercircuit and intracircuit nonacquiescence, see Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 687-88; Maranville, *supra* note 8, at 484-86; Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 583.

quiescence invokes no judicial hostility, in part because it mirrors the way circuit courts themselves treat precedent from other circuits.[20] Although one circuit may find another's views persuasive, no circuit considers itself bound by decisions of a sister circuit.[21] In contrast, decisions by one panel within a circuit are regarded as the "law of the circuit" and binding on subsequent panels and district courts within the circuit.[22] It thus is not surprising that intercircuit nonacquiescence is understood and tacitly approved by reviewing courts, while intracircuit nonacquiescence is routinely condemned.

The Board long has adhered to its policy of nonacquiescence.[23] Since at least 1944, the Board has insisted upon its right to disagree with the circuit courts over the statute's meaning.[24] Under the Board's view, only Supreme Court decisions bind the Board in future cases.[25] For years, the Board has expressly instructed its administrative law judges to follow the law as declared by the Board, rather than the law as declared by the various circuit courts.[26] The Board itself will "determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise."[27]

The Board's position is premised, in part, on its responsibility for administering a national statute.[28] The National Labor Relations Act, according to the

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20. Maranville, *supra* note 8, at 485; *see also* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 740 (discussing judicial acceptance of intercircuit nonacquiescence); Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 583 (same).

21. *See* Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir. 1985); Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 413 (1972); Maranville, *supra* note 8, at 485; Vestal, *Relitigation By Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 123, 162-63 & n.246 (1976). For a discussion of the circuits' failure to follow intercircuit stare decisis, see *infra* notes 209-11 and accompanying text.

22. *See infra* notes 212-14 and accompanying text.

23. For discussion of the history of the Board's nonacquiescence policy, see Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 706-12.

24. Acme Indus. Police, 58 N.L.R.B. 1342, 1345 (1944); Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 706 & n.144.

25. The Board does acknowledge the binding force of Supreme Court precedent. *See Acme Indus. Police*, 58 N.L.R.B. at 1344 n.3; Insurance Agents Int'l Union, 119 N.L.R.B. 768, 773 (1957). Once the Supreme Court decides a question, the Board thereafter conforms its conduct to the Court's decision. *Id.*

26. *Insurance Agents*, 119 N.L.R.B. at 773. In this case, the administrative law judge (ALJ) had applied the law as declared by the D.C. Circuit, not the law declared by the Board. The Board took issue with the ALJ's conduct, instructing its ALJs to apply Board, not circuit court, precedent in deciding the cases before them. *Id.* at 772-73.

The ALJs have abided by the Board's directive, but not without incurring the wrath of the reviewing courts. *See, e.g.*, Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1263 (5th Cir. 1978).

27. *Insurance Agents*, 119 N.L.R.B. at 773. In fact, the Board frequently does decide to acquiesce to the views of a circuit court. Zimmerman, *Restoring Stability in the Implementation of the National Labor Relations Act*, 1 LAB. LAW. 1, 5-6 (1985). See Remarks of Rosemary Collyer, *supra* note 16, for a discussion of recent cases in which the Board has rejected its prior decisions in favor of circuit court precedents. The point is that the Board insists on reserving for itself the right to evaluate the circuit courts' reasoning and to decide whether to adopt it as the new or revised policy of the Board.

28. Modjeska, *supra* note 8, at 407 & n.51; Zimmerman & Dunn, *Relations Between the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation*, 8 EMP. REL. L.J. 4, 5 (1982); Zimmerman, *supra* note 27, at 3. For criticisms of the Board's position, see Ferguson & Bordoni, *supra* note 8, at 216-17; Kafker, *supra* note 5, at 142-43; *infra* notes 158-60 and accompanying text.

Board, must be applied uniformly throughout the country.[29] Applying the law of the circuit would lead to geographical differences in the Act's meaning and application.[30] Nonacquiescence preserves uniformity, at least at the Board level.[31]

The circuit courts have never been enamored with nonacquiescence. Over the years, circuits have refused enforcement of Board orders inconsistent with circuit law.[32] It was not until the Third Circuit's decision in *Allegheny General Hospital v. NLRB*,[33] however, that judicial war was declared.

At issue in *Allegheny* was whether separate bargaining units for maintenance and powerhouse employees were appropriate in a hospital.[34] The Third Circuit previously had ruled such units were inappropriate in the health care industry, rejecting the Board's position that separate units were appropriate.[35] On remand the Board in *Allegheny* expressed its "respectful disagreement" with the circuit's view.[36]

The Third Circuit railed at the Board for disregarding the law of the circuit, which the court considered binding on the Board.[37] The court noted the Board

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29. *Insurance Agents*, 119 N.L.R.B. at 773 ("Only by [exercising a power to nonacquiesce] will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.").

30. Were the Board, for example, to follow the law of the circuit in which an unfair labor practice arose, it would be applying the law differently in different parts of the country. For a critique of this result, see *infra* notes 163-65 and accompanying text.

31. By nonacquiescing, the Board maintains uniformity at the agency level, but when appellate courts then apply circuit law on review, national uniformity is lost. Thus, a nonacquiescence policy, by itself, cannot achieve uniformity.

Some critics have used the lack of uniformity after review as a basis for condemning nonacquiescence, arguing that if uniformity is not achieved in the long run, then nonacquiescence cannot be justified. *See* Ferguson & Bordoni, *supra* note 8, at 216; Kafker, *supra* note 5, at 142-43. However, Board-level uniformity is itself a justifiable goal, enabling the Board to administer the statute more efficiently. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 748; *infra* notes 163-65 and accompanying text. Moreover, the lack of uniformity that results from reviewing courts applying circuit law could be mitigated if the courts adopted the proposal advocated in this Article that they relax their reliance on circuit law in cases of Board nonacquiescence. *See infra* notes 245-53 and accompanying text.

32. *See, e.g.*, Morand Bros. Beverage Co. v. NLRB, 204 F.2d 529, 532 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953); Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 710-12.

33. 608 F.2d 965 (3d Cir. 1979).

34. *Id.* at 966.

35. St. Vincent's Hosp. v. NLRB, 567 F.2d 588, 592 (3d Cir. 1977); Memorial Hosp. of Roxborough v. NLRB, 545 F.2d 351, 356-59 (3d Cir. 1976). The Third Circuit's view was based on the court's reading of the legislative history of the 1974 amendments to the NLRA, which brought hospitals and other health care institutions within the Act's coverage. *See St. Vincent's Hosp.*, 567 F.2d at 589-92.

36. After carefully reconsidering the legislative history of the 1974 amendments, we have concluded, that, with all due respect to the court, Congress did not intend to prohibit such units. . . . Also in its decision in *St. Vincent's Hospital v. NLRB*, the court went on to conclude that the legislative history of the 1974 amendments also precluded the Board from relying on its traditional community-of-interest criteria in making unit determinations in the health care industry. On this point, too, we must respectfully disagree.

Allegheny, 608 F.2d at 967 (quoting 239 N.L.R.B. No. 81 (1978)).

37. *Id.* at 969-70. In their article, Professors Estriecher and Revesz regard *Allegheny* as involving the Board's refusal to follow "the law of the case," not simply the law of the circuit. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 707 n.148. The case previously had been remanded to the Board *on its own motion* for reconsideration in light of the *St. Vincent* decision. *Allegheny*, 608

was not an "equal" to the court but rather was a subordinate on questions of statutory interpretation, relying on *Marbury v. Madison*'s pronouncement that "[i]t is emphatically the province and the duty of the judicial department to say what the law is."[38] Accordingly, the Third Circuit said, the Board lacked "authority to disagree, respectfully or otherwise," with circuit court decisions.[39]

The circuit courts have seized on *Allegheny*'s reasoning, treating Board nonacquiescence as defiance of judicial authority.[40] For example, the Eleventh Circuit awarded attorneys' fees against the Board for issuing a complaint at odds with circuit law.[41] Moreover, the Ninth Circuit recently threatened to impose sanctions against the Board if nonacquiescence continues.[42]

Why has nonacquiescence, openly practiced by the Board for almost fifty years, become such a lightning rod for judicial hostility only in the last ten years? Perhaps the Board has been tarred by the practices of other agencies that engage in nonacquiescence, most notably the Social Security Administration ("SSA").[43] In the early 1980s, the SSA began aggressively pursuing a policy of

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F.2d at 966. On remand, the Board considered the reasoning used in *St. Vincent* and declined to adopt it. *Id.* The case was then refiled before the Third Circuit. *Id.* at 967.

There was, however, no law of the case regarding unit appropriateness. Rather, the law the reviewing court criticized the Board for failing to apply was the law as developed in *Memorial Hospital* and *St. Vincent*. Nor, apparently, had the Third Circuit commanded the Board in remanding the original *Allegheny* petition to apply that law. Thus, *Allegheny* more properly is regarded, as the court itself regarded it, as a failure by the Board to apply the law of the circuit, not the law of the case. It was clear in *Allegheny*, however, that the Third Circuit was the court likely to hear the case, since the case was before the Board on remand from the Third Circuit.

Even when remanded, however, a case ultimately may not be reviewed in the same circuit that issued the remand. Indianapolis Power & Light Co. v. NLRB, 898 F.2d 524, 528-29 (1990) (remanded to Board by D.C. Circuit and then reviewed in Seventh Circuit); Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 687 n.34.

38. *Allegheny*, 608 F.2d at 970 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

39. *Id.*

40. Many of these courts, in condemning nonacquiescence, quoted *Allegheny* or expressly relied on its reasoning. *See, e.g.*, NLRB v. Ashkenazy Prop. Mgt. Corp., 817 F.2d 74, 75 (9th Cir. 1987); NLRB v. A. Duie Pyle, Inc., 730 F.2d 119, 128 (3d Cir. 1984); Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382-83 (D.C. Cir. 1983); PPG Indus., Inc. v. NLRB, 671 F.2d 817, 823 n.9 (4th Cir. 1982); Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980). Board Chairman Dotson aptly described *Allegheny* as "representative of the circuit decisions." Arvin Automotive, 285 N.L.R.B. 753, 761 (1987) (Dotson, dissenting). Certainly, it is fair to say that the reasoning used to criticize nonacquiescence by the Board has not proceeded beyond that employed in *Allegheny*.

41. Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983). The court did not consider the fact that the General Counsel, at the time the complaint was issued, could not have known with certainty that the case would be reviewed in the Eleventh Circuit. Moreover, the Eleventh Circuit apparently believes circuit law binds not only the Board, but also the General Counsel. As Professor Maranville points out, this belief is quite an expansion of the controlling case doctrine. *See* Maranville, *supra* note 8, at 507-08. For a discussion of the application of the controlling case doctrine to agency nonacquiescence, see *infra* notes 153, 182-83 and accompanying texts.

42. *Ashkenazy Prop. Mgt. Corp.*, 817 F.2d at 75 ("[A]ny future act of 'nonacquiescence' should be dealt with by this court in the specific context in which it occurs so that we may address the agency's particular violation of the rule of law and fashion a remedy that is appropriate in light of all the relevant circumstances."). This threat has not gone unnoticed by the Board. *See Arvin Automotive*, 285 N.L.R.B. at 761 (Dotson, dissenting).

43. *See Revenge of the Judges; Conference Can't Resolve Agency-Court Clash*, Legal Times, September 26, 1988, at 2. The nonacquiescence debate, "both in the [Administrative] conference and in the extensive writing on the subject, has clearly been colored by the practices of the Social Security Administration." *Id.* at 3. At the September 10, 1988, meeting of the Administrative Con-

nonacquiescence, cutting off benefits to disabled individuals in the face of contrary circuit law.[44] Class action suits were filed,[45] and some courts enjoined the SSA's actions.[46] As a result, nonacquiescence by all administrative agencies was in the spotlight, and it was roundly criticized by academics as well as by the judiciary.[47]

In 1987, the Board responded to these attacks. The *Arvin Automotive*[48] Board refused to apply the law as declared by the Eleventh Circuit, the circuit in which the case arose.[49] In doing so, the Board deemed "it advisable to explain in some detail [its] reasons for declining to embrace" circuit law.[50] Those rea-

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ference rejecting guidelines for curbing nonacquiescence, its panel leader stated that "[p]art of the problem that keeps people from approaching this problem objectively is the horrible record of the Social Security Administration and [Health and Human Services Department] under this administration particularly.... People don't want to talk compromise because there is tremendous polarization." *Id.* For a similar view, see Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 681; Schwartz, *supra* note 1, at 1817.

Another agency that routinely has engaged in nonacquiescence is the Internal Revenue Service. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 713-14. Professors Estreicher and Revesz, moreover, conducted a survey of the major federal administrative agencies and concluded almost all engage in nonacquiescence, at least on an ad hoc basis. Two exceptions were the Federal Communications Commission and the Environmental Protection Agency. *Id.* at 716-18. However, the most "notorious" practitioners of nonacquiescence have been the SSA, the IRS, and the NLRB. *See, e.g.*, *id.* at 681-82; Maranville, *supra* note 8, at 477-78; Schwartz, *supra* note 1, at 1816-17; Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 584.

44. The SSA had followed a policy of nonacquiescence for years, but under 1980 amendments to the Act, it was required to begin checking, from time to time, a claimant's continuing eligibility for benefits. These reassessments provoked disputes over whether evidence of medical improvements to the claimant's condition was needed to justify cutting off benefits. The agency contended no such evidence need be presented; numerous reviewing courts disagreed. The SSA refused to acquiesce to the circuits' view.

For detailed discussion of the SSA's nonacquiescence practices, see Coenen, *supra* note 8; Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 692-704; Kubitschek, *supra* note 8, at 401-08; Schwartz, *supra* note 1, at 1817-18 n.3; Note, *Nonacquiescence: Health and Human Services' Refusal to Follow Federal Court Precedent*, 63 WASH. U.L.Q. 737, 744-47 (1985).

45. *See, e.g.*, Hyatt v. Heckler, 807 F.2d 376, 376 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); Schisler v. Heckler, 787 F.2d 76, 78 (2d Cir. 1986); Kuehner v. Schweiker, 717 F.2d 813, 815 (3d Cir. 1983), *vacated*, 469 U.S. 977 (1984); Stieberger v. Heckler, 615 F. Supp. 1315, 1321 (S.D.N.Y. 1985), *vacated*, 801 F.2d 29 (2d Cir. 1986); Thomas v. Heckler, 598 F. Supp. 492, 493 (M.D. Ala. 1984); Holden v. Heckler, 584 F. Supp. 463, 466 (N.D. Ohio 1984); Lopez v. Heckler, 572 F. Supp. 26, 27 (C.D. Cal. 1983), *rev'd in part*, 725 F.2d 1489 (9th Cir.), *vacated*, 469 U.S. 1082 (1984).

46. *See, e.g.*, Schisler v. Heckler, 787 F.2d 76, 84 (2d Cir. 1987); Holden v. Heckler, 584 F. Supp. 463, 496 (N.D. Ohio 1984); Thomas v. Heckler, 598 F. Supp. 492, 495-97 (M.D. Ala. 1984); Lopez v. Heckler, 572 F. Supp. 26, 29 (D.C. Cal. 1983), *rev'd in part*, 725 F.2d 1489 (9th Cir.), *vacated*, 469 U.S. 1082 (1984).

47. *See* cases cited *supra* notes 1, 45; critical commentary cited *supra* note 8.

In 1984, while considering the Social Security Disability Benefits Reform Act of 1984, Congress considered a proposal to bar intracircuit nonacquiescence. H.R. 3755, 98th Cong., 2d Sess. § 302 (1984). It refused to enact that provision, however, although House and Senate conferees did express concern over agency nonacquiescence. H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3095.

48. 285 N.L.R.B. 753 (1987).

49. *Id.* at 754. The issue in *Arvin* concerned when the statute of limitations period begins to run in regard to the enforcement or maintenance of a superseniority clause in a collective bargaining agreement. The Eleventh Circuit in a previous case had held that the statute begins running at the time the contract is executed. The Board refused to adopt this automatic rule, preferring instead to determine the matter on a case-by-case basis. *Id.*

50. *Id.* at 756. In the 30 years between its decision in Insurance Agents International Union, 119 N.L.R.B. 768 (1957), and its decision in *Arvin Automotive*, the Board offered no detailed justifi-

sons focused primarily on the venue provisions of the National Labor Relations Act.[51]

By focusing on the Act's venue provisions, the Board sought to distinguish itself from other agencies, particularly the SSA.[52] The venue provisions for review of Board orders[53] are broader than those governing many other administrative agencies.[54] The NLRA's broad venue scheme contrasts with the venue provisions applicable to the SSA, which provide that venue always lies in the circuit in which the disabled individual resides.[55]

Under the venue provisions of the NLRA, the Board may seek enforcement of its order in the circuit where the unfair labor practice arose or in which the respondent resides or transacts business.[56] As a general policy, the Board seeks enforcement in the circuit in which the case arose.[57] This policy, however, does not make venue certain.[58] Instead of waiting for the Board to file an enforce-

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cation for its nonacquiescence policy. By 1987, however, when *Arvin* was decided, judicial hostility toward Board nonacquiescence was in full bloom. Moreover, Board Chairman Dotson was urging the Board to abandon its nonacquiescence policy. *See infra* notes 64-68 and accompanying text. It thus was incumbent upon the Board to lay out the reasons for refusing to follow circuit law.

51. *Arvin Automotive*, 285 N.L.R.B. at 757. The Board also noted that, since the Eleventh Circuit's prior decision, three other circuits had disagreed with the Eleventh Circuit's position. *Id.* at 756-57. The Board found it possible that the Eleventh Circuit would reexamine its position and would fall into line with the other circuits. *Id.* at 757.

