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# REMEDIAL NONACQUIESCENCE

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# Remedial Nonacquiescence

Ross E. Davies\*

*ABSTRACT: This Article identifies a new kind of nonacquiescence and suggests ways to deal with it. "Nonacquiescence" is an agency's persistence in its own interpretation of a statute in the face of contrary judicial precedent. It has its pros and cons. For example, it aids in the development of a coherent national body of law by facilitating the "percolation" of important issues up to the Supreme Court, but in the short term the very process of percolation imposes on parties the costs of repetitive litigation and uncertainty about the law. The intractability of the problems nonacquiescence raises with respect to the proper role of the administrative state have made it a frequent source of friction between courts and agencies, as well as a hardy perennial in Congress and law reviews.*

*Traditionally, nonacquiescence has been divided into three forms: intercircuit, intracircuit, and venue choice. But there is at least one more form, which this Article labels "remedial nonacquiescence." Unlike the traditional forms, which involve agency flouting of precedent, remedial nonacquiescence operates silently. Using the National Labor Relations Board as an example, this Article shows how each federal appellate court's commitment to its own "law of the circuit," combined with each court's willingness to enforce broad agency remedial orders that reach beyond a court's geographical jurisdiction, can enable an agency to leverage a court's contempt power to avoid problems of nonacquiescence in other jurisdictions. The results are bad. For example, percolation is corrupted because litigation in multiple circuits on some hard issues is replaced by contempt actions in the original enforcing circuit, yet the costs of repetitive litigation and uncertainty increase because agencies enjoy the flexibility to opt for contempt when the law of the enforcing circuit is favorable, or for a new enforcement action in another jurisdiction when the enforcing circuit's law is unfavorable. Remedial nonacquiescence is, in other words, forum shopping*

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*without tears for agencies. Courts can use existing Supreme Court precedent to combat remedial nonacquiescence. To do so, however, they must be modest in their devotion to the "law of the circuit" and in their willingness to impose that law in broad remedial orders.*

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## INTRODUCTION

Federal agencies, like federal courts, have imperialist tendencies and territorial sensibilities. These forces clash when bureaucrats engage in behavior commonly known as “nonacquiescence,” which the courts tend to view as the refusal of agencies of the federal government to conform their policies and practices to federal circuit court precedent.<sup>1</sup> Or, as agencies prefer to think of it, the refusal of the courts to respect the agencies’ roles as the interpreters and implementers of national policies statutorily assigned to their keeping by Congress and the President, and the failure of those courts to recognize that in some cases agencies simply cannot conform their behavior to the inconsistent standards created by courts of different jurisdictions.<sup>2</sup> Both perspectives on the nonacquiescence conflict have merit, but neither is strong enough to occupy the field, and so the struggle continues. This Article identifies a heretofore unrecognized form of nonacquiescence—call it “remedial nonacquiescence”—then weighs its merits and analyzes possible responses by affected institutions and interest groups.

Traditionally, nonacquiescence is divided into three categories—intercircuit nonacquiescence, intracircuit nonacquiescence, and nonacquiescence in the context of venue choice.<sup>3</sup> This tripartite tradition of nonacquiescence is only part of the story when it comes to agency persistence in policies that courts of appeals have rejected. For example, scholars have shown that in addition to the challenges to precedent that characterize traditional nonacquiescence, agencies also engage in subtler forms of dissent to achieve their ends, such as the arbitrary and inconsistent manipulation of squishy, multi-factor tests to achieve results that conform to the preferences of agency policymakers.<sup>4</sup> (On those rare occasions when they recognize it, courts tend to strike a pose of innocence to such lawless behavior and to find it as objectionable as traditional nonacquiescence.<sup>5</sup>)

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1. See, e.g., *Lopez v. Heckler*, 725 F.2d 1489, 1497 & n.5 (9th Cir. 1984); H.R. REP. NO. 106-976, at 4–8 (2000).

2. H.R. REP. NO. 106-976 at 16–22 (2000); *Federal Agency Compliance Act: Hearing Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary on H.R. 1924*, 106th Cong., 1st Sess. at 20–27 (1999) (statement of Arthur J. Fried, General Counsel, Social Security Administration, and subsequent testimony).

3. See *infra* Part I.

4. See Joan Flynn, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 391–421 (1995); Peter J. Rooney, *Nonacquiescence by the Securities and Exchange Commission: Its Relevance to the Nonacquiescence Debate*, 140 U. PA. L. REV. 1111, 1143 (1992); see also Michael J. Hayes, *After “Hiding the Ball” Is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 RUTGERS L.J. 523 (2002).

5. See, e.g., *NLRB v. Roswil, Inc.*, 55 F.3d 382, 387 (8th Cir. 1995) (enforcement denied where Board ignored its own squishy multi-factor test to achieve a result impossible even under such a test); *Cleveland Constr., Inc. v. NLRB*, 44 F.3d 1010, 1016 (D.C. Cir. 1995) (same); *United Food & Commercial Workers Int’l Union v. NLRB*, 1 F.3d 24, 34–35 (D.C. Cir. 1993)

Similarly, the federal courts have occasionally reprimanded agencies that opt for conclusory rather than evidence-based fact-finding.<sup>6</sup> Agencies willing to engage in this sort of devious—or at least relatively hard-to-police—decision-making might well be willing to capitalize on opportunities to engage in forms of nonacquiescence that are more difficult for the courts to police than traditional, overt nonacquiescence.<sup>7</sup>

This Article suggests that there is, in fact, at least one more category of nonacquiescence: “remedial nonacquiescence,” a variation on traditional nonacquiescence that relies on the interaction between some agencies’ broad remedial powers on the one hand and the relationships among the federal appellate courts and between each of those courts and the agencies on the other. Roughly speaking, each federal appellate court’s commitment to its own “law of the circuit,” combined with each court’s willingness to enforce broad agency remedial orders that reach beyond that court’s geographical jurisdiction, can enable an agency to leverage a court’s contempt power to avoid problems of nonacquiescence in other jurisdictions. An agency can seek contempt sanctions when the agency likes the governing law in the enforcing court, or start a fresh round of administrative proceedings in another jurisdiction when the agency would prefer to avoid the law of the enforcing court. Remedial nonacquiescence is, in other words, forum shopping without tears for agencies. Reasonable minds can and do differ on whether traditional nonacquiescence—especially the intracircuit and venue choice varieties—is good or bad for the rule of law generally and for parties subject to agency and court authority in particular.<sup>8</sup> Remedial nonacquiescence, in contrast, is unqualifiedly bad. It

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(describing the court’s own squishy multi-factor tests with unusual candor); *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1432–34 (10th Cir. 1990). *But compare, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (discussing the “strict in theory, but fatal in fact” discontinuity between the Supreme Court’s equal protection standard of review for race-based government actions and the Court’s decisions in the run of cases under that standard), *and id.* at 519 (Marshall, J., concurring in the judgment) (same), *with Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (“wish[ing] to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact’”) (quoting *Fullilove*, 448 U.S. at 507).

6. *See, e.g., NLRB v. Yeshiva Univ.*, 444 U.S. 672, 678 (1980); *Amoco Prod. Co. v. NLRB*, 613 F.2d 107, 110–11 (5th Cir. 1980); *see also Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 377–78 (1998).

7. *See Congressional Oversight of Administrative Agencies: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 906 (1968) (statement of Henry J. Friendly, Judge, United States Court of Appeals for the Second Circuit) (“It is a good working hypothesis that the agencies have uniformly failed to promulgate specific and clear policies and standards not from inability, ignorance, or ineptitude, but from unwillingness to limit themselves in the exercise of power.” (quoting Lee Loevinger, Chairman, Federal Communications Commission)).

8. *See generally* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 *YALE L.J.* 801 (1990); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 *YALE L.J.* 831 (1990) [hereinafter *Uneasy Case*]; Samuel Estreicher & Richard L. Revesz,

imposes all of the costs of the three traditional forms of nonacquiescence and generates none of the benefits.