52. Commentators before and after *Arvin* have recognized that venue uncertainty is a basis for distinguishing nonacquiescence by the NLRB from nonacquiescence by agencies operating under venue-certain statutes. They have disagreed, however, on whether this factor legitimates Board nonacquiescence. *Compare, e.g.*, Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 741-43 (finding Board nonacquiescence lawful and recognizing the broad venue provisions of the NLRA); Modjeska, *supra* note 8, at 416-17 & n.110 (same); Schwartz, *supra* note 1, at 1856-57 & n.159 (same); *with* Dotson & Williamson, *supra* note 8, at 746 & n.36 (contending that venue choice does not excuse Board nonacquiescence); Ferguson & Bordoni, *supra* note 8, at 207 (same); Silver & McAvoy, *supra* note 8, at 199-205 (same). For further discussion of venue uncertainty and its effect on the lawfulness of Board nonacquiescence, see *infra* notes 145-71 and accompanying text.

53. 29 U.S.C. § 160(e)-(f) (1988).

54. "[T]he NLRB has by far the most liberal venue provisions (and, consequently, the greatest opportunity for forum-shopping) for judicial review of its final orders." Comment, *"Respectful Disagreement": Nonacquiescence by Federal Administrative Agencies in United States Courts of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463, 491 (1985). In particular, the venue provisions governing the NLRB are broader than those governing the Social Security Administration, 42 U.S.C. § 405(g) (1988), and the Internal Revenue Service, 28 U.S.C. § 1402(a) (1988), the two other administrative agencies whose nonacquiescence policies have provoked judicial and academic criticism. *See supra* note 43. *See also* Kafker, *supra* note 5, at 144 (venue uncertainty has been a primary ground for distinguishing nonacquiescence by the NLRB from nonacquiescence by the SSA and IRS).

55. 42 U.S.C. § 405(g) (1988). In addition, an appeal of an SSA decision denying benefits is to the district court, with a right of appeal to the court of appeals. *Id.* In contrast, a petition to enforce or to set aside an order of the NLRB is filed directly with the court of appeals. 29 U.S.C. § 160(e)-(f) (1988).

56. 29 U.S.C. § 160(e) (1988).

57. Arvin Automotive, 285 N.L.R.B. 753, 754 n.2 (1987). Moreover, once a petition for review is filed, the Board will file its cross-petition for enforcement in the circuit in which the review petition is filed. This policy, as noted by Professors Estreicher and Revesz, prevents the Board from taking "full advantage of the strategic benefits of venue choice." Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 766. Presumably the Board has chosen to sacrifice a litigation advantage not only for the ease of application, but to avoid the unseemly practice of forum shopping.

58. "Although it is the Board's policy to seek enforcement of its orders in the circuit in which the unfair labor practice arose, that policy in no way assures that the Board's decision in any given case will actually be reviewed in that circuit." *Arvin Automotive*, 285 N.L.R.B. at 754 n.2; *see also*

ment action, the aggrieved party (employer or union) can seek review of a Board order either 1) in the circuit in which the case arose, *or* 2) in any circuit in which it resides *or* transacts business, *or* 3) in the United States Court of Appeals for the District of Columbia.[59] As the Board noted in *Arvin Automotive*, this venue provision always makes multiple circuits available for review of Board orders and all circuits available to a union or employer that transacts business nationwide.[60] In *Arvin Automotive*, for example, the Board had no way of knowing whether the case in fact would be reviewed in the Eleventh Circuit.[61] These broad venue provisions, the Board said, evidence a congressional intent in favor of nonacquiescence.[62] As the Board stated, "it is thus apparent that we operate under a statute that simply does not contemplate that the law of a single circuit would exclusively apply in any given case."[63]

Board Chairman Dotson dissented, saying he would abandon the Board's nonacquiescence policy in favor of applying the law of the circuit in which the case arose.[64] He noted circuit court opposition to nonacquiescence,[65] the futility of the Board's pressing a position at odds with circuit precedent,[66] and the specter of remedial action against the Board if it continues its nonacquiescence policy.[67] Dotson, echoing the position of the circuit courts, called nonacquiescence "legally untenable" and in conflict with "fundamental tenets of our Federal system."[68]

The fundamental tenet uppermost in Dotson's and the judiciary's mind was and continues to be *Marbury v. Madison*'s pronouncement, relied upon in *Allegheny*, that "it is emphatically the province and duty of the judicial department

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Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 712, 742 (discussing the Board's inability to predict venue).

59. 29 U.S.C. § 160(f) (1988).

60. 285 N.L.R.B. at 757.

61. *Id.* Although the case arose in the Eleventh Circuit and the Board would file a petition for enforcement there, the aggrieved party could seek review in another circuit.

62. *Id.*

63. *Id.*

64. Dotson would require not only the Board but also its General Counsel and, presumably, its ALJs to apply the law of the circuit in which the case arose. *Id.* at 758-63 (Dotson, dissenting). Dotson's approach, while it could not eliminate venue uncertainty, would enable the Board to identify which circuit's law to apply. For criticism of this approach, see *infra* notes 161-72 and accompanying text.

65. *Arvin Automotive*, 285 N.L.R.B. at 760-61 (Dotson, dissenting).

66. *Id.* at 762 (Dotson, dissenting). "Experience confirms that which is implicit in this grant of authority [to enforce, modify, or set aside Board orders]: a Board decision will be enforced only when it accords with circuit precedent." *Id.* (Dotson, dissenting). In other words, Dotson recognized that even if nonacquiescence were lawful, it accomplishes little, given the courts' reliance on the law of the circuit. This reliance, however, is criticized *infra* at notes 224-68 and accompanying text.

Dotson agreed with the Board's position on the merits, as opposed to the view of the Eleventh Circuit, regarding when the statute of limitations begins to run. *Arvin Automotive*, 285 N.L.R.B. at 762 (Dotson, dissenting). Yet, for the reasons set forth in the text, he argued that the Board should abide by the law as declared by the circuit court. *Id.* at 759-63 (Dotson, dissenting).

67. *Arvin Automotive*, 285 N.L.R.B. at 761 (Dotson, dissenting). Dotson found such remedial action to be "foreshadowed" by the Ninth Circuit's decision in NLRB v. Ashkenazy Prop. Mgt. Corp., 817 F.2d 74 (9th Cir. 1987).

68. *Arvin Automotive*, 285 N.L.R.B. at 762 (Dotson, dissenting). Dotson expressed similar views in a contemporaneous law review article. Dotson & Williamson, *supra* note 8, at 746-47.

to say what the law is."[69] But citation to *Marbury*, as explained more fully below, does nothing to resolve the legality of nonacquiescence to circuit court decisions.[70] *Marbury* establishes only that a court's decision is binding as the law of the case.[71] *Marbury* does not oblige any litigant, including the executive branch, to act in accordance with a circuit court's decision in the future.[72]

Nonetheless, the judiciary's reliance on *Marbury* is telling. It reflects a reluctance to recognize what the Supreme Court has made increasingly clear in recent years: administrative agencies, as well as the federal courts, have a duty and the authority to say what the law is.[73] It is inappropriate judicial second-guessing of Board lawmaking that often has set the stage for the Board's subsequent nonacquiescence.[74]

II. THE PROPER SCOPE OF JUDICIAL REVIEW

When judges, accustomed to deciding "what the law is," are expected to defer to agency lawmaking and statutory interpretation, tension occurs.[75] While deferral to agency fact-finding has been accepted, deferral to an agency's view of the law, particularly when the agency's view differs from the reviewing court's, has not.[76]

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69. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), *quoted in* Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979); *Arvin Automotive*, 285 N.L.R.B. at 760-61 (Dotson, dissenting). *Marbury*'s pronouncement that judges "say what the law is" has been relied on heavily by decisions and commentary criticizing nonacquiescence. *See, e.g.*, Ferguson & Bordoni, *supra* note 8, at 201-10, 214-15 ("In light of the principles established in *Marbury* and the statutory provisions for direct judicial review, the NLRB is indeed bound to follow the law as established by the federal circuit court of appeals."). For further discussion of separation of powers and Board nonacquiescence, see *infra* notes 154, 177-81 and accompanying texts.

70. Maranville, *supra* note 8, at 522; Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 595; Recent Developments, *supra* note 8, at 161. For further discussion, see *infra* notes 154, 177-81 and accompanying text.

71. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) ("Under *Marbury*, the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared."); *see also* Recent Developments, *supra* note 8, at 161 (discussion of *Marbury*'s relation to the issue of agency nonacquiescence); *infra* notes 178-80 and accompanying text (arguing that *Marbury* is weak support for argument against nonacquiescence).

As Professor Modjeska points out, moreover, Board orders are not self-enforcing, and *Marbury* thus is fully satisfied by the judiciary's ability to have the last word in declaring the law of the case. Modjeska, *supra* note 8, at 417.

Supreme Court decisions, however, do have a broader reach and are binding nationwide, not just on the parties to a dispute. Cooper v. Aaron, 358 U.S. 1, 18 (1958). For a discussion of *Cooper v. Aaron*, see Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 723-25. *But see* Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987). The Board, however, acknowledges the controlling force of Supreme Court precedent. *See supra* note 25.

72. *See* sources cited *supra* note 71.

73. Chevron U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837, 842-45 (1984). For discussion of this issue, see *infra* notes 75-136 and accompanying text.

74. *See supra* note 5; *infra* notes 124-33 and accompanying text.

75. *See* Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513-14 (recognizing the judiciary's reluctance to accept an executive agency's judgment on a question of law). Such deference is viewed as "a striking abdication of judicial responsibility," at odds with a "deep-rooted feeling that it is the judges who must say what the law is." *Id.* at 514; *see also* Maranville, *supra* note 8, at 528 (discussing value conflict between judicial and agency lawmaking); Strauss, *supra* note 5, at 1126-29 (discussing judicial resistance to agency-made law and the conflict between judicial focus on individual rights and agency focus on overall program).

76. "The NLRB nonacquiescence cases often have appeared to involve statutory interpretation

Administrative agencies do have lawmaking authority.[77] Some have more than others, depending upon the specificity and clarity of the agency's enabling statute.[78] The greater the ambiguity and breadth of the statute, the greater the power Congress confers on the agency.[79]

The National Labor Relations Act, because it is purposely broad and ambiguous, confers considerable lawmaking power on the Board.[80] That Congress preferred agency, rather than judicial, lawmaking in the labor relations arena reflects the circumstances under which the Act was passed.[81] Congress enacted the NLRA and created the Board in an atmosphere of distrust and displeasure toward judge-made labor law. By 1935, judicial decisions particularly hostile to unions had made Congress wary of giving federal judges authority to decide questions of labor policy.[82] The Board was formed to take national labor policy

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questions influenced by fundamental political disagreements between pro-union agency members and management-oriented courts over the desirability of unionization efforts." Maranville, *supra* note 8, at 491; *see* Kafker, *supra* note 5, at 151-52 (discussing the appeals courts' failure to defer to Board on questions of law); Vance, *A View From the Circuit: A Federal Circuit Judge Views the NLRA Appellate Scene*, 1 LAB. LAW. 39, 45-46 (1985) (recognizing that most of the cases denying enforcement of Board orders involve differing interpretations of the substantive law); Zimmerman & Dunn, *supra* note 28, at 4-5 (discussing the courts' reluctance to honor agency interpretations).

77. *See Chevron*, 467 U.S. at 842-45; Sullivan v. Everhart, 110 S. Ct. 960, 964 (1990).

As Professor Jaffe recognized years ago, "If we admit that the administrative as well as the judiciary can, and within limits should, make law, our analytic problem is much simplified." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 547 (1965).

Jaffe was not discussing nonacquiescence, but his observation is pertinent to this issue. Once one accepts an agency's authority to make law, an agency's refusal to acquiesce in circuit law becomes more understandable. This is not to suggest that agency-lawmaking authority of itself validates nonacquiescence, but it does place the agency's reasons for nonacquiescence into a proper perspective. Strauss, *supra* note 5, at 1114-15. As Professor Modjeska notes, a "[r]ealistic appraisal of the appropriate scope of judicial review is essential to grasping the jurisprudential oversimplification and operational impracticability of intracircuit acquiescence theory." Modjeska, *supra* note 8, at 410.

78. When a statute is detailed, clear, and specific, then Congress has spoken; no power to make law has been delegated to the agency. But when a statute is silent or ambiguous, Congress has delegated its lawmaking authority to the agency. *Chevron*, 467 U.S. at 842-43; *see infra* notes 98-99 and accompanying text; *see also* Scalia, *supra* note 75, at 516-17 (Justice Scalia bases *Chevron* review on congressional intent.). By enacting a silent or ambiguous statute, Congress has conferred on the agency the discretion to resolve the issue at hand. The only question of law for the courts is whether the agency acted within the scope of its discretion. *Id.*

79. *See Chevron*, 467 U.S. at 843-44.

80. *See* NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1549 (1990) (quoting Beth Israel Hospital v. NLRB, 437 U.S. 483, 500-01 (1978)) (recognizing the need for Board " 'authority to . . . fill the interstices of the broad statutory provisions' " of the NLRA); Phelps Dodge Corp. v NLRB, 313 U.S. 177, 194 (1941) ("A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application."); *see also* Modjeska, *supra* note 8, at 406 (pointing out that "the Board, not the courts, was the vehicle devised by Congress to make concrete the broadly phrased policies of the Act"); Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 57 (1968) (noting the ambiguity of the NLRA).

81. Modjeska, *supra* note 8, at 401-09; Winter, *supra* note 80, at 59. For discussion of the labor unrest, judicial decisions, and other historical developments leading to the passage of the NLRA, see A. COX, LAW AND THE NATIONAL LABOR POLICY (1960); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 134-98 (1930); C. GREGORY & H. KATZ, LABOR AND THE LAW 52-252 (3d ed. 1979).

82. As Professor Modjeska notes, the NLRA was written "against a backdrop of judicial insensitivity, if not hostility to the principles of unionism and collective bargaining." Modjeska, *supra* note 8, at 401. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1988), which restricts federal court injunctions in labor disputes, was passed in response to decisions particularly unsympathetic to

out of the hands of courts unsympathetic to the concerns of organized labor.[83]

Yet Congress did confide to the circuit courts the role of reviewing Board orders, with power to enforce them, to modify them, or to set them aside.[84] This review process serves not only to keep the Board within its statutory limits but to validate the agency's power as well.[85] Congress did not design this process, as the Supreme Court long has held, to permit judicial usurpation of the Board's lawmaking authority.[86]

In early cases arising under the Act, the Supreme Court acknowledged the Board's preeminent role in fashioning federal labor policy, admonishing the lower courts to defer to the Board's policy choices.[87] The Court has continued

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labor. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 478 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908). Similarly, the Wagner Act, 29 U.S.C. §§ 151-169 (1988), "continued what the Norris-LaGuardia Act had begun, and further removed the federal courts from labor relations." Modjeska, *supra* note 8, at 404; *see* Winter, *supra* note 80, at 59 n.5 (viewing creation of the Board as a result of congressional dissatisfaction with judge-made labor law).

83. Professor Modjeska states that in creating the Board, Congress was concerned about achieving uniformity and expertise in administration of a federal labor relations law. Modjeska, *supra* note 8, at 407-08. "Accordingly, to achieve its 'vital national purpose' Congress gave primary authority for the interpretation, development, and effectuation of national labor policy to the Board, rather than the courts." *Id.* at 408.

Additionally, Professor Ralph Winter points out that judges were ill-equipped to deal with the subject of collective bargaining. Few had any experience with the issue, and any experience that did exist was "of a kind that is likely to create a distended and skewed view of the institution." Winter, *supra* note 80, at 57. Moreover, Winter adds, the NLRA is not modeled on the common law, and courts therefore could not rely upon common-law analogies to resolve labor law problems. *Id.* at 57-58. Thus, there was a particular need for an expert agency, "better able to understand the implications of the legal issues presented and to fashion rules that are realistic in terms of the underlying problem." *Id.*

84. 29 U.S.C. § 160(e)-(f) (1988); Kafker, *supra* note 5, at 156.

85. As Professor Jaffe explains,

> The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid. . . . [T]here is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and the legislatures.

L. JAFFE, *supra* note 77, at 320-21.

86. For discussion of the Supreme Court's position on judicial review of Board orders, see Modjeska, *supra* note 8, at 409-11.

87. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

Hearst is particularly instructive. At issue in *Hearst* was whether "newsboys" were employees within the meaning of the Act. The Board held that they were, rejecting the companies' contention that one who would be an independent contractor under common law was not an employee. 322 U.S. at 115. The Supreme Court upheld the Board's position, deferring to the Board's construction of the statute. *Id.* at 130. As the Court stated:

> where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law.

Id. at 131. Thus, the Court's deferral to the Board on questions of statutory construction has a long history.

Congress responded by amending the Act to exclude independent contractors from the Act's coverage, criticizing the Court for relying on the Board's "theoretic expertness." H.R. REP. NO. 245, 80th Cong., 1st Sess. 18. Professor Archibald Cox views this exclusion as manifesting "an intention not only to narrow the scope of the Board's jurisdiction and the reach of the Act but also to

to demand such deference from the lower courts.[88] Occasionally, however, the Court has departed from this principle and has taken on the task of formulating labor law.[89]

Lower federal courts have been particularly reluctant to recognize their limited role when reviewing NLRB decisions.[90] Perhaps this reluctance stems from the deep-seated views many judges have about labor policy.[91] The more likely reason for judicial resistance to Board lawmaking, however, is the manner in which the Board accomplishes it. The Board is unique in using adjudication, not formal rulemaking, to establish policy.[92] When policy is developed after a trial-like proceeding and in the form of a written opinion, Board policymaking

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curb the power of the Board in relation to that of the judiciary." A. COX, D. BOK & R. GORMAN, LABOR LAW — CASES AND MATERIALS 100 (10th ed. 1986).

If curbing the Board's power ever were Congress's intent, it has not been realized. Rather, the *Hearst* approach to judicial review has been endorsed by *Chevron*. *See* Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 311-12 (1988); Strauss, *supra* note 5, at 1119.

88. *See, e.g.*, NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1549 (1990); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987); Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 417-19 (1982); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-01 (1978).

89. "If any conclusion can be drawn, it is that the Supreme Court believes great deference should be shown to the Board's expertise, but when the Supreme Court itself is confident that the Board is wrong, the Supreme Court need not practice what it preaches." Kafker, *supra* note 5, at 157. Professor Winter also has criticized the Court for too often appropriating the Board's policymaking function, even arguing that "the Court's failure to observe the proper scope of review of Board decisions may raise a serious issue of separation of powers." Winter, *supra* note 80, at 74.

Nonetheless, the Supreme Court's failure to observe the proper limits of judicial review does not pose the hazards for uniformity that are caused by similar failures of the courts of appeals. Even when the high court errs, the Board acknowledges the Court's decision is binding. Thus, the Court's interpretation prevails nationwide. But when a lower court does not observe the proper limits of judicial review, that ruling engenders disagreement not only between the Board and the court, but also among the various courts of appeals. Kafker, *supra* note 5, at 157-58.

90. Estreicher, *The Second Circuit and the N.L.R.B. 1980-81: A Case Study in Judicial Review of Agency Action*, 48 BROOKLYN L. REV. 1063, 1071, 1090 (1982); Kafker, *supra* note 5, at 146-52; *see infra* notes 122-29 and accompanying text.

91. See Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 28-29 (1975), in which the authors advocate retaining review of NLRB decisions in a three-member appellate panel, rather than in the district courts, because "labor relations is an area in which variations in particular attitude and philosophy among district judges are peculiarly likely to influence litigation outcomes." *Id.*; *see also* Maranville, *supra* note 8, at 491 (noting the strong "political disagreements" between the Board and the reviewing courts and asserting that these disagreements fuel the nonacquiescence debate); Vance, *supra* note 76, at 40 (in which the late Judge Vance noted that labor law "is a field in which strong convictions hold sway" and may prompt what he believes to be a small minority of judges to "write opinions that serve as vehicles for such convictions").

It has been asserted that circuit courts, with good reason, are becoming more willing to substitute their judgment for the Board's, based on a perception that Board members lack personal experience in collective bargaining and thus have no special expertise. *See* Ogden, *An Impasse in Decisionmaking*, 31 LAB. L.J. 559, 560 (1980). This argument overlooks the fact that Board expertise is not limited to Board members but includes the underlying staff as well. "That 'cumulative experience' which in the Court's view comprises much of the Board's 'specialized knowledge' necessarily resides in substantial part with the career staff." Modjeska, *supra* note 8, at 427.

92. "Despite the fact that the NLRB has explicit rulemaking authority, . . . it has chosen—unlike any other major agency of the federal government—to make almost all its policy through adjudication." NLRB v. Curtin Matheson Scientific Inc., 110 S. Ct. 1542, 1566 (1990) (Scalia, J., dissenting) (citing 29 U.S.C. § 156 (1982)). The Board has been roundly criticized for its failure to use rulemaking, as opposed to adjudication. *See, e.g.*, Morris, *The N.L.R.B. in the Dog House — Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9 (1987).

looks quite "judicial."[93] Appellate courts perhaps feel more competent to overturn such "judicially made" agency policies, substituting their own policies in the process.

But agency lawmaking, whether through adjudication or through formal rulemaking, is entitled to deference from the courts.[94] In *Chevron U.S.A. Inc. v. NRDC*, the Supreme Court mandated deference to a wide range of agency lawmaking.[95]

Chevron established a two-step approach to judicial review.[96] First, the reviewing court must determine whether the statute speaks directly to the specific issue at hand.[97] If the statute directly addresses the issue, then the court must give effect to the clear and unambiguous congressional intent.[98] If, however, the statute either skirts the precise issue or is ambiguous, the court must accept the agency's view, provided that view is based on a permissible construction of the statute.[99]

Sometimes, the statute will direct the agency to fill in the statutory gaps, expressly delegating legislative authority. If, as is often the case, the statute is silent or ambiguous, however, *Chevron* recognizes that statutory silence or ambiguity is an implicit delegation of authority.[100] Thus, the agency's construction

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93. *See* R. POSNER, THE FEDERAL COURTS 148-49 (1985) (likening the NLRB to a labor court).

94. Scalia, *supra* note 75, at 519. *But see* Comment, *Deference to N.L.R.B. Adjudicatory Decision Making: Has Judicial Review Become Meaningless?*, 58 U. CIN. L. REV. 653, 685-87 (1989) (suggesting *Chevron* may not apply to adjudicatory proceedings); *cf.* Union of Concerned Scientists v. United States Nuclear Reg. Comm'n, 824 F.2d 108, 113 (D.C. Cir. 1987) (asserting *Chevron* applies only to adjudicatory proceedings).

95. 467 U.S. 837 (1984).

96. For a discussion and debate of the *Chevron* "two-step" approach, see Starr, Sunstein, Willard & Morrison, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353 (1987). For another excellent discussion of *Chevron*, see Pierce, *supra* note 87.

97. When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, 467 U.S. at 842-43.

98. *Id.*

99. [If] the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843.

100. *Id.*; *see* Scalia, *supra* note 75, at 516.

In an article preceding *Chevron*, Professor Monaghan recognized that judicial deference to agency interpretation of the law is simply a recognition of legislative delegation to the agency. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983). So long as the court determines that the agency is acting within its statutory boundaries, agency action should be upheld. *Id.* at 32-34. As Monaghan stated:

In such an empowering arrangement, responsibility for meaning is shared between court and agency; the judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean. In this context, the court is not abdicating its constitutional duty to "say what the law is" by deferring to agency interpretations of the law: it is simply applying the law as "made" by the authorized law-making entity. Indeed,

of an ambiguous statute must be upheld, whether or not it is the only or even the best construction, as long as it is reasonable.[101]

In reaching this result, the *Chevron* Court relied upon the political accountability of administrative agencies.[102] The Court recognized that addressing statutory silences or ambiguities involves policy choices. Congress may have left the issue unresolved for several reasons: Congress may have wanted the expert agency to resolve it; Congress may not have been able to achieve a coalition on the issue and thus passed the buck to the agency; or Congress may never have considered the issue at all.[103] None of these reasons has bearing on judicial review; under any of these scenarios, the agency must make the policy choice.[104]

Chevron thus recognizes that agencies, as politically accountable experts, are better equipped than courts to make policy choices.[105] Some commentators have maintained that *Chevron* adopted the model of judicial review applied in *NLRB v. Hearst Publications, Inc.*: an agency's statutory interpretation must be affirmed if it has a reasonable basis in the law.[106] As Professor Pierce asserts, "the principal effect of the *Chevron* two-step is to allocate policy making responsibility from judges to agencies—an effect with significant benefits."[107]

Chevron applies to pure questions of statutory construction.[108] In *NLRB v. Food & Commercial Workers*, for example, the Supreme Court upheld the Board's determination that section 10(f) of the NLRA does not entitle a party to judicial review of the General Counsel's informal settlements prior to hearing.[109] Relying on *Chevron*, the Court held that the Board's construction was

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it would be violating legislative supremacy by failing to defer to the interpretation of an agency to the extent that the agency had been delegated law-making authority.

Id. at 27-28 (1983).

101. *Chevron*, 467 U.S. at 843 n. 11.

102. *Id.* at 865.

103. *Id.; see* Pierce, *supra* note 87, at 305.

104. *Chevron*, 467 U.S. at 865; *see* Pierce, *supra* note 87, at 307.

105. Professor Pierce has noted that an "agency is a more appropriate institution than a court to resolve [policy issues]. Because agencies are more accountable to the electorate than courts, agencies should have the dominant role in policymaking when the choice is between agencies and courts." Pierce, *supra* note 87, at 307-08.

106. *Id.* at 311; Strauss, *supra* note 5, at 1119. Prior to *Chevron*, Professor Monaghan had praised *Hearst* as a "paradigmatic illustration" of judicial review functioning as it should. Monaghan, *supra* note 100, at 27. *Chevron*, in essence, confirms the *Hearst* approach.

107. Pierce, *supra* note 87, at 310.

108. *See* Sullivan v. Everhart, 110 S. Ct. 960, 965-66 (1990). A question of pure statutory construction arises when the agency is construing the words of a statute susceptible to more than one meaning, not simply making a policy choice left open by a statute. *Id. But see* Immigration & Naturalization Serv. v. Cardoza-Fonesca, 480 U.S. 421 (1987). Some lower courts read *Cardoza-Fonseca* as not requiring deference to a pure question of statutory construction, even if the court views the statute as ambiguous. *See* Union of Concerned Scientists v. United States Nuclear Reg. Comm'n, 824 F.2d 108, 113 (D.C. Cir. 1987). The Supreme Court divided on this issue in NLRB v. United Food & Commercial Workers, 484 U.S. 112 (1987). *See* Scalia, *supra* note 75, at 512. Subsequently, however, the *Sullivan* Court, in a 5-4 decision, applied *Chevron* in a case of statutory construction, upholding HHS's construction of its enabling Act. *Sullivan*, 110 S. Ct. at 964-68. In his dissenting opinion, Justice Stevens claimed an ambiguous statute could not "reasonably be ascribed to a conscious delegation . . . [or] to the absence of intent." *Id.* at 973 n.7 (Stevens, J., dissenting). The opinion rejected this view as inconsistent with *Chevron*. *Id.* at 973 (Stevens, J., dissenting).

109. 484 U.S. 112, 130 (1987).

permissible and thus entitled to deference.[110] Under *Chevron*, as subsequently interpreted and applied by the Court, whenever more than one reasonable interpretation of a statute exists, the court must defer to any permissible construction by the agency.[111]

While *Food & Commercial Workers* was a statutory construction case, more often the courts, in reviewing Board orders, confront cases involving Board gap-filling under the broadly worded NLRA. *Chevron* forcefully reaffirmed that such choices should be made by a politically accountable branch of government.[112]

In *NLRB v. Curtin Matheson Scientific, Inc.*,[113] the Court most recently confirmed this principle in strongly worded terms. At issue in *Curtin Matheson* was the Board's refusal to adopt a presumption that striker replacements oppose union representation. The employer contended that the Board's "no-presumption" rule was outside its discretion, claiming that replacement workers must be presumed to oppose the union because replacements' interests are diametrically opposed to those of the strikers.[114] The Board found no such presumption warranted, reasoning that a replacement worker might support the union and noting that, as a policy matter, an anti-union presumption would impair the right to strike.[115] It instead adopted a "no-presumption" rule, leaving a determination of replacement workers' union sentiments to be decided on a case-by-case basis.[116] The Supreme Court upheld the Board's rule because it was "not irrational."[117]

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110. In his concurring opinion, Justice Scalia pointed out that a pure question of statutory construction was at issue and that *Chevron* had been applied. 484 U.S. at 133-34 (Scalia, J., concurring). The full Court, however, did not necessarily join that view. Not until Sullivan v. Everhart, 110 S. Ct. 960 (1990), did a majority of the Court confirm *Chevron*'s application to a pure question of statutory construction.

111. *Sullivan*, 110 S. Ct. at 971 (1990).

112. *Chevron*, 467 U.S. at 865-66. The opinion stated:

> [I]t is entirely appropriate for this political branch of the Government [the executive branch] to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. The Court expressly stated that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Id.* at 866.

113. 110 S. Ct. 1542 (1990).

114. *Id.* at 1550.

115. *Id.*

116. *Id.*

117. *Id.* at 1551. A certified union enjoys a rebuttable presumption of majority status. Even through work force turnover, it is presumed the employees continue to support the union in the same proportion that existed at the time of certification. Bartenders Ass'n, 213 N.L.R.B. 651, 653 (1974).

During an economic strike, however, an employer may permanently replace striking employees. The Board originally presumed these replacements did not support the union. Titan Metal Mfg. Co., 135 N.L.R.B. 196, 215 (1962). Later, the Board reversed its position and began presuming replacements did support the union. Cutten Supermarket, 220 N.L.R.B. 507, 509 (1975). Thereafter, the Board adopted its "no presumption" rule, refusing to adopt a presumption either way, and instead opting to determine support, or lack thereof, on a case-by-case basis.

The Court in *Curtin Matheson* upheld this rule in the face of the employer's claim that the Board's rejection of the anti-union presumption was unreasonable. The Court found that the employer's arguments "do not persuade us that the Board's position is irrational." *Curtin Matheson*, 110 S. Ct. at 1551.

In reversing the Fifth Circuit, which had refused to enforce the Board's order and instead had adopted a presumption of replacements' opposition to union representation, the Court reminded the lower courts of the Board's primary role in the development and application of federal labor policy.[118] The Court noted, moreover, that the Board's position was not less deserving of deference simply because it represented a departure from prior Board policy.[119] Finally, the powerful (and perhaps ultimately most persuasive) argument opposing the Board's position and favoring a presumption of replacement opposition was not cause for rejecting the Board's "not irrational" position.[120]

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118. The *Curtin Matheson* majority stated:

This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy:

> Because it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,' that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.

110 S. Ct. at 1549 (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-01 (quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945))) (other citations omitted).

119. *Id.* As *Chevron* recognized, an agency is entitled to change its mind and is free to rely on the incumbent administration's policy views in changing its position. *Chevron*, 467 U.S. at 865. Its policy choices are thus politically accountable. Also, flexibility is an attribute of the agency process; the agency can continue to assess the wisdom of its position on an ongoing basis. *Id.* at 843, 865; *see also* Scalia, *supra* note 75, at 518-19 (pointing out an agency's change in position should not be "suspect"). Scalia noted that the agency is changing the law "in light of new information or even new societal attitudes impressed upon it through the political process—all within the limited range of discretion to 'change the law' conferred by the governing statute. *Chevron*, as I say, permits recognition of this reality." *Id.*; *see also* Kafker, *supra* note 5, at 147-48 (recognizing that an agency's change in position is not a proper basis for judicial disapproval); Strauss, *supra* note 5, at 1125-26 (same). *But see* Comment, *supra* note 94, at 685-87.

Congress presumably relied upon this flexibility in delegating broad policymaking power to the Board. As Professor Winter has observed, labor legislation is difficult to amend. When the Board reverses its policy decisions, it is handling ambiguous statutory language just as Congress intended. Labor policy properly changes in response to changing political climates. Winter, *supra* note 80, at 65.

120. *Curtin Matheson*, 110 S. Ct. at 1550-53.

In his concurring opinion, Chief Justice Rehnquist acknowledged that "the Board's 'no-presumption' rule seems to me to press to the limit the deference to which the Board is entitled in assessing industrial reality," noting that the Board was "refusing to allow the employer to resort to what would seem to be commonsense assumptions about the views of an entire class of workers." *Id.* at 1554-55 (Rehnquist, C.J., concurring). This "commonsense assumption" is based on the reality that a union frequently will negotiate a strike settlement that calls for the firing of replacements to make way for returning strikers. *Id.* at 1555 (Rehnquist, C.J., concurring). Nonetheless, the Court upheld the Board's "not irrational" refusal to adopt an anti-union presumption. *Id.* at 1553.

Justice Blackmun dissented, criticizing the Board for failing to reconcile its "no-presumption" rule with a competing line of cases regarding the union's diminished bargaining rights and responsibilities for replacement workers. *Id.* at 1556 (Blackmun, J., dissenting). In his view, judicial review permits the courts to insist that Board decisions not be internally inconsistent and that apparent contradictions be explained. *Id.* (Blackmun, J., dissenting). The majority, however, found the two lines of cases were not "unreconcilable," refusing to require that the Board itself explain or justify what may initially appear to be inconsistencies. *Id.* at 1550-51.

Justice Scalia, in a dissent joined by Justices O'Connor and Kennedy, viewed the case as presenting only a factual question, the Board's resolution of which he found was not supported by substantial evidence on the record as a whole. *Id.* at 1557 (Scalia, J., dissenting). By casting the issue as one of fact, Justice Scalia was able to reconcile his dissenting position with his strong reading of *Chevron*. He found *Chevron* inapplicable because he viewed *Curtin Matheson* as raising only a factual dispute. *Id.* at 1557 (Scalia, J., dissenting). The majority disagreed with that characterization:

These recent decisions confirm the considerable lawmaking authority the Board possesses and the appropriate standard of judicial review. The courts must defer to the Board's decisions, unless the decisions are at odds with clearly expressed congressional intent or represent "irrational" policy choices.[121]

How does this standard of review impact upon nonacquiescence? As set forth below, it can be viewed as supporting nonacquiescence at the agency level.[122] But more importantly, it suggests that the occasions for Board nonacquiescence would be limited if the reviewing courts were to swallow hard and accept the *Chevron* standard of review.[123]

The circuit courts, before and after *Chevron*, have refused to defer to Board lawmaking. Instead, they have criticized the Board when it has refused to acquiesce in circuit decisions.[124] The Second Circuit, for example, has consistently refused to enforce the Board's "Gissel" bargaining orders (bargaining orders issued despite the absence of a union election victory) when the Board has

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> Whether the Board permissibly refused to adopt a general presumption applicable to all cases of this type is not an evidentiary question concerning the facts of this particular case. The substantial evidence standard is therefore inapplicable to the issue before us. Rather, we must determine whether the Board's refusal to adopt the presumption is rational and consistent with the Act.

Id. at 1545 n.2.

121. *See* Kafker, *supra* note 5, at 152 (recognizing the Board as the "superior arbiter of the meaning of the statute in particular contexts").