This Article focuses on remedial nonacquiescence at the National Labor Relations Board (“NLRB” or “Board”), an agency with a long history of traditional nonacquiescence conflicts with the federal courts of appeals,<sup>9</sup> to take a closer look at an opportunity that is potentially open to numerous agencies.<sup>10</sup> Part I of the Article takes a step back and provides some background on the operation and costs and benefits of the three traditional forms of nonacquiescence and the resulting agency-court conflicts. Parts II through V describe the essential ingredients of remedial nonacquiescence: (II) the NLRB’s role in the federal regulation of labor-management relations, its broad powers to order remedies for violations of the federal labor laws, and the federal circuit courts’ role as enforcers of NLRB orders; (III) the “law of the circuit” in the federal courts of appeals; (IV) judicial deference to an agency’s interpretations of a statute it is charged with administering, and the great deference usually enjoyed by the NLRB in the specification of remedies for unfair labor practices; and (V) the NLRB’s commitment to traditional nonacquiescence, which for the Board almost always means nonacquiescence in the context of venue choice. Part VI brings those elements together to explain the operation of remedial nonacquiescence, and to highlight the features that make it a useful tool for the NLRB but a bad thing for the development and even-handed enforcement of the federal labor laws. There is no reason, however, to suppose that the NLRB’s behavior is unlawful in the way that some other forms of agency manipulation of judicial review might be,<sup>11</sup> and so Part VII

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*Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) [hereinafter *Nonacquiescence*].

9. See *Nonacquiescence*, *supra* note 8, at 745 n.312 (describing the NLRB as one of “the two agencies most often involved in nonacquiescence disputes,” the other being the Social Security Administration). There is no particular reason to think that the NLRB is more likely than other agencies to engage in remedial nonacquiescence, other than its widely recognized affinity for the traditional forms of nonacquiescence, but one must start somewhere.

10. Any agency that (a) has the authority to issue broad remedial orders enforceable in federal court and (b) is subject to a statute providing for venue choice is positioned to engage in remedial nonacquiescence. See, e.g., 5 U.S.C. §§ 7105, 7111–7112, 7117–7123 (1996) (Federal Labor Relations Authority); 15 U.S.C. §§ 21, 45 (1997) (Surface Transportation Board, Federal Communications Commission, Department of Transportation, Board of Governors of the Federal Reserve Board, and Federal Trade Commission); *id.* §§ 77h-1, 77t (Securities and Exchange Commission); 29 U.S.C. §§ 658–666 (2000) (Occupational Safety and Health Review Commission); 42 U.S.C. §§ 7134, 7171 (Federal Energy Regulatory Commission).

11. See, e.g., Hayes, *supra* note 4, at 532–46 (describing the impact of *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998), on the NLRB’s capacity to lawfully engage in policy development through fact-finding).

first considers the potential for congressional action and then possible responses of various interests and institutions operating under current law.<sup>12</sup>

### I. DEFINITIONS OF NONACQUIESCENCE

In their still-authoritative 1989 article, *Nonacquiescence by Federal Administrative Agencies*,<sup>13</sup> Samuel Estreicher and Richard Revesz identify three categories of nonacquiescence:

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

The third category is defined by reference to venue choice. Here, the agency refuses to follow the case law of a court of appeals that has rejected its position, but review may be had either in that court or in one that has not rejected the agency's position. . . .

Normally, under conditions of venue choice, the identity of the reviewing court will be uncertain at the time the agency makes its decision. Such uncertainty is not eliminated simply because the agency has a basis for predicting which circuit will hear the case. Only where all uncertainty is removed—for example, because all courts of proper venue have adopted positions contrary to the agency's policy—does an agency's continued nonadherence to circuit law become intracircuit nonacquiescence.<sup>14</sup>

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12. Any discussion of nonacquiescence can be complicated by the uncertain line between nonacquiescence on the one hand and legitimate agency assertion of congressionally delegated interpretive authority on the other. *Compare, e.g.,* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (reversing D.C. Circuit decision striking down agency interpretation of statute that contradicted D.C. Circuit precedent), *with* *Lechmere v. NLRB*, 502 U.S. 527, 536–38 (1992) (reversing agency interpretation of statute that contradicted Supreme Court precedent).

13. *See generally* *Nonacquiescence*, *supra* note 8.

14. *Id.* at 687. As Estreicher and Revesz point out:

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

This Part briefly reviews each of these three forms of nonacquiescence, focusing on how they function and their main costs and benefits. It then turns to remedial nonacquiescence and, deferring discussion of how it functions, briefly summarizes its costs and benefits.

#### A. INTERCIRCUIT NONACQUIESCENCE

Practically no one objects to the first category of nonacquiescence—the *intercircuit* variety.

Intercircuit nonacquiescence is, in practice, little more than a fancy term to describe the routine behavior of anyone whose actions are subject to review in federal court. If a party knows in advance which court will review its actions and knows the law of that jurisdiction with respect to a particular question, then it can conform its behavior—including its litigating positions if it has the misfortune to end up in court—to that law with some reasonable level of confidence that doing so will keep it out of trouble and doing otherwise will get it into trouble. If conditions are not quite so certain—if the governing jurisdiction has not answered a particular question but a sister jurisdiction has done so—then a party might take the sister jurisdiction's decision into account. The question of whether or not to follow that decision, however, would be a prudential matter, both for the party and for the court with jurisdiction over the party. When a party—here, a federal administrative agency—rejects the sister circuit's precedent and instead seeks to have its own view of the law prevail in the court that does have jurisdiction, that is intercircuit nonacquiescence. Under these more uncertain conditions, the court with jurisdiction might or might not follow its sister's precedent, but it should not find fault with a party's decision to criticize or distinguish that precedent.<sup>15</sup>

There is, after all, no guarantee that the first court to decide an issue will necessarily get it right, let alone optimally right. In fact, if that were the case there would be no need for appellate courts at all, or at least no need for more than one appellate court and certainly no need for en banc reviews or a Supreme Court to review the work of appellate courts. Judges in the American system may enjoy infallibility (subject to appellate review or congressional correction) on a case-by-case basis,<sup>16</sup> but everyone, including

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15. There are limits to this supposition. If the issue in question has been decided adversely to the nonacquiescing party in numerous jurisdictions and there is no reason for that party to believe that the court before which it is now appearing will reach a different result, that court might reasonably question the legitimacy of the party's position, with the intensity of the questioning rising in proportion to the number of other courts that have rejected the party's position. *Compare, e.g.*, *Thompson v. Goetzmann*, 315 F.3d 457, 469–70 (5th Cir. 2002), *with* *United States v. Lerebours*, 87 F.3d 582, 584–85 (1st Cir. 1996), *and* *Great Lakes Higher Educ. Corp. v. Cavazos*, 911 F.2d 10, 15 (7th Cir. 1990).

16. As Justice Robert Jackson observed half-a-century ago:

Whenever decisions of one court are reviewed by another, a percentage of them



the judges, knows that over the run of cases, they err from time to time, and that correctives are necessary. That is why intercircuit nonacquiescence by federal agencies ought to be unobjectionable at the outset. It is a practical and implicitly acceptable necessity for parties and courts in the abstract and in all specific cases, except those where oxen belonging to a particular individual or institution are being gored, and even then only the owner of the relevant bovines will object. Moreover, there are also reasons why intercircuit nonacquiescence should be, and generally is, considered to be an affirmatively good feature of federal administrative law: its benefits are high.