Long before *Chevron*, Professor Winter recognized the need for judicial deferral to Board lawmaking. *See supra* notes 80-83. He urged the courts to scrutinize more carefully the Board's factual findings, however, saying that in doing so, the reviewing courts can ensure that the law is being applied evenhandedly. *See* Winter, *supra* note 80, at 75. He also would use the "substantial evidence" level of deference to Board factual findings only when the Board has affirmed the findings of its ALJ. *Id.* One circuit recently adopted this approach. Weather Shield Mfg. Inc. v. NLRB, 890 F.2d 52, 57 (7th Cir. 1989).

122. *See infra* text accompanying notes 170-71.

123. Although not endorsing Board nonacquiescence, Mr. Kafker's article points out that Board frustration with judicial interference may explain the Board's nonacquiescence policy. As he explains:

> Nonacquiescence can be seen as a defense mechanism when the Board is confronted with a clear example of the courts of appeals stepping out of their role as reviewers of Board decisions and arrogating to themselves the Board's administrative responsibility. Given the limitations on the Board's capacity to have its rulings reviewed and reinstated by the Supreme Court, the Board believes nonacquiescence is the only ready means of assuring Congress's objective of a national labor policy formulated by an experienced and expert tribunal.

Kafker, *supra* note 5, at 150-51; *see also* Strauss, *supra* note 5, at 1114-15 (indicating that a formal policy of nonacquiescence is reasoned policy).

124. See Kafker, *supra* note 5, at 154-56, and Zimmerman & Dunn, *supra* note 28, at 19, for discussions of circuit court decisions in which the authors assert that proper deference to the Board was not accorded. In United Technologies Corp. v. NLRB, 814 F.2d 876 (2d Cir. 1987), for example, the Second Circuit refused to accept the Board's view that a company ban on certain car displays was not an 8(a)(1) violation. *Id.* at 879. Saying that the Board had misread not only the statute but also prior judicial interpretations of it, the court set the Board's order aside. *Id.* at 880-82. Of course, it is the Board's interpretation, not the reviewing court's, that is entitled to deference. *See supra* notes 94-118 and accompanying text. The court also criticized the Board for departing from prior Board interpretations. *United Technologies Corp.*, 814 F.2d at 882. Such departures, however, are no basis for judicial criticisms. NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1549 (1990); *see supra* note 119.

For an illustration of the judiciary's unwillingness to recognize the Board's lawmaking authority, see Weis, *supra* note 8. Judge Weis minimizes the deference reviewing courts owe the Board.

failed to consider subsequent events or when "hallmark" violations are not present.[125] Moreover, the Second Circuit has chastised the Board when it fails to adopt the court-constructed "Gissel" standards. Determining the standards for issuance of a "Gissel" bargaining order, however, is statutory gap-filling committed to the Board's discretion,[126] a policy choice for the Board to make.

Ambiguous statutory language also presents policy choices for the Board.[127] A reviewing court's belief that the Board has "misread" a statute is no basis for refusing to enforce a Board order, so long as the Board's reading is within the realm of reasonableness.[128] But considering themselves the branch of government responsible for statutory interpretation, the courts too often have given the Board little deference when a question of statutory construction is involved,[129] thereby setting the stage for later nonacquiescence by the Board.

Nonacquiescence stems from the Board's view that a national statute should be applied uniformly nationwide.[130] The Supreme Court has not directly addressed the appropriateness of nonacquiescence. Through *Chevron*, however, the Court not only has limited the occasions for nonacquiescence but also has helped achieve national uniformity by directing the lower courts to defer to agency interpretations of their governing statutes.[131] As Professor Pierce has observed, judges frequently may differ in their interpretations of ambiguous statutes, but they generally should agree on whether a statute is silent or ambigu-

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125. *See, e.g.*, NLRB v. Jamaica Towing, Inc., 632 F.2d 208 (2d Cir. 1980).

In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court approved the Board's discretionary authority to issue a bargaining order as a remedy for unfair labor practices that undermine election proceedings or make the holding of a fair election unlikely.

126. *See* Zimmerman, *supra* note 27, at 2 n.2. As Professor Estreicher also points out, the Second Circuit in *Jamaica Towing* "was embarking in a debatable enterprise when it acted to second-guess the Board's assessment of the impact of acknowledged violations." Estreicher, *supra* note 90, at 1090. Professor Estreicher criticizes the Second Circuit for provoking the Board's nonacquiescence. At the same time, however, he chastises the Board for not acquiescing "when it appeared with fair certainty" that a particular circuit would hear a case. *Id.* at 1078.

Professor Estreicher's view apparently has changed. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 714-42. *Chevron* perhaps played no small part in this conversion. In his earlier article, Professor Estreicher found judicial deference to an agency's statutory interpretations "analytically questionable." Estreicher, *supra* note 90, at 1068. *Chevron* and its progeny, however, confirm that such deference must occur. Possibly, the Court's recognition that statutory interpretation involves policy choices and its confirmation that policy choices are for agencies, not courts, to make has influenced Professor Estreicher's view on the acquiescence issue. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 724-25.

127. *See supra* notes 100-01 and accompanying text.

128. *Id.*

129. The appropriateness of health care bargaining units is but one example of a statutory construction issue on which proper deference did not occur. Statutory silences and ambiguities left to the Board a question of policy. What the courts found, however, was a question of statutory construction that the judiciary was better suited to answer. Zimmerman & Dunn, *supra* note 28, at 12-13; *see, e.g.*, Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980); NLRB v. St. Francis Hosp., 601 F.2d 404, 414 (9th Cir. 1979); St. Vincent's Hosp. v. NLRB, 567 F.2d 588, 590 (3d Cir. 1977). Interestingly, it was the Board's failure to acquiesce in these circuit court rulings that prompted judicial ire over nonacquiescence. *See* Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970-71 (3d Cir. 1979).

130. *See supra* notes 28-31 and accompanying text.

131. *See* Strauss, *supra* note 5, at 1119. Professor Strauss views *Chevron* as a method for obtaining national uniformity of statutes by giving more deference to agencies.

ous.[132] Upon finding statutory silence or ambiguity, any rational agency interpretation will prevail nationwide. That interpretation will prevail even if the agency changes its reading from time to time, so long as the varied readings are rational. Thus, careful adherence to *Chevron* promotes the Board's goal, endorsed by the Court, of uniform application of the NLRA.[133]

But observing the *Chevron* limits of judicial review will merely reduce, not eliminate, nonacquiescence. The reviewing court, under *Chevron*'s step one, may find congressional intent not only clear but clearly at odds with the agency's view.[134] Moreover, under *Chevron*'s step two, the reviewing court may find the agency's policy choice to be "irrational."[135] It is those difficult cases that most forcefully present the question of the lawfulness of Board nonacquiescence.[136]

III. THE LAWFULNESS OF BOARD NONACQUIESCENCE

Determining the lawfulness of Board action requires a recognition of the two separate stages of nonacquiescence: nonacquiescence at the agency decisionmaking stage and nonacquiescence at the appellate review stage.[137] The

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132. Pierce, *supra* note 87, at 313.

133. *See id.*; Strauss, *supra* note 5, at 1119. *Chevron*, says Professor Pierce, gives judges

> less room to infuse their personal political principles in the Nation's policy making process, [allowing] judges of widely differing political perspectives to agree in a large number of cases that Congress did or did not resolve a particular policy issue. This should reduce the unfortunate tendency of judges to engage in policymaking disguised as interpretation of ambiguous statutory language.

Pierce, *supra* note 87, at 313.

134. *See, e.g.*, North American Van Lines, Inc. v. NLRB, 869 F.2d 596, 598-99 (D.C. Cir. 1989); Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382 (D.C. Cir. 1983); Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980).

As Justice Scalia has pointed out, determining whether a statute is clear is where "future battles . . . will be fought." Scalia, *supra* note 75, at 521. To the extent a court views a statute as clear, there is less need to defer to the agency's view of the statute. *Id.* This potential for dispute over a statute's clarity is described by Justice Scalia as "the chink in Chevron's armor." *Id.* at 520.

135. *See, e.g.*, NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1549 (1990) (recognizing and applying the "not irrational" standard to Board policymaking).

136. *See* Strauss, *supra* note 5, at 1122 (finding nonacquiescence "far less acceptable" if it occurs after *Chevron* deference previously was applied by the reviewing court).

137. The courts have been critical of nonacquiescence, whether it occurs when the General Counsel issues a complaint at odds with circuit law, *see, e.g.*, Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983); or when an ALJ refuses to follow circuit law in issuing a recommended decision and order, *see, e.g.*, PPG Indus., Inc. v. NLRB, 671 F.2d 817, 822-23 (4th Cir. 1982); or when the Board itself rejects circuit law in its own decisions, *see, e.g.*, Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969 (3d Cir. 1979). They also have criticized the Board for nonacquiescing when the Board insists on its position during judicial review. *See* Kubitschek, *supra* note 8, at 404; Strauss, *supra* note 5, at 1107.

Some commentators view nonacquiescence as occurring only at the agency level. *See* Coenen, *supra* note 8, at n.38; Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 687-88; Maranville, *supra* note 8, at 475; Schwartz, *supra* note 1, at 1830-32. Thereafter, the agency is seeking only to relitigate the issue before the court of appeals. The agency's prior nonacquiescence enables it to relitigate the issue by keeping the agency's position alive.

The courts, however, make no such distinction. They do not distinguish between an agency's decisionmaking and its litigation stance, characterizing both as nonacquiescence. When the Board adheres to its position before the appeals court, it is choosing not to acquiesce or to capitulate to circuit law. The courts thus commonly and correctly understand both stages to involve nonacquiescence. *See, e.g.*, Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382-83 (D.C. Cir. 1983). The courts, however, fail to analyze these stages separately.

point at which nonacquiescence occurs shapes analysis of its lawfulness.[138] One could argue, for example, that nonacquiescence by the Board at the agency decisionmaking level is lawful, largely because of venue uncertainty, while nonacquiescence before the court of appeals is not. Courts and academics for the most part have failed to distinguish clearly between these levels of nonacquiescence, either condemning or, less frequently, condoning Board nonacquiescence regardless of the level at which it occurs.[139]

My conclusion is that nonacquiescence is lawful and appropriate at both the agency and appellate court levels. The broad venue provisions of the National Labor Relations Act make nonacquiescence at the agency level relatively easy to defend.[140] While venue uncertainty vanishes once a Board order is before a particular circuit court, nonacquiescence still remains lawful, given the unique characteristics of the agency as litigant.[141]

A. Nonacquiescence at the Agency Level

When the General Counsel issues a complaint and the Board and its administrative law judges decide a case, they cannot know with certainty which court of appeals will review their decisions. No matter where the case arose or where the parties transact business, the D.C. Circuit is always a potential forum.[142] Most unions and employers, moreover, transact business in multiple circuits or even nationwide.[143] Under the NLRA, parties are free to petition any of the available circuits for review.[144] In addition, the Board frequently does not know all the circuits in which a party resides or transacts business and thus is unaware of the circuits in which review could be sought.[145]

Accordingly, nonacquiescence at the Board level raises the question: To which circuit's law is the Board expected to acquiesce? Is the Board bound nationwide by the first circuit that rules against it, simply because that circuit is a possible review forum?[146] What if various circuits disagree on the Board's

138. *See infra* notes 174-85 and accompanying text.

139. *See supra* note 137.

140. *See infra* notes 142-72 and accompanying text. Not surprisingly, venue affects the lawfulness of nonacquiescence. As Professor Jaffe observed, "The single most important variable in review procedure, particularly federal, is venue." L. JAFFE, *supra* note 77, at 155.

141. *See infra* notes 173-202 and accompanying text.

142. 29 U.S.C. § 160(f) (1988). Under the statute, the aggrieved party has the additional option of seeking review in the D.C. Circuit. Thus, if the aggrieved party transacts business only in the circuit in which the case arose, it still could seek review in the D.C. Circuit. *See, e.g.*, Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 712, 742 (discussing the Board's difficulties in predicting venue).

143. Arvin Automotive, 285 N.L.R.B. 753, 757 (1987); *see* Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 604 ("Courts have broadly interpreted the phrase 'transacts business,' so any multistate business has a variety of circuit choices.").

144. 29 U.S.C. § 160(f) (1988).

145. Such information need not and thus frequently may not be part of the record before the Board. Furthermore, an aggrieved party, at the time it petitions for review, may be transacting business in different or in additional locations than it did at the time of the hearing.

146. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 739; *infra* note 152 and accompanying text (discussing and rejecting this alternative). *But cf.* Comment, *supra* note 8, at 847 (advocating that agencies should be bound nationwide by an adverse circuit court decision).

position? If the Board applies the law of Circuit A and the employer wins, the union will be the aggrieved party and will seek a circuit hospitable to its position. If the Board instead applies the law of Circuit *B* and the union wins, the employer will be the aggrieved party, and if venue lies, will seek review in Circuit *A*. In this not-uncommon scenario, acquiescence to the law of one circuit is nonacquiescence to the law of another.[147] What if all circuits that have considered the question have disagreed with the Board, but other circuits have yet to confront the particular question? Is the Board nonacquiescing when it decides the case in accordance with its own views, knowing the likelihood of success in the circuits, while possible, is small?[148]

This venue uncertainty has led some recent commentators correctly to conclude that nonacquiescence by the Board at the agency level is lawful. Professor Schwartz, who finds much agency nonacquiescence an unconstitutional abuse of shared Article III power, recognizes the constitutionality of nonacquiescence in the face of venue choice.[149] The agency cannot know which precedent will be applicable and thus does not abuse judicial power by rejecting "governing" law. The presence of multiple venues makes the law of no particular circuit governing or controlling.[150]

Professors Estreicher and Revesz also rely on venue choice to distinguish nonacquiescence by the Board from nonacquiescence by other agencies. They point out that the same reasons that legitimate intercircuit nonacquiescence—which include allowing for percolation of ideas among the circuits, permitting agencies and courts to compare the consequences of different legal rules, and assisting the Supreme Court in identifying difficult issues and resolving them on the merits—similarly justify nonacquiescence in the face of venue choice.[151] Were Board acquiescence required, the Board would be forced to conform its rulings to the first circuit that rejected its position in order to assure that future nonacquiescence would not occur, a result at odds with the geographically restricted scope of the circuits and with the benefits served by multiple circuit

147. *See* Arvin Automotive, 285 N.L.R.B. 753, 757-58 (1987) (discussing this possibility).

148. The degree of uncertainty should not alter the lawfulness of nonacquiescence. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 687 n.34. Even if the Board were fairly confident of where the case would be reviewed, it still could not be certain and thus would not be rejecting any "controlling" law. *Id.* at 712, 742; Schwartz, *supra* note 1, at 1857 n.159.

Professors Estreicher, Revesz, and Schwartz, however, would limit Board nonacquiescence "when all the circuits in which an action for judicial review might be brought have rejected the agency's position." Schwartz, *supra* note 1, at 1857. As a practical matter, as set forth above, this is not a realistic concern. The Board cannot know in which circuits venue will lie. *See supra* notes 143-45. Only if *every* circuit had rejected the Board's position could the Board know it would be in an inhospitable forum. In the history of the Act, the Board has never adhered to a position in the face of rejection from all 12 circuits. Nor is it likely to in the future, given the Board's practice of carefully considering the views of the courts of appeals. *See supra* note 27.

149. Schwartz, *supra* note 1, at 1856-57.

150. *Id.*

151. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 735-43. While acknowledging the lawfulness of agency-level nonacquiescence by the NLRB, the Schwartz, Estreicher, and Revesz articles focus on the lawfulness of "pure" intracircuit nonacquiescence by other agencies, that is, nonacquiescence occurring in the face of venue certainty. Professor Coenen also focuses on this form of nonacquiescence—nonacquiescence "occurring when the decisionmakers know their actions are reviewable by that, and no other, circuit court." Coenen, *supra* note 8, at 6.

review of an issue.[152]

Because Congress has given no circuit exclusive authority over the Board, either in general or in resolving any particular group of cases, the most powerful arguments against nonacquiescence lack compelling force. Stare decisis, *if* it is applicable to agency decisionmaking, cannot control Board-level decisions because the Board cannot know to which law it must defer.[153] The specter of defiance toward judicial authority that underlies most separation of powers arguments similarly is missing when the Board cannot know which circuit ultimately will review its actions.[154] Nor is nonacquiescence a deprivation of any due process right to application of the "controlling law" in adjudication of claims, when it is unclear which law controls.[155] Furthermore, compelling ac-

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152. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 735-43. As the authors point out,

> not only would adverse decisions truncate further dialogue, but they would also dominate decisions that are favorable to the agency. The result would be a one-way ratchet in which the authoritative voice would be that of the first court of appeals to rule *against* the agency.... A system in which the decision of the first court of appeals to rule against the agency—even in the presence of several decisions favorable to the agency—becomes binding law nationwide is inconsistent with [*Chevron*'s premise that agencies are the primary policymakers].

Id. at 738-39.

153. Whether stare decisis applies at all to agency-level decisionmaking has been debated forcefully. Some have contended that just as lower courts are bound by circuit court rulings, so, too, are administrative agencies. *See, e.g.*, Schwartz, *supra* note 1, at 1880; Weis, *supra* note 8, at 852; Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 595-97; Note, *Denying Precedential Effect*, *supra* note 8, at 181. These commentators reason that because agencies exercise judicial or quasi-judicial authority and because their decisions are subject to judicial review, agencies are bound by stare decisis.

However, agencies are not courts but are part of the executive branch, where flexibility is especially important. Maranville, *supra* note 8, at 501-04. Professor Maranville contends that "[i]n sum, stare decisis and the controlling case doctrine are not clearly applicable to administrative agencies, and the policies justifying those doctrines do not necessarily support their extension to agencies." *Id.* at 504.

Whatever its applicability to agency action in general, stare decisis logically cannot apply when venue is uncertain. There is no way for the Board to determine what law it must regard as controlling. *See, e.g.*, Modjeska, *supra* note 8, at 416; Schwartz, *supra* note 1, at 1856-57; Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 604.

154. *See, e.g.*, Schwartz, *supra* note 1, at 1856-57 ("The availability of alternative venue for judicial review signals that the court that rendered the precedent adverse to the agency lacks exclusive authority to dictate the law to be applied to the adjudication of the case before the agency.").

Whether the separation of powers argument should constrain nonacquiescence in the absence of venue choice is a different issue. For discussion of this issue, see Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 723-32; Maranville, *supra* note 8, at 522-28.

155. *See* Schwartz, *supra* note 1, at 1856. For a discussion of whether a due process challenge to agency nonacquiescence otherwise can be launched, see Coenen, *supra* note 8, at 9-11; Maranville, *supra* note 8, at 518-21; Schwartz, *supra* note 1, at 1828 n.37; Comment, *Federal Agency Nonacquiescence: Defining and Enforcing Constitutional Limitations on Bad Faith Agency Adjudication*, 38 ME. L. REV. 185, 231-59 (1986).

Any due process challenge to Board decisionmaking, moreover, that otherwise might exist is further weakened by the fact that Board orders are not self-enforcing. Thus, no deprivation can occur until after judicial review. This procedure should be contrasted with the administrative scheme of the Social Security Administration, in which benefits are cut off following an unfavorable agency ruling, and the claimant must go to court to get benefits reinstated. In that situation, not only is a claimant deprived of governing circuit law, but he is immediately disadvantaged unless and until he successfully appeals. No such scenario exists under the NLRA.

Similarly, the specter of unequal treatment of the rich and poor, in the sense that those who have money to appeal will win while those who do not will lose—a forceful argument that has been accepted in the context of nonacquiescence by the Social Security Administration—is of little force in labor cases. *See* Lopez v. Heckler, 572 F. Supp. 26, 30 (C.D. Cal. 1983), *rev'd in part*, 725 F.2d

quiescence in the face of venue choice is inconsistent with the Supreme Court's rejection of nonmutual collateral estoppel against the government.[156] The advantages of percolation and law development relied upon by the Court in rejecting nonmutual collateral estoppel against the government, as Estreicher and Revesz recognize, are incompatible with mandating acquiescence by the Board, because acquiescence would stifle percolation and law development by requiring the Board to follow the law of the first circuit to reject its position.[157]

While venue choice makes nonacquiescence constitutional, it does not, according to some commentators, make nonacquiescence sound policy. Rather, they claim the Board should apply the law of the circuit in which the claim arose.[158] On review, the circuit court, if it is not the circuit in which the claim arose, should not penalize the Board for nonacquiescence but instead should recognize the Board already has "acquiesced" to a different circuit's law.[159] This approach, they argue, would minimize conflict with the reviewing courts and would respect what they believe is the courts' superior role in saying what the law is.[160]

The problems with this approach are numerous. First, one can easily imagine cases in which identifying the circuit "in which the case arose" would be difficult at best.[161] Second, the resource demands of requiring the General

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1489 (9th Cir.), *vacated*, 469 U.S. 1082 (1984). As commentators have noted, litigants before the NLRB "tend to be relatively affluent and sophisticated and thus more likely to appeal." Kafker, *supra* note 5, at 143. Whereas nonacquiescence by the SSA

> pits defenseless individuals against a large and powerful bureaucracy[,] . . . [n]onacquiescence by the NLRB, by contrast, takes place in a multiparty context. The practice will have a consistent substantive effect of favoring unions or management only if the NLRB and the judiciary have consistent and opposing predilections. Many, though certainly not all, of the affected unions and employers will have substantive resources for obtaining judicial relief or for approaching Congress on the merits of underlying issues. Thus, all parties affected by NLRB nonacquiescence benefit from the practice on occasion, and the need for resolution of the issue may seem less pressing than in the case of the SSA.

Maranville, *supra* note 8, at 533-34.

156. In *United States v. Mendoza*, the Supreme Court disapproved the use of nonmutual collateral estoppel against the federal government. 464 U.S. 154, 162 (1984). For further discussion of *Mendoza*, see *infra* notes 190-97 and accompanying text.

157. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 741-43.

158. *See* Dotson & Williamson, *supra* note 8, at 745; Ferguson & Bordoni, *supra* note 8, at 220; Weis, *supra* note 8, at 851.

159. Circuit courts currently chastise the Board for nonacquiescence to circuit law even when the claim did not arise in the reviewing circuit. *See, e.g.*, Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382-83 (D.C. Cir. 1983); Ferguson & Bordoni, *supra* note 8, at 202, 210; Strauss, *supra* note 5, at 1111. Were the circuit courts to apply the law of the circuit in which the claim arose, it "would work a fundamental change in the conventional wisdom that underlies section 10(f) review in the District of Columbia Circuit." Ferguson & Bordoni, *supra* note 8, at 220. Congress perhaps gave the option of resort to that circuit with the intent that the D.C. Circuit would not be bound by the law of another, possibly less hospitable, circuit. *Id.* at 221-22.

160. *See* Dotson & Williamson, *supra* note 8, at 744-45; Ferguson & Bordoni, *supra* note 8, at 211-16; Weis, *supra* note 8, at 852.

161. For example, if an employer is charged with a "runaway shop" violation, is the circuit in which the claim arose the one in which the old plant was closed, the one in which the new one was opened, or the one in which corporate headquarters are located and the decision to close was made? *But cf.* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 766 (acknowledging such difficulties would exist but claiming they would be "rare"). Certainly such problems will not arise in every case, but with the large number of multistate actors involved in Board proceedings, labelling these disputes as "rare" seems unwarranted.

Counsel, the Board, and their staffs to ascertain and apply the law differently in different parts of the country are considerable.[162] Even leaving these practical problems aside, one must conclude that agency-level nonacquiescence is both appropriate and desirable.

Applying the law of the circuit in which the claim arose does eliminate uncertainty in knowing which circuit's law to apply, but it wreaks havoc with uniformity. While nonacquiescence admittedly does not obtain ultimate uniformity after judicial review, it at least maintains uniformity at the agency level.[163] Were the Board to administer the law differently in different parts of the country, the NLRA's goal of promoting a uniform national labor policy would be undermined.[164] If national labor law varied from one part of the country to another, regions would be better able to compete for industry on the basis of more hospitable circuit law. Such competition is at odds with the nationalization of labor law.[165]

Nor is deferral to judge-made law consistent with Congress's creation of the

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162. [S]ince approximately 40,000 or more unfair labor practice charges are filed annually, the mind boggles at the thought of the General Counsel attempting to predict, analyze and apply "relevant" circuit doctrine. One suspects that the fallout from any such process would have a devastating impact upon the General Counsel's impressive settlement rate of approximately 95%.

Modjeska, *supra* note 8, at 425; *see also* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 690-91 (noting the practical difficulties of applying the law differently in different regions); Maranville, *supra* note 8, at 493-94 (discussing the difficulties of having lower-level staff "acquiesce" to circuit law).

163. Critics of nonacquiescence have denigrated this Board-level uniformity, saying that it is not "meaningful" because the circuit courts apply circuit law and thus labor policy ultimately is not uniform. Accordingly, they claim, uniformity is not an appropriate justification for nonacquiescence. All nonacquiescence accomplishes, they argue, is protracted litigation that favors those with money to appeal. Ferguson & Bordoni, *supra* note 8, at 216-17; Kafker, *supra* note 5, at 142-43.

As set forth in Part IV, routine application of the law of the circuit when reviewing Board decisions destroys national uniformity. The solution urged here is for the circuit courts to relax their grip on circuit law. *See infra* notes 224-68 and accompanying text.

Even under the present system, however, Board-level uniformity is important. It enables the Board and General Counsel to dispose of the vast majority of cases without a formal hearing. *See* Modjeska, *supra* note 8, at 425. Unions, employers, and their lawyers can rely on the law as developed and applied by the Board, free from trying to ascertain which circuit's law should apply and what the law of that circuit is. Moreover, even if ultimate uniformity is not achieved, uniformity at the agency level promotes a sense of fairness and evenhandedness by the agency. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 748.

164. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 748 (noting the importance of "equal treatment of regulatees or claimants regardless of where in this country the dispute or claim arose").

165. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 623 (1989) ("The economic and competitive factors involved in [NLRB cases] strongly indicate an unusual need for nationwide uniformity of treatment.").

As Estreicher and Revesz explain:

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

NLRB. Congress wanted labor policy formulated by an expert agency that possesses a necessary flexibility.[166] If circuit law were to govern the Board, not only would Board level uniformity be lost, but the Board's ability to change its position in response to shifting political climates or agency experience would be lost as well.[167]

In addition, the Board's "senior partner" role in policymaking renders it understandably reluctant to consider itself bound by circuit rulings.[168] Were the Board bound by the law of the circuit in which a case arose, it would be bound not only by rulings occurring after proper *Chevron* deference was accorded but also by rulings that improperly encroached on Board lawmaking. While the judiciary's failure to observe *Chevron* would not immunize unlawful nonacquiescence,[169] it does explain the Board's refusal to adopt a nonacquiescence posture neither constitutionally nor statutorily required.[170]

The Board's policy decision not to adopt the law of the circuit in which the unfair labor practice occurred, moreover, is itself due deference under *Chevron*. The statute does not require acquiescence to circuit law. The Board's view that the multiple venue provisions are inconsistent with adopting a policy of deferring to the law of the circuit in which the case arose is an exercise of discretion deserving of *Chevron* deference.

Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 748. *But see* Coenen, *supra* note 8, at 59-60 (questioning whether firms make location decisions based on circuit law).

While maintaining that the NLRA's broad venue provisions make Board nonacquiescence lawful, Estreicher and Revesz nonetheless propose that the NLRA should be amended to provide venue certainty. They urge this in large part to reduce the tension that presently exists between the Board and courts caused by Board nonacquiescence. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 764-70.

This proposal, however, is inconsistent with their recognition, quoted above, of the adverse effects of "competing" circuit law. Those effects perhaps explain Congress's choice of the broad and uncertain venue provisions that presently govern review of Board decisions and weigh heavily against the venue-certain scheme proposed by Estreicher and Revesz.

Because appellate courts presently adhere to circuit law, some of this regional competition is now possible and is a powerful inducement for eliminating the law of the circuit in cases of Board nonacquiescence. *See infra* notes 245-47 and accompanying text. Board acquiescence and venue certainty would exacerbate, not eliminate, regional competition.

166. *See* Kafker, *supra* note 5, at 152; Modjeska, *supra* note 8, at 406-09; Winter, *supra* note 80, at 54-67.

As explained by former Board member Zimmerman:

> Courts should view the Board's nonacquiescence position as protecting the statutory rights of the charging parties, in whose name the case is brought, and not as impugning the authority of the court. A charging party is entitled to the enforcement of his statutory rights, as recognized by the Board, no matter where those rights were violated. For the Board to deny a charging party the relief it concludes is warranted under its considered view of the statute simply because the likely circuit court of review has ruled otherwise, comes close to an abdication of the Board's responsibilities.

Zimmerman, *supra* note 27, at 5.

167. *See* Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1135-36 (9th Cir. 1988) (en banc), *cert. denied*, 111 S. Ct. 209 (1990); *infra* notes 222-29 and accompanying text.

168. Modjeska, *supra* note 8, at 406-09 (relying upon the Board's "senior partner" status in policymaking and its expertise to defend the Board's nonacquiescence policy); *see also* Maranville, *supra* note 8, at 492 (recognizing an agency's "territorial imperative" makes it unwilling to concede authority to the courts).

169. Schwartz, *supra* note 1, at 1902 n.352.

170. Kafker, *supra* note 5, at 150; Strauss, *supra* note 5, at 1114-16.

Agency-level nonacquiescence by the Board is thus permissible. The broad venue provisions governing judicial review insulate the Board from any constitutional attack.[171] As a matter of policy, moreover, Board nonacquiescence is sound and is entitled to deference from the reviewing courts.[172]

B. Nonacquiescence at the Circuit Court Level

Uncertainty in knowing which circuit will review a case validates nonacquiescence at the agency level. Once review is sought, however, that uncertainty is removed. The Board, as a party, now knows which circuit will review its order. Yet the Board, in the face of contrary circuit precedent, refuses to concede error. The Board instead presents its view of the law to the circuit, insisting upon its right to "respectfully disagree" with circuit precedent.

This stage of nonacquiescence most enrages the judiciary.[173] Given the Board's authority to make law free from the constraints of circuit court precedent, however, the courts are unjustifiably angered at the Board's subsequent defense of its law.

When the Board is before the circuit court for review of its decision, the Board is a litigant, not a lawmaker. As a litigant, the Board cannot encroach on the judicial power. Thus, as explained below, the "separation of powers" and "stare decisis" arguments used by the courts to condemn the Board are misplaced when the Board is nonacquiescing at the appellate review level.

The courts, moreover, must recognize the Board as a special litigant. The Board is responsible for administering and applying a national law. When the Board appears before a court advocating a position at odds with circuit law but in keeping with its national position, it is exercising its responsibility for maintaining an expert and uniform view of the statute.[174] While the circuit courts are free to reject that position, the advocacy of it is no basis for judicial sanctions.[175]

In criticizing Board nonacquiescence, the circuits unanimously have relied

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171. *See supra* notes 153-57 and accompanying text.

172. *See supra* notes 161-70 and accompanying text.

173. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 712, 742; *see also* Strauss, *supra* note 5, at 1111 (noting that courts too often fail to recognize the Board's uncertainty in predicting venue).

Estreicher and Revesz, in their extensive work on nonacquiescence, focus only on the lawfulness of nonacquiescence at the agency decisionmaking level. As they state: "From our perspective, what is relevant is the conduct of the agency at the time of the administrative proceedings, not the posture in which the agency finds itself when it gets to court." Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 742, 688. This position overlooks the fact that when the Board adheres to its view of the Act after a reviewing circuit has been identified, the Board is at that point refusing to acquiesce in the law of the reviewing circuit.

174. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 724; Kafker, *supra* note 5, at 152; Modjeska, *supra* note 8, at 407-16; Zimmerman, *supra* note 27, at 3-5.

175. Mr. Zimmerman states:

> In most instances the Board's position does not disregard the law of the circuit, but attempts to better articulate a principle or emphasize a point it thinks may persuade the court to reconsider its view. While the court obviously retains power to disagree and to reverse, the Board fulfills its mandate when it asks the court simply to reconsider.

Zimmerman, *supra* note 27, at 3; *see also* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 741,

on *Marbury v. Madison*'s directive that it is up to the judiciary to "say what the law is."[176] They claim that when the Board fails to abide by circuit law, it is violating separation of powers principles.[177] *Marbury*, however, is weak support for any argument against nonacquiescence.[178] *Marbury* establishes only that a court's decision will be controlling in the case in which it was issued; it does not elevate the decision to a controlling rule of law.[179] More important, venue choice makes a *Marbury* argument of little use in challenging agency level decisionmaking by the Board because venue uncertainty makes "what the law is" an unknown.[180]

Separation of powers arguments, moreover, are misplaced when directed at nonacquiescence at the circuit court level. At that point, the Board is not exercising any judicial power and thus is not encroaching on the territory of the judiciary branch. Rather, at the appellate level, the court alone is exercising judicial power. The court is exercising its powers of judicial review, under which it has the authority to reject the Board's position and to "say what the law is." When the board simply asks the court to accept a position at odds with circuit law, it does not violate any separation of powers principles.[181]

Nor does "stare decisis" provide a legitimate basis for criticizing Board nonacquiescence at the circuit-court level. Stare decisis, as discussed previously, cannot be relied upon to condemn nonacquiescence at the agency level because the Board cannot know which circuit's law it must follow.[182] Moreover, when the Board is before the court of appeals, it is not exercising any "judicial" power that would bring stare decisis into play.[183] The Board's order already has issued. The circuit court now shoulders the burden of deciding whether to follow

754 (urging that when nonacquiescence is lawful, remedial action is unwarranted); Estreicher & Revesz, *Reply*, *supra* note 8, at 842 (same).

176. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

177. *See, e.g.*, Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979); Kafker, *supra* note 5, at 151-52; Maranville, *supra* note 8, at 499; Recent Developments, *supra* note 8, at 151 (noting courts' reliance on *Marbury v. Madison*).

178. Commentators routinely have so recognized. *See, e.g.*, Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 722-32; Maranville, *supra* note 8, at 522; Modjeska, *supra* note 8, at 417; Schwartz, *supra* note 1, at 1829; Recent Developments, *supra* note 8, at 161; Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 595; Note, *supra* note 44, at 748. *But see* Note, *Executive Nonacquiescence*, *supra* note 8, at 1152-53, 1159-63.

179. *See supra* notes 70-72 and accompanying text.

180. *See supra* note 154.

181. Professor Schwartz, for example, who acknowledges the lawfulness of nonacquiescence in the face of venue choice, condemns pure intracircuit, agency-level nonacquiescence as an abuse of shared Article III power. Under his theory, if an agency is going to perform judicial functions, it should act like a court in doing so. Schwartz, *supra* note 1, at 1851-55. When appearing before a court as a litigant, however, an agency is not performing any judicial function. Accordingly, Professor Schwartz's reasons for restricting nonacquiescence would not restrain the agency's litigation conduct. Indeed, Professor Schwartz would find "tightly controlled" intracircuit relitigation itself shielded by United States v. Mendoza, 464 U.S. 154 (1984), when the agency level nonacquiescence is lawful. Schwartz, *supra* note 1, at 1875-81. For further discussion of *Mendoza*, see *infra* notes 190-97 and accompanying text.