The first benefit of intercircuit non-acquiescence is its facilitation of the development of coherent national law at the Supreme Court by giving the Court useful information derived from the experience of multiple inferior courts on which to base its decisions, both at the certiorari stage and on the merits. At the certiorari stage, the circuit splits that develop in the course of intercircuit nonacquiescence signal to the Court where the most difficult and pressing legal questions are, and then at the merits stage, the same circuit splits ensure that the Court will have the benefit of at least two judicial perspectives on the issue in question, and probably more. Although the Supreme Court has never ruled directly on the validity of intercircuit nonacquiescence, it gave a strong signal about its likely approval when, in *United States v. Mendoza*,<sup>17</sup> it declined to apply nonmutual offensive collateral estoppel to the federal government.<sup>18</sup> As the Court explained, the repetitive litigation in which the government would be able to engage as a result of the *Mendoza* decision was desirable because of "the benefit [the Court] receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."<sup>19</sup> As a result, "[c]onflicts in the circuits are generally accepted and in some ways even welcomed."<sup>20</sup>

There is no way to generate a circuit split over agency interpretation of a statute unless the agency pursues its preferred interpretation in the face of

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are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

*Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

17. 464 U.S. 154 (1984).

18. *Id.* at 160; *see also* *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 & n.6 (1984).

19. *Mendoza*, 464 U.S. at 160.

20. *Stauffer Chem.*, 464 U.S. at 177 (White, J., concurring); *see also* SUP. CT. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons. The following . . . indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .").

adverse precedent in at least one circuit other than the circuit in which it is appearing. In fact, barring intercircuit nonacquiescence “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.”<sup>21</sup> This is the “percolation” theory of the development of judge-made federal law.<sup>22</sup> It is the most widely acknowledged,<sup>23</sup> though not necessarily widely popular,<sup>24</sup> justification of nonacquiescence.

Second, intercircuit nonacquiescence provides opportunities for the courts of appeals themselves to make better decisions by capitalizing on the quality of each other’s reasoning and the concrete impact of each other’s decisions. Estreicher and Revesz describe these benefits as constructive “dialogues”:

First, doctrinal dialogue takes place when one court of appeals addresses the legal reasoning of another and reaches a different conclusion. Such dialogue is likely to result in better decisions, as it will produce a more careful and focused consideration of the issues.

Second, experiential dialogue occurs when courts of appeals are able to observe and compare the consequences of different legal rules. This empirical evidence is relevant both to circuits that have not yet considered an issue as well as to ones that may wish to reconsider their position.<sup>25</sup>

Although these ideals of “dialogue” are appealing in the abstract and may well have some genuine beneficial effects, the courts of appeals are nowhere near as enthusiastic about them as the Supreme Court is about “percolation.”<sup>26</sup>

The third benefit of intercircuit nonacquiescence springs directly from the second: the opportunity to relitigate an issue in courts that have not yet decided an issue enables a federal agency charged with nationwide responsibility for the administration of a particular statute to persuade initially disagreeable courts of appeals that the agency’s interpretation of the law is correct. In other words, under intercircuit nonacquiescence, the

21. *Mendoza*, 464 U.S. at 160.

22. *Chambers v. Ohio Dep’t of Human Servs.*, 145 F.3d 793, 801 & n.14 (6th Cir. 1998); see Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716–42 (1984) (discussing managerial model of the court).

23. See *Johnson v. United States R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992) (discussing percolation theory in context of labor relations); *Ga. Dep’t of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988) (discussing percolation theory more generally).

24. See Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 92–96 (1995).

25. *Nonacquiescence*, *supra* note 8, at 736 (footnotes omitted).

26. See *infra* Part III.A.

dialogue isn't just between courts in different jurisdictions; rather, it is also between the courts and the agency.

Finally, as discussed in more detail in Part III, the federal appellate courts have a strong historical and institutional commitment to maintaining control over the development of the law in their respective jurisdictions. Intercircuit nonacquiescence supports that century-old tradition, and the courts should have no interest in killing off an agency practice that preserves for each circuit the power to say what the law is within its jurisdiction. The alternative would be practically unavoidable judicial crossfire for agencies and a point-blank shot in the foot for courts that insist on intercircuit acquiescence: an agency would be able to pursue its chosen policies so long as the courts uphold them, but once one court rejected a policy, a ban on intercircuit nonacquiescence would compel the agency to bow to the one adverse judgment in order to avoid nonacquiescing in some other jurisdiction. But the same ban would prohibit the agency from ignoring the earlier, supporting precedent. The result would be a system that either mandates uncertainty in the law or empowers the first court that decided an issue *adversely* to an agency to determine the law of all circuits, nationwide. As Estreicher and Revesz point out, “[i]t is difficult to imagine a justification for such a system, other than perhaps hostility to the decisions of administrative agencies—regardless of the substance of those decisions.”<sup>27</sup> Furthermore, such a system would reflect equal hostility to the judgment of courts that approve the decisions of administrative agencies—regardless of the substance of those judgments. Thus, intercircuit nonacquiescence is consistent with the current institutional design and identity of the lower federal courts.

“Percolation” and “dialogue” do have costs. Conventionally and quite reasonably, they are measured in terms of both general inter-jurisdictional uncertainty during a period of percolation and individual inconvenience and even *ex post* perceptions of unfairness for parties involved in cases that are the part of a particular course of judicial percolation or interjurisdictional conversation.<sup>28</sup> The Supreme Court, however, appears to

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27. *Nonacquiescence*, *supra* note 8, at 739.

28. Thus, for example, although then-Justice Rehnquist wrote for a unanimous Court in *Mendoza*, his opinion does not mean that percolation would exist in his version of the ideal world of appellate litigation. Two years after *Mendoza*, Rehnquist argued in favor of the creation of a “national court of appeals” in part on the ground that for litigants trapped in the process, percolation is a poor substitute for prompt, definitive answers about what the law is:

If we were talking about laboratory cultures or seedlings, the concept of issues “percolating” in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live. We are not engaged in a scientific experiment or in an effort to square the circle, with respect to which endeavors, hoped for dramatic and earth-shaking success at the end of the line may justify many years of cautious preparation and experimentation. But what lawyers and

have decided that benefits in the form of optimization of the law nationwide outweigh those costs. There may be other ways to achieve the same end, but none appears to be available under the current judicial system.<sup>29</sup>

Alas, the NLRB almost never enjoys an opportunity to engage in intercircuit nonacquiescence. This is because, as discussed in Part II.C, *infra*, the NLRB almost never knows in advance with certainty which court of appeals will eventually have jurisdiction over the Board's decision in a particular case.

### B. INTRACIRCUIT NONACQUIESCENCE

The second and most controversial form of nonacquiescence is *intracircuit* nonacquiescence—issuing decisions directly forbidden by precedent in the federal court and refusing to bow to that precedent when confronted with it in litigation.

For anyone other than an agency of the federal government, intracircuit nonacquiescence is probably self-destructive. It is the rare entity that—knowing in advance the identity of the court that will review its actions, the law of that jurisdiction with respect to a particular question, and

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litigants in our country's federal courts are seeking to know may be, for example, the meaning of a particular subsection of the Internal Revenue Code. If we were all members of a monastic order presided over by Plato or by Saint Thomas Aquinas, we might accede to the idea that there need be no rush to judgment on such a question, and that an occasional hypothetical or tentative answer proposed and thought about for a while may help us reach the ultimately "correct" solution. But there is no obviously "correct" solution to many of the problems of statutory construction which confront the federal courts; Congress may have used ambiguous language, the legislative history may shed no great light on it, and prior precedent may be of little help. What we need is not the "correct" answer in the philosophical or mathematical sense, but the "definitive" answer, and the "definitive" answer can be given under our system only by the court of last resort. It is of little solace to the litigant who lost years ago in a court of appeals decision to learn that his case was part of the "percolation" process which ultimately allowed the Supreme Court to vindicate his position.

Two thousand years ago Cicero observed that the law is not "one thing at Rome and another at Athens, one now and another in the future." He was talking, of course, about natural law, and there have been later political philosophers who disagreed with him. But surely it is hard to dispute that, in a country with a national government such as ours, Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute. In short, we need today more national decision-making capacity than the Supreme Court as presently constituted can furnish.