182. *See supra* note 153 and accompanying text.

183. *But see* Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 596 (arguing that "stare decisis" precludes *litigants* from acting in a manner inconsistent with circuit precedent). This argument fails to account for the fact that stare decisis is a doctrine that directly governs the actions of courts, not litigants. *See* Maranville, *supra* note 8, at 501; Schwartz, *supra* note 1, at 1879-80.

the law of the circuit. Thus, stare decisis affords no support for condemning nonacquiescence at the circuit court level.

The courts, however, do expect litigants within the circuit to acknowledge the force of circuit law.[184] While the Board acknowledges the existence of adverse precedent and recognizes the court's power to deny enforcement based on adverse circuit law, it does not concede that the law is dispositive. Rather, the Board insists on its right to ask the court to reconsider its decision.[185]

Perhaps this practice so angers the courts because they fail to recognize the Board's authority to make law without regard to circuit precedent.[186] Opinions condemning nonacquiescence criticize the Board for issuing an order at odds with circuit law, not merely for adhering to that position during review proceedings.[187] If the courts were to acknowledge the Board's freedom from circuit precedent at the agency decisionmaking level, their hostility toward nonacquiescence at the circuit level no doubt would be tempered.[188] Moreover, once the courts admit the lawfulness of nonacquiescence at the agency level, the use of judicial sanctions—such as injunctions, contempt citations, and attorneys' fees—should be viewed as inappropriate responses to the Board's litigation position. A review of the Supreme Court's decision in *United States v. Mendoza*[189] helps illustrate why courts should hesitate to penalize the Board for litigation conduct designed to advance its nationally uniform view of the statute.

In *United States v. Mendoza* the Supreme Court, in refusing to apply nonmutual offensive collateral estoppel against the United States, recognized that the government stands in a different posture from private litigants.[190] "[T]he nature of the issues the government litigates," the Court stated, calls for relaxation of legal principles applicable to other litigants.[191] The Court recognized, moreover, that the government, unlike other litigants, cannot always petition the Court for review of circuit court decisions with which it disagrees. The Solicitor General must balance a large group of cases and consider the Court's docket before authorizing a certiorari petition.[192] If the government were bound by adverse rulings, the Solicitor General would be forced to appeal every decision against the agency.[193] Without acquiescence, moreover, the Board could allow circuit law to develop without fear that it would be precluded from asking a

184. *See, e.g.*, NLRB v. Blackstone Co., Inc., 685 F.2d 102, 106 (3d Cir. 1982). The circuits retain the power, moreover, to sanction parties for frivolous litigation. *See* Coenen, *supra* note 8, n.515; Note, *Intracircuit Nonacquiescence*, *supra* note 8, at 596.

185. *See supra* note 16 and accompanying text.

186. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 742.

187. *See, e.g.*, Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382-83 (D.C. Cir. 1983).

188. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 742 & n.307. Because of the friction that does exist, however, Professors Estreicher and Revesz suggest that Congress eliminate venue choice, which, as I have explained, is an unsatisfactory solution. *See supra* note 165.

189. 464 U.S. 154 (1984).

190. *Id.* at 159-60 (1984). For a discussion of *Mendoza*'s reasoning, see Modjeska, *supra* note 8, at 412-15.

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

192. *Id.* at 160-61; *see* Strauss, *supra* note 5, at 1108 (discussing the constraints on the Solicitor General).

193. *Mendoza*, 464 U.S. at 161.

court to reconsider its position.[194]

While *Mendoza* does not directly immunize nonacquiescence at the circuit court level,[195] its reasoning suggests that commanding acquiescence is improper.[196] Certainly, requiring the Board to withdraw its petition for enforcement upon finding itself in a circuit with adverse precedent would relieve parties of costs, would conserve judicial resources, and could prevent inconsistent decisions. But these same arguments were applicable and were rejected in *Mendoza*, given the unique character of the government as litigant.[197]

Furthermore, unlike other litigants, the Board is charged with developing a national labor policy. While the courts may disagree with the Board's view of the statute, they should be wary of punishing the executive branch merely for asking the court to rethink a prior decision.[198] Essentially, such a request is all that circuit level nonacquiescence entails.

Certainly, the appeals court is free to apply the law of the circuit and set aside the Board order.[199] To date, that routinely is what has happened, after the court either pens harsh words regarding the Board's failure to acquiesce or issues ominous threats of future sanctions.[200] But these harsh words and threats

194. Modjeska, *supra* note 8, at 414; Schwartz, *supra* note 1, at 1878.

195. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 685. Also, percolation among the circuits could still occur through intercircuit nonacquiescence, even if intracircuit nonacquiescence were forbidden. *See* Schwartz, *supra* note 1, at 1878.

196. Modjeska, *supra* note 8, at 412-16; Schwartz, *supra* note 1, at 1878-81; Note, *supra* note 44, at 748-49.

197. *Mendoza* disposes of an argument that nonmutual collateral estoppel precludes nonacquiescence at the circuit level, as argued by some commentators. *See* Comment, *supra* note 8, at 857-61; Note, *Denying Precedential Effect*, *supra* note 8, at 178-83. As Professor Schwartz correctly notes, these arguments really are no more than attacks on *Mendoza*. Schwartz, *supra* note 1, at 1877 nn.233-34. Any argument that *Mendoza* does not apply to intracircuit relitigation is "virtually exclude[d]" by *Mendoza*'s holding. Schwartz, *supra* note 1, at 1878 n.236; *see also* Maranville, *supra* note 8, at 514 (discussing *Mendoza* and its effect on the legality of intracircuit relitigation).

Thus, courts cannot rely (and at least in the NLRB context they have not relied) upon nonmutual collateral estoppel to restrain nonacquiescence. Rather, circuit courts' remarks reflect a view that the Board's litigation posture is frivolous or is contemptuous of circuit precedent, leading to threats of sanctions. *See, e.g.*, NLRB v. Ashkenazy Prop. Mgt. Corp., 817 F.2d 74, 75 (9th Cir. 1987); Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382-83 (D.C. Cir. 1983).

198. Indeed, when reviewing Board orders, even those issues that are at odds with circuit law, the courts must remember they are reviewing policy choices made by a co-equal branch of government. Pierce, *supra* note 87, at 307-08.

Professor Modjeska relies upon the Board's success rate before the Supreme Court, in the face of conflicting circuit precedent, as "a virtual validation of *Mendoza* principles. In cases too numerous to recount, the Board has prevailed in the Supreme Court notwithstanding substantial circuit court rejection of the Board's position." Modjeska, *supra* note 8, at 414. This record, he points out, counsels against circuit court stifling of the Board's position. *Id.* at 415. He adds Congress's failure "to intrude upon the NLRB nonacquiescence policy, while amending the Act in various other respects on several occasions, suggests that the NLRB stance is in harmony with congressional notions of national labor policy." *Id.* at 415-16.

199. "[A] previous rejection [of an agency's position] can be a sufficient condition for setting aside the agency's action, but it is not a sufficient condition for enjoining [agency-level] nonacquiescence." Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 754. As set forth below, I disagree that prior adverse precedent should be viewed as a sufficient basis for a reviewing court to reject the agency's position. *See infra* notes 224-68 and accompanying text.

200. *See* NLRB v. A. Duie Pyle, Inc., 730 F.2d 119, 128 (3d Cir. 1984); *Yellow Taxi Co.*, 721 F.2d at 383; Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983); NLRB v. Blackstone Co., 685 F.2d 102, 106 n.5 (3d Cir. 1982), *vacated*, 462 U.S. 1127 (1983); PPG Indus., Inc. v. NLRB, 671 F.2d 817, 823 (4th Cir. 1982); NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 215-16 (2d Cir. 1980);

are misguided because the Board acts within its rights when it nonacquiesces at the agency level and then defends its position on the merits in the courts of appeals.[201]

If the circuit courts, however, acknowledge the Board's right to nonacquiesce but then, in response, simply apply circuit law and deny enforcement of the Board's order, the result is a stalemate that contributes little toward development of a nationally uniform law.[202] To resolve this problem, the courts should relax the law of the circuit doctrine when reviewing Board orders. The remainder of this Article is directed to this proposal.

IV. RELAXING THE LAW OF THE CIRCUIT DOCTRINE

Stare decisis is a fundamental principle of the English and American legal systems.[203] This common-law doctrine is based on a desire for certainty and predictability in the law.[204] Respect for the law is fostered when like cases are treated alike. Stare decisis assists in keeping the law uniform and impartial.[205]

Ithaca College v. NLRB, 623 F.2d 224, 228-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); Mary Thompson Hosp. Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1252 (5th Cir. 1978).

201. *See supra* notes 143-98 and accompanying text.

202. *See* Kafker, *supra* note 5, at 159 (recognizing the Board and courts frequently have arrived at "an impasse in decisionmaking"). Kafker recommends the Board and courts adopt a "collaborative" model of decisionmaking, asking the Board to better articulate its reasoning and asking the reviewing courts, in cases of disagreement, to remand to the Board, rather than substituting their judgment for the Board's. *Id.*

Professors Estreicher and Revesz, who approve Board nonacquiescence at the agency level, do not advocate a departure from the law of the circuit doctrine. Rather, they assume that circuit courts, through en bancs and other such established procedures for reconsidering precedent, will be willing to overrule past decisions when such overrulings are necessary. Estreicher & Revesz, *Reply*, *supra* note 8, at 836-37. In the meantime, they assume the law of the circuit will apply but advocate that remedial measures should not be used against an agency that engages in lawful nonacquiescence at the agency decisionmaking level. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 754.

Estreicher and Revesz rely on circuits' supposed willingness to formally revisit precedent as a justification for their defense of "pure" intracircuit agency-level nonacquiescence, that is, nonacquiescence that occurs when venue is certain. They claim agencies must be permitted to nonacquiesce at the agency level so that a vehicle for en banc review of circuit precedent will exist. *Id.*

In response to Estreicher and Revesz, Diller and Morawetz criticize as unfounded Estreicher's and Revesz's assumption that circuits will be amenable to holding en bancs or using other formal procedures to reconsider settled circuit law when faced with agency nonacquiescence. Diller & Morawetz, *supra* note 8, at 804-09; *see also* Kubitschek, *supra* note 8, at 424-25 (similarly criticizing Estreicher and Revesz on this point). Diller and Morawetz then proceed to explain why circuit law should be stable and praise the courts' adherence to the law of the circuit. Diller & Morawetz, *supra* note 8, at 807-11.

I agree with Diller and Morawetz that the formal reconsideration Estreicher and Revesz assume occurs in fact is not occurring. Instead, the circuits rely on the law of the circuit to deny enforcement of Board orders in nonacquiescence cases. *See supra* note 200; Kubitschek, *supra* note 8, at 404, 424-25. But unlike Diller, Morawetz, and Kubitschek, who focus on nonacquiescence by the Social Security Administration and commend the circuit courts for adhering to precedent in those cases, I see little value to the "law of the circuit" in cases of NLRB nonacquiescence. *See infra* notes 203-78 and accompanying text.

203. "Stare decisis is of course a doctrine peculiar to the English common law; it is not found in civil law systems or in international law." J. MURPHY & R. RUETER, STARE DECISIS IN COMMONWEALTH APPELLATE COURTS 3 (1981).

204. *Id.* at 93.

205. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921) ("There must be noth-

Certainty and predictability enable persons to plan, to conduct their affairs, and to determine whether to litigate or to settle disputes based on a knowledge of the governing law. Without stare decisis, uncertainty concerning the law would encourage repetitive litigation. Settlements, based largely on predictions concerning the governing law, would be undermined. More important, persons within a jurisdiction would be unable to structure their transactions or to conduct business with any confidence in what legal rules apply. One cannot conform his conduct to the law if he does not know what the law is or at least what it is likely to be.[206]

Furthermore, stare decisis aids judges in performing their work. As Justice Cardozo once remarked, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[207] Additionally, regarding past decisions as binding is an act of courtesy and comity toward fellow judges that promotes civility within the courts.[208]

If stare decisis applied intercircuit within our federal appellate system, a panel decision in one circuit would be controlling nationwide. This approach would further the values that underlie stare decisis.[209] But stare decisis among our federal circuits has been rejected. A decision by one circuit is of persuasive, not binding, force in a sister circuit.[210] The advantages of percolation and of providing the Supreme Court with different approaches to important issues are seen as outweighing an unavoidable loss of uniformity.[211]

Within each circuit, a rule of intracircuit stare decisis, commonly referred to as the law of the circuit, obtains.[212] All circuits have adopted this practice, and most have formalized it in their operating procedures.[213] A panel decision

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ing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent.").

206. For a discussion of the benefits of stare decisis, see J. MURPHY & R. RUETER, *supra* note 203, at 93-97; Hellman, *Jumboism & Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 544 (1989).

207. B. CARDOZO, *supra* note 205, at 149.

208. J. MURPHY & R. RUETER, *supra* note 203, at 104.

209. These reasons have led some to advocate the adoption of intercircuit stare decisis. *See, e.g.*, Vestal, *supra* note 21, at 176-79.

210. *See* R. POSNER, *supra* note 93, at 252; Maranville, *supra* note 8, at 485.

211. For defense of the present system, see R. POSNER, *supra* note 93, at 163-64, 256; Estreicher & Revesz, *Reply*, *supra* note 8, at 835-35. Judge Posner, however, believes that while a lack of intercircuit stare decisis is good, the circuits presently give too little weight to each others' decisions. R. POSNER, *supra* note 93, at 256. Moreover, he would find that if the first three circuits agree on an issue of law, the remaining circuits should be bound. *Id.* at 165.

The reasoning in *United States v. Mendoza*, moreover, supports the lack of intercircuit stare decisis. 464 U.S. 154, 163 (1984). Percolation aids the development of national law. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 736-38; Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1156 (1990). *But see* Meador, *supra* note 165, at 634 (asserting that "[a]s applied to judicial interpretations of federal statutes, 'percolation' is a euphemism for incoherence").

212. *See* R. POSNER, *supra* note 93, at 252; Vestal, *supra* note 21, at 161.

213. *See, e.g.*, Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969 n.2 (3d Cir. 1979) ("Under the Internal Operating Procedures of this court, one panel may not overrule a decision of a previous panel."); *see also* J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 187 (1981)

is binding on district courts within the circuit and on other panels until overruled by the circuit en banc or by the Supreme Court.[214]

Intracircuit stare decisis generally promotes uniformity within the circuit.[215] Like cases are decided alike, helping to avoid a perception that a result depends upon the composition of the panel. More important, persons within the jurisdiction can conform their conduct to circuit law. Persons can plan their affairs or structure business transactions aware of the governing law. Lawyers can advise clients on the merits of litigation or settlement by predicting the applicable law. District court judges, as well as subsequent panels, can decide cases based on circuit law and avoid the need to decide every issue anew. Within the circuit, moreover, collegiality is promoted when one panel's decision is followed by other panels. Thus, intracircuit stare decisis in general promotes desirable goals.[216]

Many of these bases for intracircuit stare decisis, however, are inapplicable to decisions involving the NLRB. An employer, for example, may be located within a circuit's geographic territory. But that does not mean that circuit's law necessarily will govern the employer's actions; another circuit may well review a Board order and determine the law to be applied.[217] Thus, the law of the circuit doctrine does not aid the employer in conforming its conduct to the law or structuring its transactions with the union.[218] The goals of certainty and predictabil-

("Adherence to precedent remains the everyday, working rule of American law, enabling appellate judges to control the premises of decision of subordinates who apply general rules to particular cases."); Diller & Morawetz, *supra* note 8, at 805 n.17 (providing a list of cases setting forth the rules of each circuit); Hellman, *supra* note 206, at 545 ("[A]ll of the courts of appeals are committed to the rule of intracircuit stare decisis: panel decisions are binding upon subsequent panels unless overruled by the court en banc.").

214. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 480 (1986) ("Theoretically, of course, circuit judges are bound by circuit precedent until it is overruled either by the circuit court itself, sitting en banc, or by the Supreme Court."). Judge Wald goes on to assert, however, that judges do not always follow in practice what they have committed to follow in theory. For a similar point of view, see J. HOWARD, *supra* note 213, at 210 ("It is considered improper for one panel to overrule the decisions of another, though judges admitted that 'we fudge on it sometimes' by distinguishing cases, narrowing down rulings, and other tactics.").

215. As recently stated:

> By requiring adherence to prior panel decisions, the circuits are able to maintain a degree of consistency within each circuit that would be impossible if each panel were entitled to reject the conclusion of a prior panel. A system in which panels were free to overturn prior panels would allow the law within each circuit to be in constant flux, and would deprive the circuits of their ability to provide clear direction to parties and the lower courts. Rules of stare decisis promote equality of treatment at the lower court level (as well as for those who never seek judicial review) by giving clear guidance as to the rule of law.

Diller & Morawetz, *supra* note 8, at 807.

216. For a discussion of the values of intracircuit stare decisis, see J. HOWARD, *supra* note 213, at 210; Diller & Morawetz, *supra* note 8, at 806-08; Hellman, *supra* note 206, at 544-47.

Judge Posner, however, has suggested relaxing the law of the circuit when a subsequent circuit rejects the prior circuit's point of view. "On what basis could the Third Circuit think its earlier decision more authoritative than the Fourth Circuit's contrary decision? It ought to reexamine its previous decision conscientiously and without preconceptions." R. POSNER, *supra* note 93, at 256. Judge Posner is correct, especially when the administration of a national statute is at issue. His recognition that the law of the circuit is not sacrosanct is in keeping with the premise advocated here.

217. *See supra* notes 56-63, 147 and accompanying texts.