William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11-12 (1986) (footnotes omitted).

29. See generally Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913 (1994).

(as is the case with federal agencies) the great likelihood of judicial review for obviously unlawful actions—will intentionally behave in violation of that law.<sup>30</sup> Under intracircuit nonacquiescence there is none of the uncertainty about what law the reviewing court will follow that justifies intercourt nonacquiescence; rather, the court has already specified the law it will follow in the form of its own earlier decisions on the subject. It is simply a matter of an agency determining to follow its own way, notwithstanding the fact that the court that will review the agency's action has already declared the action the agency is taking to be unlawful.

An agency following this course might be seen as participating in the complex separation-of-powers dance in which Congress and the executive branch play roles equal to the role of the Supreme Court,<sup>31</sup> or at least equal to the lower federal courts that, are after all, creations of Congress and the executive.<sup>32</sup> On the other hand, the fact that under the Constitution all branches are created equal does not entitle any branch to usurp the governance responsibilities assigned to another branch. That is why intracircuit nonacquiescence by federal agencies is so infuriating for many, but not all,<sup>33</sup> reviewing courts. To the extent those courts view themselves as the final authorities (absent extremely rare Supreme Court review of their own work) on the meaning of statutes, as well as the Constitution, they tend to expect obedience. Any response other than acknowledgment that the court's last word on a subject is the true last word is lawlessness.<sup>34</sup>

Even here, reasonable people can and do differ about whether the costs of nonacquiescence outweigh the benefits, at least in certain circumstances. However, even Estreicher and Revesz, the strongest supporters of intracircuit nonacquiescence outside the executive branch, conclude that

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30. None of which is to say that acting in conflict with settled law is inherently illegitimate. Some civil disobedience to vindicate civil rights or social change comes to mind. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (affirming the right of Jehovah's Witnesses to refuse to recite the pledge of allegiance as required by state law). On the other hand, nonacquiescence by state governments to federal court precedent tends to elicit a different sort of response. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that "[n]o state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."). Here, however, the discussion is focused on nonacquiescence by agencies of the federal government in the precedents of the federal courts, rather than on citizen civil rights advocates or state governments.

31. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987) (arguing that the Congress and the executive are coequal with the Supreme Court in discovering the meaning of the Constitution).

32. See *Nonacquiescence*, *supra* note 8, at 730 (suggesting that Congress could authorize agency nonacquiescence to the decisions of lower Article III courts).

33. See *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 385 (D.C. Cir. 1983) (Bork, J., concurring) ("An agency with nationwide jurisdiction is not required to conform to every interpretation given a statute by a court of appeals.")

34. See Robert F. Nagel, *Perspectives on the Authoritativeness of Supreme Court Decisions: A Comment on Democratic Constitutionalism*, 61 TUL. L. REV. 1027, 1033–35 (1987).

“such nonacquiescence can be justified only as an interim measure that allows the agency to maintain a uniform administration of its governing statute while it makes reasonable attempts to persuade the courts to validate its position.”<sup>35</sup>

The first benefit of intracircuit nonacquiescence dovetails with the third benefit of intercircuit nonacquiescence. Once a court of appeals has ruled against an agency, almost the only way to give that court a chance to change its mind—perhaps after witnessing the reasoning and experience of courts in other jurisdictions—is for the agency to ignore the adverse precedent in that court and plunge ahead.<sup>36</sup> Even if federal appellate judges never made mistakes (in which case there would be no such thing as a dissent or a circuit split and the Supreme Court would be the Supreme Rubber Stamp), social circumstances would change over time, and in some instances those circumstances would affect judgments.<sup>37</sup>

In any event, courts of appeals do err, or at least change their minds, and intracircuit nonacquiescence gives them a chance to see the error of their ways, even in the absence of “doctrinal dialogue.”<sup>38</sup> The courts acknowledge this reality in their own rules, which invariably include special procedures for overruling circuit precedent.<sup>39</sup> These procedures are occasionally used in cases of intracircuit nonacquiescence.<sup>40</sup> On rare occasions marked by a sense of unusual urgency, appellate panels will simply reach out to overrule “an incorrect opinion [that] could cause irreparable harm for many years before the case comes before this court in a technically correct posture.”<sup>41</sup> Inextricably entwined with the perpetual possibility of

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35. *Nonacquiescence*, *supra* note 8, at 743. Perhaps because they were writing at a time when the Supreme Court was granting more petitions for writs of certiorari than it does today, Estreicher and Revesz do not address the problem of reading certiorari-denial tea leaves. Compare *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 354 tbl.II (1988) (239 petitions for review granted on the appellate docket, 11.2% of those filed, and thirty-two granted on the miscellaneous docket, 1.4% of those filed), with *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 546 tbl.II (2001) (eighty-five petitions for review granted on the appellate docket, 4.3% of those filed, and fourteen granted on the miscellaneous docket, 0.2% of those filed). “[D]enial of a writ of certiorari imports no expression of opinion upon the merits of the case.” *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)). So, if the Court repeatedly declines to review both cases in which an agency prevails and cases in which an agency loses on a particular issue, what does that mean for continued nonacquiescence on that issue?

36. See *Chi. & N.W. Ry. Co. v. United Transp. Union*, 422 F.2d 979, 982–83 (7th Cir. 1970), *rev'd on other grounds*, 402 U.S. 570 (1971).

37. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

38. *Nonacquiescence*, *supra* note 8, at 736.

39. See *United States v. Wilson*, 315 F.3d 972, 973 (8th Cir. 2003); *Encore Videos, Inc. v. City of San Antonio*, 310 F.3d 812, 812–21 (5th Cir. 2002); *Elliott v. Apfel*, 28 Fed. Appx. 420, 424 (6th Cir. 2002).

40. See *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 (9th Cir. 2001) (en banc).

41. *Chi. & N.W. Ry.*, 422 F.2d at 983.

judges changing their minds is the ineluctable truth that judges are not perpetual, and, therefore, even if judges do not change their minds, the minds of the judges sitting on any court will change over time. Changes in court personnel do sometimes result in changes in the law.<sup>42</sup>

To classify this category of cases as a “benefit,” however, an agency must sway the courts at least some substantial percent of the time. Otherwise, intracircuit nonacquiescence is nothing more than a vehicle for delaying (in cases involving well-heeled regulated entities that can afford to pursue their cases to final judicial review) or denying (in cases involving the poor) justice. For example, in defense of its practices under nonacquiescence in the context of venue choice, the NLRB has in the past made much of what it has described as “an enviable record in the Supreme Court,”<sup>43</sup> which the Board interprets as “persuasive evidence that the Board has exercised good judgment in deciding when it is appropriate to continue to insist that intermediate courts have overstepped their authority” by disagreeing with the NLRB.<sup>44</sup> There is no indication, however, that the NLRB’s poor showing in the Supreme Court over the past five years has inspired any rethinking of the Board’s approach to nonacquiescence.<sup>45</sup>

Second, intracircuit nonacquiescence might enable an agency to save administrative costs. National uniformity presumably reduces training and communications costs and the like, while efforts at nationwide acquiescence in every federal appellate jurisdiction would be costly and otherwise administratively burdensome. As Estreicher and Revesz sensibly summarize the problem:

[E]nforcement staff, often non-lawyers who are normally responsible for large caseloads, may find it difficult to become familiar not only with the agency’s own policy but also with adverse court of appeals decisions. Such personnel are typically informed of their agency’s policies by means of instructions manuals

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42. See Joseph P. Bradley, *Comments on a Draft of the Address*, in FULLER & WASHINGTON AT CENTURIES’ ENDS 65–66 (Montgomery N. Kosma & Ross E. Davies eds., 1999). Compare *Hepburn v. Griswold*, 75 U.S. 603 (1869), with *Legal Tender Cases*, 79 U.S. 457 (1871).

43. Letter from Jeffrey D. Wedekind, Acting Solicitor, NLRB, to Patricia S. Connor, Clerk, U.S. Court of Appeals for the Fourth Circuit 11 (Feb. 6, 1997) (on file with author).

44. *Id.*

45. The Board has not been the prevailing party on the merits in a case before the Supreme Court since 1996. See *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996). In the Court’s past ten terms it has ruled in the Board’s favor four times. *Id.*; *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1995); see also *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317 (1994). It has ruled against the Board five times. See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998); *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994). This gives the Board an unimpressive .444 batting average before the Court over the past decade.

prepared by the agency's General Counsel. If such officials are to follow a policy of acquiescence, they will have to be separately instructed on the case law of the relevant circuits. And whenever the agency loses a case in a court of appeals, these documents will have to be updated. More importantly, if officials in different parts of the country must operate under different legal regimes, it will be difficult for the agency to use a single training system for all such officials or to evaluate them pursuant to uniform standards. A portion of the economies of scale that attach to centralized administration will thereby be lost.<sup>46</sup>

Intracircuit nonacquiescence is, at bottom, an agency-court duel in which the only blood drawn belongs to the public fisc or to the party opposing agency action. In a case of first impression, from the inception of agency action until the moment before a judgment by the reviewing court, the agency's power to act independently determines the status of a case. Once a court with proper jurisdiction exerts its power of review or enforcement, however, it is the interpretation of the relevant law by the court that is deciding the case that becomes the law of that jurisdiction.<sup>47</sup> For an agency committed to intracircuit nonacquiescence, however, nothing about the outcome of the first case affects the law in the next case on the same issue under the same legal authorities, before the same court.<sup>48</sup> The agency will again assert its power on the same legal issue without regard to the authority of the reviewing court, and the court will again trump the agency. Thus, only those parties with the money and power to pay for and survive the process of fighting with an agency through its administrative processes and into the federal courts of appeals can enjoy the protection of the law of the governing jurisdiction. Under intracircuit nonacquiescence, then, there truly is one law for the rich and powerful and another for the poor and weak. Small businesses, for example, may be confronted with a Hobson's choice: bow to the agency's will or go bankrupt trying to stand up

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46. *Nonacquiescence*, *supra* note 8, at 748–49 (footnotes omitted); *see also id.* at 690–91.

47. *See Lechmere Inc. v. NLRB*, 502 U.S. 527, 536–38 (1992).

48. Professor Thomas W. Merrill's encapsulation of the best thinking on this subject bears re-reading:

At bottom, the question . . . turns on whether executive agencies are bound by the judicial understanding of the law as set forth in judicial opinions. If opinions are binding law for executive actors, it is hard, if not impossible, to justify the practice of intracircuit nonacquiescence. Alternatively, if opinions are, from the perspective of the executive branch, explanations for judgments, then the practice of intracircuit nonacquiescence may implicate considerations of prudence and interbranch comity, but it does not entail the breach of any legal duty.

Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 48 (1993).



to the agency in court.<sup>49</sup> On the other hand, acceding to an unlawful exercise of agency power may have the same result over the long haul.<sup>50</sup> Poor and sick individuals may be confronted with even more tragic choices—for example, between spending money to vindicate their legal right to medical benefits denied by an agency, and investing in their physical survival under circumstances where the time involved in litigating against the agency may exceed their life expectancy without the denied benefits.<sup>51</sup>

Again, as with intercircuit nonacquiescence, the NLRB is almost never able to intentionally engage in intracircuit nonacquiescence because the NLRB almost never knows in advance with certainty which court of appeals will eventually have jurisdiction over the Board's decision in a particular case.<sup>52</sup>

### C. NONACQUIESCENCE IN THE CONTEXT OF VENUE CHOICE

Nonacquiescence in the context of venue choice ("venue choice nonacquiescence")—the form of nonacquiescence in which the NLRB generally engages—is neither as patently pernicious as intracircuit nonacquiescence nor as consistently reasonable and beneficial as intercircuit nonacquiescence.

Under most circumstances, an agency engages in venue choice nonacquiescence because it cannot help it. The culprit is venue choice itself. When a statute gives an agency, a regulated entity, or both, the opportunity to choose among jurisdictions when seeking enforcement or review of an agency decision, then for any given instance of agency action, the total number of jurisdictions in which either the agency or a regulated entity can seek review equals the number of precedential authorities to which that agency action might be subject. At the end of the day, of course, the agency will be subject to only one body of precedent per decision, but unless the courts of all of the possible reviewing jurisdictions have established identical law on the relevant subject, then the agency operates in the dark with respect to the law governing its actions.

Thus, venue choice nonacquiescence has the potential to have the benefits and costs of either intercircuit nonacquiescence or intracircuit nonacquiescence, but it is impossible to know which until it is too late—until

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49. A "Hobson's choice" is no real choice at all. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1185 (2d. ed. 1955). Historically significant examples include automobile marketing and federal regulation of the role of chickens. See *UTU v. Chi. & Ill. Midland Ry. Co.*, 731 F. Supp. 1336, 1342 (C.D. Ill. 1990) ("Plaintiff's argument reminds us of Henry Ford's statement to the effect that a purchaser of a Model T could have any color he chose—so long as it was black. It hardly needs to be said that a choice of one is no choice at all."); F.H. Buckley, *Machine Law*, 6 GREEN BAG 2D 359, 363–66 (2003) (describing oral argument in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

50. See *Nonacquiescence*, *supra* note 8, at 749–50.

51. *Lopez v. Heckler*, 725 F.2d 1489, 1497 (9th Cir. 1984).

52. See *infra* Part II.C.

after the agency has acted, one or more interested parties has sought review of some sort in federal court, and the venue choice process<sup>53</sup> has, at last, determined what court and thus what law will govern the agency's earlier decision. Venue choice nonacquiescence is the Schrödinger's Cat of administrative law.<sup>54</sup>

#### D. REMEDIAL NONACQUIESCENCE

In sum, the key benefits of the traditional forms of nonacquiescence fall into two categories: (1) opportunities for an agency and the courts to contest and communicate about the optimal reading of a statute with an eye to eventually either achieving consensus at the appellate level or, failing that, transmitting clear signals for review and the full range of the best judicial thinking to the Supreme Court (in other words, better or at least more consistent law over the long haul); and (2) efficiency of uniform administration of a national law (in other words, relatively fast and cheap administration at the agency level). The most important costs also fall into two categories: (1) uncertainty in the law; and (2) uneven enforcement of the law.

As Parts II through VII will show, remedial nonacquiescence does not contribute to either of the two main categories of nonacquiescence benefits, but instead adds to both categories of nonacquiescence costs. Moreover,

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53. A process that can be as brutal as the traditional race to the courthouse or as rational as a random drawing from among the jurisdictions preferred by each party seeking enforcement or review. *See* 28 U.S.C. § 2112(a) (2000) (contemplating the use of either method, depending on the circumstances); 29 U.S.C. § 160(e), (f) (2000) (same).

54. Erwin Schrödinger developed a famous feline experiment to illustrate the intuitive outrageousness of fellow physicist Niels Bohr's theory that the true state of a quantum system does not settle until that system has been observed:

An unfortunate cat is placed in a sealed box with a quantum device that has a 50-50 chance of going to a particular state within, say, one hour. If the state is not achieved, nothing happens. If it is achieved, it explodes a cyanide capsule and kills the cat. At the end of the hour, but before we open the box, what has happened? If we accept the Copenhagen assertion that the system has no state until it is observed, we have to believe that the cat, until observed, remains in a "superposed" state of both dead and alive. If you object that the cat itself made the observation, then let's leave the cat out of it, run the experiment with an empty box, then clear the laboratory except for a graduate student who opens the box and will be killed if the cyanide has been released. As we stand outside the closed lab door, we reflect that according to Bohr the cyanide has been neither released nor unreleased until the student opens the box. The student's own observation, and not the prior state of the cyanide canister, will decide whether he lives or dies. Does anybody believe that the world really works this way?