218. *See* J. MURPHY & R. RUETER, *supra* note 203, at 106 (recognizing that when no reliance

ity cannot be served by intracircuit stare decisis when it is impossible to know which circuit's law will govern.

Moreover, there is no need to supply a body of governing law for the district courts. NLRB orders are directly reviewed by the circuit courts, which all but eliminates district court involvement in Board orders.[219] Nor can the NLRB be governed by the law of the circuit because, as shown earlier, the General Counsel cannot know when it issues a complaint and the Board cannot know when it makes its orders which circuit's law will apply.[220] Thus, litigants, lawyers, and "lower level" decisionmakers are not aided by application of intracircuit stare decisis.

There remain, however, underlying principles that are served by the law of the circuit doctrine, even in NLRB review proceedings. Certainly, circuit court time is saved when one panel disposes of a case on the basis of circuit law.[221] Additionally, collegiality within the court is enhanced when panel decisions are regarded as controlling.[222]

These remaining interests are not strong enough to justify routine application of intracircuit stare decisis when reviewing Board orders.[223] A relaxation of intracircuit stare decisis should occur, however, only in cases in which nonacquiescence is present, that is, in cases in which the Board is asking the circuit to depart from a prior panel opinion.

A. Benefits of Discarding the Law of the Circuit Doctrine When Reviewing Board Orders

The circuit court, entrusted with the task of judicial review, can deny enforcement of Board orders on the basis of "binding" circuit law.[224] Although applying the law of the circuit is usually within the court's power, this approach fails to give full effect to the spirit of *Chevron*, which recognizes the agency's substantial role in the lawmaking process.

There are some circumstances in which *Chevron* compels a departure from the law of the circuit. When a reviewing panel upholds the Board's position as a reasonable view of the statute and the Board later reverses itself and changes

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interest is present, strict adherence to stare decisis is "an unnecessary fetter of judicial function"). The authors advocate a departure from strict adherence to stare decisis for intermediate courts in the Commonwealth system. *See id.* at 105-12.

219. 29 U.S.C. § 160(e)-(f) (1988).

220. *See supra* notes 56-60, 147 and accompanying texts.

221. "If the decisions of the circuits were not accorded precedential weight, but were constantly open to question, these courts could be easily overwhelmed by parties raising issues addressed in earlier rulings by the same court. The system simply could not function if precedent were so unstable." Diller & Morawetz, *supra* note 8, at 808.

222. *See* J. HOWARD, *supra* note 213, at 210.

223. *See infra* notes 269-74 and accompanying text.

224. At issue here, with the exception noted *infra* in the text accompanying notes 225-30, is not whether circuit courts have the power to deny enforcement based on circuit court precedent; it is readily conceded that they do. Rather, the issue is whether that power should be exercised or instead should be held in check by the courts themselves.

course, a later panel must be able to defer to the Board's changed position free of the constraints of circuit law.

The Ninth Circuit, en banc, has endorsed this view.[225] The Ninth Circuit reasoned that so long as the prior panel decision simply deferred to the Board and did not hold the Board position to be the only reasonable reading of the statute, subsequent panels may adopt new Board interpretations without an en banc hearing.[226] The court recognized that adherence to the law of the circuit would deprive the Board of the deference it is due under *Chevron*.[227] The Board is entitled to change its interpretation of the statute, and its changed position likewise is entitled to *Chevron* deference.[228] *Chevron* would be thwarted if the law of the circuit doctrine precluded a reviewing court from deferring to the Board.[229]

The Ninth Circuit narrowly limited the scope of its holding. Under the Ninth Circuit's approach, only when the prior panel decision endorsed the Board's view and when the decision did not hold its endorsement to be the only reasonable reading of the statute should a departure from intracircuit stare decisis occur.[230] In those circumstances, as the Ninth Circuit acknowledged, *Chevron* mandates abandoning the law of the circuit.[231]

In other circumstances, such as when a panel has refused to endorse the Board's view and the issue later comes before the court with no change in the Board's position, *Chevron* suggests, although it does not compel, rejection of intracircuit stare decisis.[232] When a court regards a prior panel decision as a roadblock to reconsidering the agency's expert view, that position is at odds with *Chevron*'s respect for agency lawmaking.[233]

A panel's decision is the reasoned view of the law by all or by a majority of

225. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Labor, 861 F.2d 1124, 1136 (9th Cir. 1988) (en banc), *cert. denied*, 111 S. Ct. 209 (1990). For a discussion of the *Mesa Verde* decision, see Comment, *supra* note 94, at 674-80.

226. *Mesa Verde*, 861 F.2d at 1134-35.

227. *Id.* at 1135.

228. *Id.*

229. *Id.* See *supra* notes 95-108 for discussion of *Chevron*.

230. *Mesa Verde*, 861 F.2d at 1136.

231. *Id.*

232. When a reviewing court determines the Board's position is at odds with the statute, *Chevron* certainly does not require the court to change its view. The *Mesa Verde* court presumably adhered to a *Chevron* standard of review the first time around, and the holding of *Chevron* compels no additional deference. I do not contend that *Chevron* requires a departure from intracircuit stare decisis. I do contend it suggests the need for flexible application of circuit law.

233. Professors Estreicher and Revesz rely on agencies' lawmaking functions and responsibility for administering a nationally uniform statute as reasons why circuit courts are more likely to hold en banc reviews or otherwise formally to overrule precedent when administration of a national statute is at issue. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 724-32; Estreicher & Revesz, *Reply*, *supra* note 8, at 841-42. Allowing agencies to nonacquiesce is necessary so that opportunities for reversal can arise. In response, authors Diller and Morawetz disagree that circuit courts are readily willing to hold en banc hearings in cases involving agency lawmaking. Diller & Morawetz, *supra* note 8, at 803-12; *see also* Kubitschek, *supra* note 8, at 424-25 (recognizing circuit courts do not regularly overturn past decisions but instead rely on the law of the circuit to condemn nonacquiescence). Diller and Morawetz further contend that circuits do not and should not reconsider rules of law established during review of agency decisions. Diller & Morawetz, *supra* note 8, at 803-12. Diller and Morawetz, however, focus on intracircuit nonacquiescence occurring in the face of venue

the judges on the panel. It commands considerable respect. The panel, however, may (and probably does) have relatively little familiarity with labor law.[234] In deciding the issue before it, moreover, the panel is unlikely to be able to place the issue into the broader perspective of the overall agency program.[235] Yet

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certainty. *Id.* Thus, much of their argument extolling the virtues of intracircuit stare decisis is inapplicable in the context of reviewing NLRB orders. *See supra* notes 217-20.

But in terms of describing the reality of circuit courts' treatment of precedent, Diller and Morawetz, not Estreicher and Revesz, are correct. Intracircuit stare decisis is the traditionally followed rule, and en banc reversal of precedent is not occurring routinely. *See supra* notes 212-14. Diller & Morawetz, *supra* note 8, at 806; Solimine, *Ideology and En Banc Review*, 67 N.C.L. REV. 29, 46 (1988).

Accordingly, because courts use the law of the circuit to deny enforcement of Board orders and because this approach stymies development of a nationally uniform labor law, this Article advocates that circuit courts discard the law of the circuit doctrine when confronting nonacquiescence by the NLRB.

See also Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 878 n.71 (1989) ("Although the analogy to en banc review is problematic because lack of uniform decisionmaking within a circuit is likely to become intolerable more quickly, the advantages of experimentation by different three-judge panels nonetheless merits consideration."). In the NLRB context, the problems of a lack of uniformity are minimized because of an inability of circuit law to guide the decisionmaking of the Board. Moreover, there is no district court involvement in lawmaking, so an absence of guidance to lower courts is not implicated.

234. In view of the limited volume of labor cases, it is unrealistic to expect a particular expertise in labor law from the members of the court. It is a fact of life that lawyers with prior labor experience rarely receive appointments to circuit courts of appeals. . . . When appearing before a federal circuit court, advocates should remember that labor law is a subject that is largely unfamiliar to the professional deciders who will rule on the case.

Vance, *supra* note 76, at 39-40; *see* Kafker, *supra* note 5, at 148 (quoting Judge Vance); Meador, *supra* note 165, at 619, 623. Professor Meador suggests that when an appellate court does not deal with a "critical mass" of cases in a particular subject area, it may be unable to handle a case in that area effectively. *Id.* at 619. As he states:

> For an appellate court to deal coherently and constructively with a field of law over time, the court needs more than a random case or a handful of cases annually. . . . If a judge deals with only an occasional case in a particular field, there is a possibility that the judge will either deal inadequately with the problem presented or will spend an inordinate amount of time educating himself in the legal setting in which the case arises.

Id.

He identifies NLRB cases as fitting into this category. *Id.* at 623. While there were 561 appeals from NLRB orders in 1987, several circuits handled fewer than 20. *Id.*

235. The episodic intervention of a particular panel of three of the nation's 156 circuit judges, pressed to decide a particular point on particular facts, is unlikely to generate an integrated view. If it cannot be pretended that the panel will have either the perspective or the responsibility for integration, then accepting its ruling as a definitive point that must be accommodated is inviting a crazy and tattered quilt.

Strauss, *supra* note 5, at 1115; *see* Koch, *Confining Judicial Authority Over Administrative Action*, 49 MO. L. REV. 183, 185 (1984).

Professor Strauss notes the outcome of a particular case can be "dramatically distorting of the program as a whole." Strauss, *supra* note 5, at 1116 n.94. For example, he says, were the Board to spend its resources complying with a circuit's ruling on one point, it would have to withdraw those resources from elsewhere. *Id.* at 1115 n.88. Characterizing the judiciary as "the bull in the legal china shop," Strauss asserts that there is a growing realization that "judicial lawmaking can serve as a disruptive force when it occurs circuit by circuit, in competition with agencies that are able to generate national standards." *Id.* at 1128-29.

Strauss's arguments are aimed at explaining *Chevron* and demonstrating how it helps achieve national uniformity. *See supra* notes 128-30. While sympathetic to nonacquiescence, Strauss believes that once proper *Chevron* deference occurs, nonacquiescence is "far less acceptable." Strauss, *supra* note 5, at 1122.

As set forth above, nonacquiescence in the face of venue choice is lawful. *See supra* notes 141-72 and accompanying text. Strauss's arguments in defense of *Chevron* are also powerful, as explained herein, when made in favor of relaxing the law of the circuit.

under the law of the circuit, the panel decision governs future dispositions of that issue throughout the jurisdiction.[236]

If the Board thereafter considers and rejects the panel's view, its reasons for rejection merit consideration that the law of the circuit now precludes. The Board's expert reading is based on an integrated view of the statute.[237] As the entity Congress entrusted with national administration of the Act, the Board's position deserves at least another look.[238] The Board, after all, shares in the lawmaking process and has a mandate to fashion and to implement a nationally uniform program.[239] When the usual benefits of stare decisis (*e.g.*, certainty and predictability for lawyers, litigants, and lower courts) already are missing, agency expertise and lawmaking authority are powerful incentives for reconsideration of the issue by a subsequent panel.

Moreover, relaxing the law of the circuit doctrine provides a useful means of ensuring that *Chevron* deference in fact occurs. Under the present system, the Board theoretically can turn to the Supreme Court to enforce *Chevron*.[240] As a practical matter, that check often is of limited value.[241] When the Court can hear only 150 cases per year, it cannot be expected to correct all judicial overreaching.[242] Furthermore, the lower courts have been reluctant to follow *Chevron* in reviewing Board orders.[243] If one panel were free to disagree with another panel's application of *Chevron*, then greater adherence to *Chevron* through the threat of peer scrutiny could be expected. Additionally, any judicial "mistakes" in applying *Chevron* would not freeze circuit law into a position at odds with the Board's.

Chevron was a giant step toward uniformity in areas of national law. By instructing circuit courts to defer to an agency's rational interpretation of a statute, the Supreme Court sought to restrain the lower courts and to allow the national agency interpretation to prevail.[244] Routine application of the law of the circuit doctrine undermines this value underlying *Chevron*.

Applying the law of the circuit results in a balkanization of federal law.[245] Labor law, supposedly uniform, takes on a different meaning and application in

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236. This result, not surprisingly, leaves some judges uncomfortable. But the dislike of being wedded to a position they had no part in formulating is balanced against judges' distaste for the en banc process. J. HOWARD, *supra* note 213, at 217.

237. Strauss, *supra* note 5, at 1111, 1115.

238. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 724-32; Estreicher & Revesz, *Reply*, *supra* note 8, at 841-42 (stressing the agency's national jurisdiction, as opposed to the regional jurisdiction of the appeals courts, as a basis for validating nonacquiescence).

239. *See* Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 724-32; Estreicher & Revesz, *Reply*, *supra* note 8, at 841-42.

240. Schwartz, *supra* note 1, at 1902 n.352.

241. Strauss, *supra* note 5, at 1105.

242. *Id.*

243. *See supra* notes 130-33 and accompanying text.

244. Pierce, *supra* note 87, at 313; Strauss, *supra* note 5, at 1119, 1126; *see supra* notes 130-33 and accompanying text.

245. Friendly, *supra* note 21, at 412-13; Strauss, *supra* note 5, at 1105.

different parts of the country.[246] Under the present system, Board nonacquiescence serves only to obtain uniformity at the agency level.[247]

If the law of the circuit were disregarded, however, nonacquiescence would lead to greater uniformity. Suppose, for example, that the Sixth Circuit rejects the Board's statutory interpretation, but that the Seventh Circuit subsequently accepts the Board's view. When the same issue again comes before the Sixth Circuit, the law of the circuit would dictate a refusal to enforce the Board's order.[248] But if the Sixth Circuit panel were free to disregard the prior panel decision and to accept the Seventh Circuit's view, uniformity could more quickly and easily be accomplished.

True, a subsequent Sixth Circuit panel would have conflicting views from which to choose both within and outside the circuit, but to the extent it endorses the second panel's approach, a more uniform law would evolve. At the least, no circuit is wedded to a particular position on the basis of a prior panel decision rejecting the Board's approach. While opposing views of federal labor law are not eliminated, such opposition is not a foregone conclusion on the basis of regional precedent.

This approach gives labor law needed flexibility. While a court en banc can overturn a panel decision, en banc proceedings are cumbersome and unwieldy.[249] En bancs also tend to polarize a court, and accordingly circuits avoid

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246. *See* Meador, *supra* note 165, at 615-16. In some areas of federal law, this problem is not significant. *See* R. POSNER, *supra* note 93, at 164. As Diller and Morawetz assert:

> As long as parties can discern which circuit law applies to any given conduct, the parties can shape their action to conform to legal standards. Furthermore, permitting circuits to independently examine issues contributes to resolution of important legal questions on a national basis. Accordingly, each circuit remains completely free to accept or reject the reasoning of other courts of appeals. This mixture of uniformity and diversity strikes a balance that permits legal issues to receive independent examination by a number of courts, while at the same time maintaining a unitary rule of law in any given geographic location.

Diller & Morawetz, *supra* note 8, at 805; *see also* Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 931 (1983) (stating that since most litigants live and work in one circuit, they only have to conform to the law of one circuit and are not troubled by conflicting circuit views).

Diller and Morawetz were discussing the benefits of circuit law in the context of review of social security cases. Of course, as set forth earlier, parties cannot discern which circuit's law will apply in labor cases. *See supra* notes 217-18 and accompanying text. Moreover, having different rules of law in different parts of the country encourages competition among the circuits and is destructive of national labor policy. *See supra* note 165 and accompanying text. Thus, circuit law poses particular problems in the labor law context, rendering Diller and Morawetz's arguments of little force.

A survey of labor law practitioners revealed concern over balkanization:

> Lawyers and clients alike are willing to accept the fact that the law is uncertain and that outcomes cannot be predicted because the legal rule is unsettled or the facts undetermined. But they have difficulty accepting the fact that the outcome depends on where the case is heard or who hears it. They are not troubled by state law differing from state to state, but they are troubled by federal law differing from circuit to circuit. Though the practical problems created may be the same, differences in state law are viewed as unfortunate, while differences in federal law are viewed as unseemly or unfair.

Summers, REPORT TO HRUSKA COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, 67 F.R.D. 195, 374 (1975). The Hruska Commission recommended establishment of a national court of appeals. *Id.* at 199, 237. This controversial recommendation was never adopted.

247. *See supra* note 31 and accompanying text.

248. *See supra* notes 212-14 and accompanying text.

249. J. HOWARD, *supra* note 213, at 217; Meador, *supra* note 165, at 605-06.

them when possible.[250] Because of the unlikelihood of an en banc overruling, a panel decision thus effectively freezes the law of the circuit. The Board, however, is empowered to shift its position in response to its experience or to the political process.[251] If circuit courts are denied the flexibility to approve changing Board views, the Board's own flexibility is stymied.[252]

For example, suppose the Fifth Circuit endorses the Board's view of the statute. The Board later changes its mind, and its new position is endorsed by the Third and Fourth Circuits. If the Fifth Circuit is compelled by the law of the circuit to stand by its prior decision and to deny enforcement in accordance with the law of the circuit, an unnecessary lack of uniformity in federal labor law has been created.[253] If a Fifth Circuit panel were free to look at the issue anew, it might well agree with the Board and its sister circuits. Thus, freedom from the law of the circuit can aid in obtaining national uniformity.

Adherence to the law of the circuit, moreover, promotes forum shopping.[254] Many, if not most, parties to Board proceedings have numerous circuits from which to choose in selecting a reviewing court.[255] Using the law of the circuit, aggrieved parties can shop for a circuit whose law is hospitable to their positions.[256] This encourages appeals by the losing party, who has the ability to select a favorable forum.[257]

If the courts relaxed the law of the circuit, however, a party could not be certain of circuit law. A prior panel's rejection of the Board's position would not guarantee how a subsequent panel in that circuit would rule. A subsequent panel would remain free to accept the Board's view over that of a sister panel, eliminating the opportunity to select a forum with favorable law.