Timothy Ferris, *Quantum Leaps: Weirdness Makes Sense*, N.Y. TIMES, Sept. 29, 1996, § 6, at 143.

Regardless of whether the "real world" works as Schrödinger caricatured it, the federal labor law world does work that way. Absent uniform national precedent on a disputed issue or agreement between the parties on the court in which to seek review, there is no way to determine whether the NLRB has engaged in nonacquiescence until after the venue choice box has been opened.

remedial nonacquiescence undermines the benefits of ordinary nonacquiescence by reducing the reasoning and experience shared between circuits, and by reducing the occasions on which the Supreme Court will receive signals percolating from below about particularly problematic questions of federal administrative law.

## II. THE NLRB AND ENFORCEMENT OF THE LABOR LAWS

The NLRB was created in 1935 by the National Labor Relations Act (“NLRA” or “Act”) to enforce the substantive provisions of the Act.<sup>55</sup> Originally, the Board was responsible for investigating, prosecuting, and adjudicating the two basic categories of labor-management disputes: (1) disputes over whether a group of employees was to be represented by an exclusive bargaining agent (i.e. a union), and if so, by whom (commonly known as “representation” cases);<sup>56</sup> and (2) disputes over whether an employer, a union, or both had violated an individual’s rights to fair treatment under the labor laws (commonly known as “unfair labor practice” or “ULP” cases).<sup>57</sup> The NLRB’s jurisdiction over the first category is triggered by a representation petition under section 9(c) of the NLRA.<sup>58</sup> Its jurisdiction over the second category is triggered by an unfair labor practice charge under section 10(b) of the Act.<sup>59</sup>

Experience quickly showed that such a system put too much power in too few hands,<sup>60</sup> and amendments to the NLRA in 1947 divided the Board’s powers between a General Counsel, with responsibility for investigation and prosecution of unfair labor practice charges, and a five-member Board with responsibility for representation petitions and for adjudication of unfair labor practice cases.<sup>61</sup> In 1959, Congress granted the NLRB the authority to delegate responsibility for representation petitions to regional directors supervised by the General Counsel,<sup>62</sup> and the Board exercised that power

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55. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449, 451 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2000)).

56. *Id.* § 159.

57. *Id.* § 158.

58. *Id.* § 159(c).

59. *Id.* § 160(b).

60. H.R. REP. NO. 245, at 25 (1947) (“Acting as prosecutor, judge, and jury, and to all intents and purposes as its own Supreme Court insofar as its findings of fact are concerned, the Board seems to have found the temptation to be arrogant, arbitrary, and unfair irresistible.”); 1 THE DEVELOPING LABOR LAW 34–48 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001); see also Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 289 (1960) (“The chaotic state of industrial relations in the immediate postwar period and the seeming inability of the new Administration to cope with the situation were major issues in the mid-term campaign of 1946 . . .”).

61. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 8U-101, 61 Stat. 136 (1947).

62. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 541 (1959) (codified as amended at 29 U.S.C. § 153(b) (2000)).

two years later.<sup>63</sup> As a result, by 1961 the five-member body known as the “National Labor Relations Board” that heads an agency of the same name had become an essentially judicial body, reviewing decisions by subordinate regional directors in representation cases and adjudicating complaints filed by the General Counsel in unfair labor practice cases.<sup>64</sup> Not much has changed in the organization and operation of the Board since then, except for its unexceptional bureaucratic tendency to grow larger and more complicated.

#### A. PROCEDURES BELOW THE BOARD

Although the NLRB has jurisdiction over both representation cases and unfair labor practice cases, as a general matter only the Board’s decisions in unfair labor practice cases are subject to judicial review.<sup>65</sup> This means that the only path to review of a decision by the Board on a representation issue is for the unsatisfied party to refuse to comply with the Board’s decision, triggering (in all likelihood) an unfair labor practice charge. The Board’s allegedly erroneous decision on the representation issue then becomes an issue in the unfair labor practice case, and it is subject to judicial review in that context.<sup>66</sup>

Today, a typical unfair-labor-practice case begins when an individual, a union, or an employer files an unfair-labor-practice charge with a regional director.<sup>67</sup> A member of the regional staff investigates the charge, and the regional director, sometimes with guidance from the General Counsel’s staff at Board headquarters in Washington, D.C., decides whether to issue a complaint, thereby invoking the jurisdiction of the NLRB; no complaint

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63. 26 Fed. Reg. 3885, 3889 (May 4, 1961) (codified as amended at NATIONAL LABOR RELATIONS BOARD, RULES AND REGULATIONS AND STATEMENT OF PROCEDURE).

64. One might imagine that it would sometimes be hard to tell whether a reference to the “National Labor Relations Board” is to the five-member body alone or to the agency as a whole (i.e., the five-member body, the General Counsel, and all the people who work for them). Distinctions, however, have been sufficiently obvious from context on a day-to-day basis over the past several decades, rendering unnecessary the creation of some special convention for distinguishing references to the agency from references to the smaller governing body.

65. *AFL v. NLRB*, 308 U.S. 401, 409–12 (1940). The Board’s authority overlaps with that of the judiciary in other contexts that may be relevant to some instances of remedial nonacquiescence—§ 10(j) injunction proceedings, duty of fair representation cases (*see Vaca v. Sipes*, 386 U.S. 171 (1967)), contract actions under § 301 of the Taft-Hartley Act, and FOIA requests, for example—but they are not necessary to the occurrence of remedial nonacquiescence in the first instance and therefore need not be addressed separately here.

66. *AFL v. NLRB*, 308 U.S. 401, 409–12 (1940).

67. NATIONAL LABOR RELATIONS BOARD, RULES AND REGULATIONS AND STATEMENT OF PROCEDURE § 102.9 (2002) [hereinafter NLRB]. There are now thirty-seven NLRB regional or subregional offices, each headed by a regional director or the equivalent.

means no jurisdiction, and no case before the NLRB.<sup>68</sup> The Regional Director's decision is subject to review by the General Counsel,<sup>69</sup> but the General Counsel's final decision on whether to respond to an unfair labor practice charge by issuing a complaint is "unreviewable."<sup>70</sup>

Thus, in the first instance, it is the General Counsel—one of the two heads of the NLRB (the Board itself being the other)—who sets the national labor law litigation agenda by selecting those cases that will be adjudicated by the NLRB. If a complaint issues, then a lawyer from the regional office staff builds a case with the assistance of the charging party while the charged party—an employer or a union accused of engaging in one or more unfair labor practices—does the same. There is a formal adversarial hearing with nearly the full panoply of evidence and argument—much like a bench trial—before a Board-appointed administrative law judge. The ALJ issues findings of fact and legal analysis, and, if called for by that analysis, a recommended remedial order.

### B. REMEDIES AT THE NLRB

The Board's view of its authority (delegated to its ALJs, subject to Board review and modification) to tailor remedies to fit the unfair labor practices to which they are addressed is expansive:

The Board, of course, bears the primary responsibility for determining the appropriate remedies for violations of the Act. . . . To the extent that we discharge this responsibility in a manner consistent with that obligation, we believe it is within the scope of our discretionary authority to determine the proper form of substantively appropriate remedial provisions.<sup>71</sup>

In other words, the Board decides what the remedy is to be and how that remedy is to be formulated.

The Supreme Court agrees with this view, as it explained in a collage of early precedents cited in the *Fibreboard* case:

[Section 10(c) of the National Labor Relations Act] "charges the Board with the task of devising remedies to effectuate the policies of the Act." The Board's power is a broad discretionary one, subject

68. This does not necessarily mean that a charging party has no other recourse. For example, an individual may bypass the NLRB and file a duty of fair representation claim directly in court. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967).