Finally, if the courts released themselves from the constraints of the law of the circuit doctrine, they would reduce the Board/court tensions caused by nonacquiescence. As previously discussed, the Board should not be bound by circuit law in making its decisions and is free to reject the law of any circuit, even one likely to review a particular case.[258] Under the present system, however, the reviewing court is not free to "respectfully disagree" with a prior panel, but rather it is bound to follow that decision.[259] This anomaly, that the Board in its

250. J. HOWARD, *supra* note 213, at 217; Meador, *supra* note 165, at 605-06; Wald, *supra* note 214, at 488.

251. *See supra* note 119 and accompanying text.

252. *See* Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1135 (9th Cir. 1988) (en banc), *cert. denied*, 111 S. Ct. 209 (1990).

253. *Id.*

254. Friendly, *supra* note 21, at 412; Strauss, *supra* note 5, at 1105.

255. *See supra* notes 52-60 and accompanying text.

256. When petitions are filed in more than one circuit, the first to file controls, unless competing petitions are filed within 10 days of the Board's order. In that circumstance, the reviewing court is determined by lottery. Pub. L. No. 100-236, 101 Stat. 1731, 1731 (1988) (amending 28 U.S.C. § 2112(a) (1982)). This random selection process precludes forum shopping only when competing petitions are filed. Moreover, it increases the uncertainty in predicting which circuit will review a case. Modjeska, *supra* note 8, at 417.

257. Ferguson & Bordoni, *supra* note 8, at 216.

258. *See supra* notes 141-70 and accompanying text.

259. *See supra* notes 212-14 and accompanying text.

decisionmaking process can ignore precedent the reviewing court cannot, exacerbates conflict between the Board and the courts.[260]

The Board cannot ease tension over this anomaly and remain true to its statutory responsibilities. In contrast, the courts have the power to remove the Board-circuit court friction.[261] The circuit courts should relinquish the law of the circuit when reviewing Board orders; then a panel, like the Board, could reject circuit precedent with which it "respectfully disagrees."

The end result of this approach is a more nationalized law of labor relations. In essence, circuit boundaries often would be unimportant when Board orders are reviewed. A panel would be free to prefer the view of the Board or of another circuit over the view of a sister panel.

Differences in statutory interpretation among the circuits inevitably will occur. Moreover, under this approach, differences may occur within a circuit. Conflicting panel decisions, however, are no more intolerable than conflicting circuit views, because circuit law, given the broad venue provisions governing review, cannot be used or relied upon to shape employer, union, or individual action, or to govern Board proceedings or rulings. A coherent body of circuit law rejecting the Board's position lends no stability to a national labor law.

It is not necessarily unhealthy that differing statutory interpretations could exist within and among the circuits. As the Court recognized in *Mendoza*, significant advantages flow from percolation.[262] Percolation is useful, whether it occurs within or among the circuits.[263] Additionally, the appellate courts would have greater freedom to work out their own disagreements.[264] Conflicting views that continued to exist would be more representative of circuit judges as a whole, as opposed to conflicts engendered by a single panel decision that froze circuit law.

Uniformity is further enhanced by recognizing that the law of the circuit *should* apply when the first panel within a circuit to address a particular issue has endorsed the Board's view, and the Board is again seeking enforcement of a

260. Estreicher & Revesz, *Nonacquiescence*, *supra* note 8, at 742.

261. Intracircuit stare decisis is a judge-made doctrine and thus is judicially modifiable. J. MURPHY & R. RUETER, *supra* note 203, at 104-05. Maranville, *supra* note 8, at 500. The circuit judges, moreover, are free to revise their internal operating procedures. *See* Solimine, *supra* note 233, at 35 n.28; FED. R. APP. P. 47.

262. *See supra* notes 151-52 and accompanying text.

263. "[A] difficult question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases than if it is answered finally by the first panel to consider it." R. POSNER, *supra* note 93, at 163, *quoted in* Estreicher & Revesz, *Reply*, *supra* note 8, at 835 n.24. That these different sets of judges sit within a circuit, as well as among the circuits, does not make their participation in the dialogue or contributions toward the development of national law any less valuable.

264. Under our federal system, the Supreme Court is empowered to resolve conflicts that develop among the circuits, but its capacity to do so is limited. *See* Diller & Morawetz, *supra* note 8, at 809-10; Friendly, *supra* note 21, at 412; Strauss, *supra* note 5, at 1105. Thus, reliance on the Supreme Court to resolve all intercircuit conflicts is not well grounded.

It is true that the circuits themselves can harmonize the law by reversing position. Presently, however, as Diller and Morawetz point out, "the rules are structured to make departures from prior decisions unusual events requiring the attention of the full court." Diller & Morawetz, *supra* note 8, at 805 n.18. Were the circuits free from the constraints of such rules, conflicts could be more easily ironed out. *See* R. POSNER, *supra* note 93, at 256.

subsequent order. In other words, when the Board's position has been upheld by a circuit panel and the issue subsequently is brought before the court by an aggrieved party seeking a departure from circuit law, the court should follow the general rule of intracircuit stare decisis. In this situation, no special circumstance exists that warrants a departure from the law of the circuit.[265] In those cases, which do not involve nonacquiescence, the rationale underlying an abandonment of circuit law is inapplicable. The agency's expert view has been accepted, and the agency can count on enforcement of its view in administering its program. Were circuit law always open to reconsideration, even when it conformed to the agency's expert view, uniformity and stability would be undermined, not enhanced. Such a result is at odds with the reasons for recognizing an exception in the first place. Thus, the exception advocated here to intracircuit stare decisis must be narrowly drawn to advance the goals it is designed to achieve.

Additionally, certainty and predictability in the enforcement of Board-made law do guide the actions of those within the Board's jurisdiction. When unions, employers, individuals, and their counsel know that the circuits with the potential to review a Board order accept the Board's position, that knowledge is a powerful incentive for conforming their conduct to the law as administered and applied by the agency. This underlying benefit of intracircuit stare decisis must be retained. Accordingly, a review procedure that relaxes the law of the circuit *only* in cases of Board nonacquiescence promotes a nationally uniform labor law.

This national appellate approach avoids balkanization, exchanging it for a panel's freedom to fall into line with a view outside the circuit that favors the agency's nationally uniform program. A reasoned step toward uniformity is worth taking in the area of labor relations, where the need for a uniform law is particularly acute.[266]

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265. Admittedly, this approach skews the development of the law in favor of the agency's position. Given the agency's expertise and its primary role in developing national labor policy, as recognized in *Chevron*, this advantage is merited. However, I do not go so far as to suggest that when one panel has rejected the Board's position, a subsequent panel decision in favor of the agency thereafter should bind the circuit to the Board's view. Where conflicting views exist, they should be permitted to percolate. If subsequent decisions routinely endorse the Board, an en banc hearing could remove the conflict by overruling the first panel decision.

266. *See supra* notes 163-65 and accompanying text. The Supreme Court long has recognized the importance of uniformity in labor law through its preemption cases. *See* White, *Section 301's Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377 (1990); Zimmerman, *supra* note 27, at 4.

See also Meador, *supra* note 165, at 617-21. Professor Meador, who advocates the creation of nonregional appellate courts, discusses seven factors that identify areas of the law where uniformity is particularly important. His factors are as follows:

1. Is there a nationwide federal program administered by a single federal agency?
2. Are multi-circuit actors frequently involved in the area being regulated?
3. Would regionalization lead to undesirable results?
4. Are there strong local interests that outweigh national interests? For example, as Professor Meador points out, protecting marine life is not of similar importance to all areas of the country.
5. Is there a dearth of cases in a particular circuit or circuits?
6. Is it easy to define the particular subject matter at issue?

At some point, however, a circuit reasonably could conclude that a law of the circuit should be formed. When panel decisions within a circuit routinely refuse to enforce the Board's position or find the Board's position to be the only permissible reading of the statute, the circuit should hold an en banc hearing. Once the en banc court formally rejects the Board's view of the statute or endorses it as the only reasonable reading, the court then should rely upon the law of the circuit in future cases. This circuit law, however, could neither restrain agency lawmaking nor justify remedial measures against the Board.[267] It would be used to dispose of the Board's enforcement action without further consideration.

Conflicting panel decisions within a circuit should not automatically result in en banc review. Because circuit law cannot provide certainty or stability to actors within the circuit, disagreement within the circuit can and should be tolerated. Moreover, when circuit judges vigorously disagree on whether congressional intent is clear or on whether agency action is irrational, such disagreements should not be stifled by creating a binding circuit law.[268]

In short, en banc establishment of circuit law should be the exception, not the rule, in reviewing Board orders in the face of nonacquiescence. The benefits of increasing exposure to agency expertise, of providing flexibility to more easily achieve uniformity, of limiting forum shopping, and of eliminating tension between the Board and courts over the binding effect of circuit law rarely should be outweighed by the desire for a "law of the circuit."

B. Recognizing the Drawbacks

An approach to judicial review that allows one panel to reject a prior panel's position is not without its costs. First, an increase in judicial workload would occur.[269] When a panel is not bound by circuit law but is expected to examine an issue for itself, courts will expend additional time and energy on Board cases.[270] Labor cases, however, represent a small percentage of appellate

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7. Is the overall volume of cases in the subject matter particularly high?

Id. Professor Meador concludes that each of these factors supports taking review of NLRB orders away from the regional appellate courts, in order to achieve greater uniformity. *Id.* at 621.

Much of the desired uniformity is obtainable without such a radical step and without a need for congressional intervention by discarding routine reliance on intracircuit stare decisis. Moreover, uniformity is obtainable without losing the benefits of percolation or without creating a specialized court, which some have criticized as unworkable or undesirable. *See* R. POSNER, *supra* note 93, at 150.

267. Although circuit law would be settled, the Board should not be punished for adhering to its nationally uniform view of the statute. "While a single court of appeals can settle the rights of parties to a lawsuit, it should not be able to unilaterally stymie the prospects for uniformity in administration of Federal law while an agency is reasonably attempting to obtain the nationwide validation of its position." Estreicher & Revesz, *Reply*, *supra* note 8, at 842.

268. It is these difficult issues that are most in need of the benefits of percolation. *See* R. POSNER, *supra* note 93, at 163.

269. The workload of the federal courts is growing by leaps and bounds. *See generally* Solimine, *supra* note 233, at 41 (reporting a more than 700% increase in cases filed over approximately the last 25 years).

270. Conserving judicial resources is one of the justifications for the law of the circuit doctrine.

court caseloads.[271] Most of these cases, moreover, are "substantial evidence" cases, in which the court determines whether the Board's factual determinations are supported by substantial evidence on the record as a whole.[272] The bulk of the cases implicates neither nonacquiescence nor the law of the circuit, as factual issues only are presented. Other cases involve a review of a Board position that the court previously has accepted at first exposure. Those cases neither involve a nonacquiescence issue nor do they justify any departure from the law of the circuit.[273] Rather, national uniformity and a stability of Board law are enhanced when the circuit routinely adheres to the Board's position.[274]

What remains is the narrow category of cases involving statutory interpretation or policy choices on which the Board and a panel of the reviewing circuit court have disagreed. Asking federal judges to rethink these issues, bearing in mind the agency's expertise and responsibility for the entire program, imposes a justifiable and modest increase in judicial workloads.

Perhaps more troubling is the possibility of increased tension within a circuit. The comity principle that underlies stare decisis is as important in reviewing Board orders as it is in other areas of the law. If intracircuit stare decisis were to be lifted in this narrow category of cases, however, one panel's disagreement with another's view of the law would not involve the extraordinary flouting of precedent that such conflicts now represent. Instead, just as a panel currently feels free to reject another circuit's view, similar treatment of prior panel decisions would be a recognized and accepted part of the review system.

Finally, this departure from intracircuit stare decisis in reviewing Board orders will not lead to a wholesale retreat from the law of the circuit doctrine when reviewing agency lawmaking in general. It is the NLRA's judicial review provisions that make the law of the circuit of little use in labor cases.[275] Under statutes in which one circuit reviews all cases arising within the jurisdiction, certainty and predictability of circuit law enable litigants to conform their conduct, structure their affairs, or make litigation decisions according to circuit law.

See supra note 207 and accompanying text. Whenever that doctrine is abandoned, an increase in workloads undeniably occurs.

271. *See* Meador, *supra* note 165, at 604, 624. According to his figures, 561 appeals from NLRB decisions were filed in 1987, out of over 37,000 total appeals. *See also* Vance, *supra* note 76, at 39 (noting that "[l]abor cases constitute a surprisingly small percentage of the total work load in most circuits").

272. THE DEVELOPING LABOR LAW 1704 (C. Morris 2d ed. 1983).

273. *See supra* note 265 and accompanying text.

274. *Id.*

275. *See supra* notes 217-20 and accompanying text. Additionally, the factors that make uniformity particularly important in Board cases are not present in reviewing all administrative action. *See supra* note 266.

These attributes should be considered in determining how judicial review is best accomplished. As Professor Winter noted, judicial review should depend on an evaluation of an agency's functions:

> That evaluation can be made in large part only by examining each agency individually, for each has its unique characteristics and its unique functions, determined by the nature of the matters to be regulated, the private interests involved, the character of the basic legislation, and the structure of the agency itself.

Winter, *supra* note 80, at 53.

In those cases, adherence to the law of the circuit satisfies important goals.[276] Similarly, when review of agency action is confided at the first level to the district court, a law of the circuit is needed to guide lower court decisionmaking.[277]

These attributes of intracircuit stare decisis are missing in the NLRB context and, as discussed above, justify relaxing the law of the circuit doctrine. But the reasons for relaxing it in this context are not so widespread as to make the law of the circuit doctrine generally inapplicable to all agency review actions.[278]

CONCLUSION

Nonacquiescence by the NLRB has become a source of real tension between the Board and the courts. This Article suggests the judiciary bears responsibility for this tension on two fronts. First, by failing to observe *Chevron*, the reviewing courts increase the Board's need to nonacquiesce.[279] *Chevron* commands the lower courts to give considerable judicial deference to the Board's policy choices. Whether these policy choices are made through statutory gap-filling or through construction of an ambiguous NLRA provision, the Board's position must be upheld if rational. When a reviewing court fails to defer to the Board's rational policy choices, it creates the opportunity for the Board thereafter to nonacquiesce. Were the courts to adhere more carefully to *Chevron*, nonacquiescence would be reduced.

Second, by not recognizing the lawfulness of Board nonacquiescence at both the agency and appellate review levels, the judiciary unfairly accuses the Board of acting outside the law, when it simply is exercising its statutory authority. Board nonacquiescence at the agency level is lawful; the broad venue provisions of the NLRA render no circuit's law "controlling" for purposes of agency-level decisionmaking. When the Board nonacquiesces at the appellate review level, its litigation conduct is shielded by its responsibility for interpreting and applying a rationally uniform law.[280]

This Article asks the judiciary, however, to step beyond acknowledging nonacquiescence's lawfulness. It asks the courts to consider what place "circuit law" has in developing a national labor law. Upon finding a limited usefulness to the law of the circuit doctrine in cases involving Board nonacquiescence and upon recognizing benefits to its demise, it advocates a relaxation of intracircuit stare decisis when reviewing Board orders.

This solution admittedly is not perfect in an era of expanding judicial work-

276. *See* Diller & Morawetz, *supra* note 8, at 803-11.

277. For example, district courts review decisions of the Social Security Administration. *See supra* note 55.

278. This is not to suggest that NLRB orders are the exclusive candidate for this approach. There may be other agencies, operating under similarly broad venue provisions and for whose programs national uniformity is critical, that deserve such treatment. This Article, however, focuses on the NLRB and analyzes the usefulness of the law of the circuit when reviewing Board orders. It leaves to others whether this analysis can be expanded to encompass any other agency.

279. *See supra* notes 124-28 and accompanying text.

280. *See supra* notes 143-98 and accompanying text.

loads.[281] And, certainly, other possible avenues for achieving labor law uniformity exist. Creation of a national court or an intercircuit tribunal[282] to resolve intercircuit conflicts or formation of a specialized labor court, for example, are proposals that have been debated off and on for years.[283] As national programs become more balkanized by circuit law, the push for uniformity will grow.[284] But to date, Congress has not responded.

Drastic restructuring, however, may not be necessary. The judiciary has the means for reducing geographical differences in our national labor policy. The "judicial bull in the legal china shop,"[285] accordingly, should take itself by the horns and renounce its unnecessary adherence to the law of the circuit when confronting Board nonacquiescence.

281. See *supra* note 269 and accompanying text.

282. *See, e.g.*, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 208-47 (1975); Levin, *Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Inter-Circuit Tribunal*, 39 WASH. & LEE L. REV. 1, 11-21 (1982).

283. *See, e.g.*, Meador, *supra* note 165. Professor Meador suggests the use of non-regional appellate courts to handle particular subject areas, including review of NLRB orders, or alternatively suggests the elimination of the circuits, with a unitary appeals court.

284. Meador, *supra* note 165, at 605-06, 615-16; *see Sweeping Changes in Federal Judiciary Urged by Federal Courts Study Committee*, 58 U.S.L.W. 2599 (1990). That uniformity presently does not exist was highlighted recently by Justice White. Dissenting from a denial of certiorari in a case involving intercircuit conflicts, Justice White noted that in the most recent term of the Court he dissented 48 times from a denial of certiorari in cases involving conflicts among the circuits. Beaulieu v. United States, 110 S. Ct. 3302 (1990) (White, J., dissenting).

285. This colorful phrase was coined by Professor Strauss. *See* Strauss, *supra* note 5, at 1129, quoted *supra* note 235.