69. NLRB, *supra* note 67, at § 102.19.

70. *Vaca*, 386 U.S. at 182; *see also* *Fitz v. Communications Workers of Am.*, No. 88-1214, 1989 U.S. Dist. LEXIS 17199, at \*15-16 (D.D.C. Aug. 17, 1989).

71. *Beverly Health & Rehab. Servs., Inc.*, 335 N.L.R.B. 54, *available at* 2001 NLRB LEXIS 720, at \*38-39 (Aug. 27, 2001) (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193-96 (1941); *APRA Fuel Oil Buyers Group*, 320 N.L.R.B. 408, 410 (1995), *enforced*, 159 F.3d 1345 (2d Cir. 1998)).

to limited judicial review. “[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . . .” “In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience.” The Board’s order will not be disturbed “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” Such a showing has not been made in this case.<sup>72</sup>

According to the Board, its remedial powers under the NLRA extend to broad company- and union-wide, national remedial orders: “Such a remedy falls well within the Board’s authority to define the scope and terms of a remedial order as ‘necessary to prevent the employer before it from engaging in any unfair labor practice affecting commerce.’”<sup>73</sup> Again, the Supreme Court appears to agree, although the Court has never explicitly ruled on the question of nationwide orders: “[t]he test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it ‘from engaging in any unfair labor practice. . . affecting commerce.’”<sup>74</sup>

Presumably, a broad order would be improper if an employer’s or union’s operations were purely local and there were no reasonable prospect that they would expand.

Which is not to say that the Board demands broad remedies lightly—at least in recent times—or that the courts will enforce them in every case. In its 1979 *Hickmott Foods* decision, the NLRB adopted a heightened standard for imposition of broad remedial awards.<sup>75</sup> In *Hickmott Foods*, the Board stated that its past practice in discriminatory discharge cases under section 7 of the NLRA had been to routinely include a broad order “to cease and desist from ‘in any other manner restraining or coercing employees . . . in the exercise of their Section 7 rights to organize and bargain collectively or to refrain from such activities.’”<sup>76</sup> The Board described this practice as a subset of its more general practice of issuing a broad “in any other manner” order

72. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (citations omitted); see also *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943) (“The particular means by which the effects of unfair labor practices are to be expunged are matters ‘for the Board not the courts to determine.’”).

73. *May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945).

74. *APRA Fuel Oil Buyers Group*, 320 NLRB at 410 (quoting *May Dep’t Stores Co. v. NLRB*, 326 U.S. at 390 (1945)). The U.S. Justice Department has recently argued that “the Board acted well within its discretion in imposing a corporate-wide order on petitioner.” Brief for the National Labor Relations Board in Opposition to Petition for a Writ of Certiorari, *Beverly Cal. Corp. v. NLRB*, 533 U.S. 950 (2001) (No. 00-1563).

75. *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357 (1979).

76. *Id.* at 1357 (alteration in original).

“whenever respondents were found to have committed violations which went ‘to the very heart of the Act,’” as articulated in the Fourth Circuit’s *Entwistle Manufacturing* decision enforcing a broad remedial order.<sup>77</sup> The Board reaffirmed its commitment to the *Entwistle* standard and the broad relief associated with it—relief designed to “prevent further infraction of the [National Labor Relations] Act in any manner.”<sup>78</sup> However, the Board also concluded that determination of whether an unfair labor practice did, in fact, go “to the very heart of the Act” and whether a broad order was the proper remedy required a more searching and case-specific evaluation. Thus, as the Board explained in a later decision relying on *Hickmott Foods*,

a broad remedial “order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for . . . fundamental statutory rights.” . . . A determination of the need for a broad order in each case turns on the nature and extent of violations committed by the respondent.<sup>79</sup>

The Board has in some cases rejected ALJs’ recommendations for broad remedial orders on the ground that the facts of the case and the history of the charged party’s infractions did not satisfy the *Hickmott Foods* standard.<sup>80</sup> The Board has received the same treatment in the courts.<sup>81</sup> In other cases, however, the Board has rejected ALJs’ recommendations for narrow remedies and substituted broad remedial orders, citing *Hickmott Foods* for the

77. *Id.* (quoting *NLRB v. Entwistle Manufacturing Co.*, 120 F.2d 532 (4th Cir. 1941)); see also *Grinnell Fire Prot. Sys. Co.*, 335 N.L.R.B. 473, 473 (2001) (“[W]e find that the Respondent is a repeat offender with a proclivity to violate the Act. Thus, we shall impose the broad cease-and-desist order recommended by the judge.”).

78. *Astro Container Co.*, 180 N.L.R.B. 815, 823 (1970). The following is the leading formulation of broad relief:

Cease and desist from: . . . In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist said New England Joint Board, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3) of the Act, as amended.

*R. & R. Screen Engraving, Inc.*, 151 N.L.R.B. 1579, 1587–88 (1965).

79. *Teamsters Local Union No. 122*, 334 N.L.R.B. 1190 (2001) (quoting *Hickmott Foods*) (emphasis in original).

80. *See id.*

81. *See Torrington Extend-A-Care Employee Ass’n v. NLRB*, 17 F.3d 580, 586 (2d Cir. 1994).

rule that such broad action is justified when the Board is confronted by "repeat offenders of the Act."<sup>82</sup> The courts agree sometimes.<sup>83</sup>

It is not clear whether the actual effect of the *Hickmott Foods* standard at the Board and in the courts has been to put meaningful limits on the Board's use of broad remedies.<sup>84</sup> It is clear, however, that the Board has the power to issue remedial orders that are very broad in terms of both their reach within a company or union and their geographic scope. In addition, it is clear that the courts recognize that authority and that they have acted on that recognition to enforce such awards.<sup>85</sup>

ALJ decisions and recommended remedial orders are transferred to the NLRB and become final a short time after they are issued by the Board unless excepted (i.e., appealed) to the Board by any party to the proceeding or by the General Counsel.<sup>86</sup> When exceptions to an ALJ decision are filed, a panel of the Board<sup>87</sup> accepts briefs from the parties, and, very rarely in some cases that it considers especially important, oral argument. Usually, the Board adopts the ALJ's decision with a few modifications and issues a final order.

Thus, in the second instance it is the Board, with assistance from an ALJ,<sup>88</sup> that determines the result of the General Counsel's initial decision to issue a complaint. And the Board's authority to pick and choose among possible remedies for unfair labor practices is nearly as broad as the General Counsel's freedom to pick and choose which cases to try before an ALJ and then the Board itself.

### C. FINAL REVIEW IN AN UNKNOWN COURT

It is at this stage, once the Board has issued its final order, that the courts become important because the Board's orders are not self-enforcing. Instead, they are enforced by the federal courts of appeals.<sup>89</sup>

82. See *Nortech Waste*, 336 N.L.R.B. No. 84 (2001), available at Case 20-CA-28884, 2001 N.L.R.B. LEXIS 882, at \*2 n.2.

83. See *NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 119–21 (2d Cir. 2001).

84. See *Flynn*, *supra* note 4, at 391–402 (describing the Board's allegedly intentional use of a "de jure/de facto gap" in adjudication to "disguise policymaking as factfinding").

85. See *NLRB v. Beverly Cal. Corp.*, Nos. 01-3197 & 01-3289, 2001 U.S. App. LEXIS 25079 (7th Cir. Nov. 20, 2001); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 960 (2d Cir. 1988) ("In certain cases, the Board has discretion to expand its remedial powers beyond the actual locations at which unfair labor practices were committed in order to offset effects caused by extensive unlawful conduct.").

86. 29 U.S.C. § 160(c) (2000); *NLRB*, *supra* note 67, §§ 102.46(a), 102.48(a).

87. Of the Board's five members, only three sit on routine cases. 29 U.S.C. § 153(b). Normally, each case is staffed by a single attorney drawn from the office of one of the three Board members on the panel.

88. If no one excepts to the ALJ's decision, that is the end of the matter and the Board never gets directly involved, other than to publish the ALJ's decision. 29 U.S.C. § 160(c); *NLRB*, *supra* note 67, §§ 102.46(a), 102.48(a).

89. 29 U.S.C. § 160(e), (f) (2000).



It is also at this stage that the problems with traditional nonacquiescence under the NLRA become apparent because the NLRA provides for broad venue choice. As discussed in more general terms in Part I.C, *supra*, both the Board and any party (charging or charged) “aggrieved by” an order issued by the Board may seek review in what usually amounts to any one of several circuits.<sup>90</sup> Section 10(e) of the NLRA provides that “[t]he Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . .”<sup>91</sup> Section 10(f) grants even broader venue choice to an aggrieved party:

“Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . .”<sup>92</sup>

Thus, in the third and final instance, it is a federal court of appeals that determines the result in the case.<sup>93</sup> However, there is no way to know at the beginning of an unfair labor practice proceeding (when the General Counsel decides whether or not to issue a complaint), or even at the end of an unfair labor practice proceeding (when the Board issues its final order), which court of appeals will review the Board’s order and thus there is no way to know which “law of the circuit” will govern.<sup>94</sup> Appropriately (given the uncertainty created by the venue selection terms of the NLRA), when timely petitions seeking review or enforcement of a Board order are filed in more than one circuit, the choice among those circuits is made randomly by the Judicial Panel on Multidistrict Litigation.<sup>95</sup> It is only then that the Board and

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90. An “aggrieved party” is any party to a Board unfair labor practice proceeding who suffers an adverse effect as a result of the Board’s order or who “gets less than he requested.” *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982) (quoting *Chatham Mfg. Co. v. NLRB*, 404 F.2d 1116, 1118 (4th Cir. 1968)).

91. 29 U.S.C. § 160(e) (2000).

92. *Id.* § 160(f).

93. Except for the extremely rare case in which the Supreme Court elects to have the last word.

94. The only exception to this situation occurs when an unfair labor practice occurs in the District of Columbia and the District of Columbia is the only jurisdiction in which the parties reside or transact business for purposes of the venue provisions of the NLRA. The Board is not the only agency confronted by this sort of dilemma. The Surface Transportation Board and the Federal Trade Commission, for example, are subject to similar venue uncertainty, but without the special provision for venue in the D.C. Circuit. *See* 15 U.S.C. §§ 21, 45 (2000).

95. 28 U.S.C. § 2112(a)(3) (2000).

the parties know which “law of the circuit” will control the outcome of the case.<sup>96</sup>

### III. FEDERAL APPELLATE COURTS AND THE LAW OF THE CIRCUIT

The federal appellate courts that review and (when they judge it appropriate to do so) enforce Board orders are barely forty years older than the Board itself, having been created by the Evarts Act of 1891.<sup>97</sup> These courts operate on the assumption that they are the courts of last resort within their territorial jurisdiction (which is reasonable given the extreme unlikelihood of Supreme Court review), with the associated duty to make their best efforts to interpret the law.<sup>98</sup> They have also interpreted the Evarts Act to require that each federal appellate court independently develop, maintain, and protect its own law—its “law of [the] circuit.”<sup>99</sup>

#### A. INTERCIRCUIT DISREGARD IF NOT DISRESPECT

The Evarts Act granted the courts of appeals the authority to review the decisions of their subordinate district courts. In light of their role as essentially regional Supreme Courts, the courts of appeals have interpreted their review authority much more broadly, adopting *Marbury v. Madison* as their own, with its assertion of the judicial power and obligation to “say what the law is.”<sup>100</sup> Perhaps not surprisingly, the courts of appeals have tended to develop an intolerance of agency nonacquiescence on statutory interpretation issues that is on a par with the Supreme Court’s response to states’ occasional “massive resistance” on constitutional issues.<sup>101</sup>

96. There are circumstances under which venue uncertainty does not equal legal uncertainty. For example, if review or enforcement of a Board order could be had in any of five circuits, but the law of all five circuits is the same and well settled, then nonacquiescence by the Board against the law of any one of those circuits is functionally identical to intracircuit nonacquiescence against the law of all five.

97. Circuit Court of Appeals Act, 26 Stat. 826 (1891), *relevant portions codified as amended at* 28 U.S.C. §§ 41–49, 1291–1294 (2000).

98. *Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506 (11th Cir. 1987).

99. *Id.*; *see also* *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685 (1960).

100. 5 U.S. 137, 177 (1803).

101. *Compare* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (*Marbury* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and by the Country as a permanent and indispensable feature of our constitutional system”), *with e.g.*, *Lopez v. Heckler*, 725 F.2d 1489, 1497 & n.5 (9th Cir. 1984) (“Far from raising questions of judicial interference in executive actions, this case presents the reverse constitutional problem: the executive branch defying the courts and undermining what are perhaps the fundamental precepts of our constitutional system—the separation of powers and respect for the law.”) (citing *Cooper*, 358 U.S. at 18, and *Marbury*, 5 U.S. at 177), and *Beverly Enter. v. NLRB*, 727 F.2d 591, 592 (6th Cir. 1984), and *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 968–70 (3d Cir. 1979). *But see* *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 385 (D.C. Cir. 1983) (Bork, J., concurring) (“An agency with nationwide jurisdiction is not required to conform to every interpretation given a statute by a court of appeals.”).

A not necessarily inevitable, but by now universal and unquestioned, by-product of this appellate-court-centered view of federal law has been the refusal of each appellate court to treat the decisions of other courts as *stare decisis*.

Precedents of a federal appellate court have no authority in that court's sister circuits.<sup>102</sup> As mini-Supreme Courts, the appellate courts do not—as those courts understand the hierarchical federal judicial system, must not—recognize any binding precedential authority in the decisions of other courts (except, of course, for the real Supreme Court), including the other courts of appeals. Thus, within its geographical limits, a court of appeals views itself as responsible for exercising sovereign authority over the interpretation of federal law. Once an appellate court arrives at a conclusion regarding the meaning of a federal law, that interpretation is binding on all parties within the court's jurisdiction, even if another appellate court disagrees, or even if all twelve other appellate courts do so.<sup>103</sup> In other words, appellate courts are mutually powerless, at least as sources of binding law.<sup>104</sup>

In one context—tax cases—some courts of appeals have shown sensitivity to the problems associated with the conflict between the law of the circuit and the importance of uniform national law, even without regard to issues of nonacquiescence. In the same vein, the United States Court of Appeals for the Federal Circuit has held that while its mandate calls for adherence to consistent nationwide interpretations of patent law, on procedural matters the court will follow the precedents of those jurisdictions in which the cases it hears arise.<sup>105</sup> These developments offer a potential toehold for a solution to nonacquiescence that will be addressed in Part VII.D.

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102. See, e.g., *United States v. Ramirez-Valadez*, No. 96-3343, 1997 U.S. App. LEXIS 30421, at \*3 (7th Cir. Oct. 31, 1997) (“While decisions from our sister circuits are often informative, they are never binding.”); *Associated Builders & Contractors v. Perry*, 115 F.3d 386, 393 (6th Cir. 1997) (“The above-cited cases from sister circuits are not, of course, binding precedent. However, the logic of their reasoning is very persuasive.”); *Humphreys v. DEA*, 105 F.3d 112, 117 (3d Cir. 1996) (“All of the remaining cases cited by the DEA are from sister circuits and therefore not binding on us; nor do we find them persuasive.”); *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1257–58 (D.C. Cir. 1996); see also *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 276 F.3d 876, 883 (6th Cir. 2002) (O’Malley, J., dissenting).

103. Normally, binding law of the circuit is created by a three-judge panel, subject only to review by the court sitting en banc or by the Supreme Court. See, e.g., *Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999); *United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995).

104. *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1003 (D.C. Cir. 2001); *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 986–87 (D.C. Cir. 2001); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066–67 (7th Cir. 1988) (“This circuit is not authorized to interpret the labor laws with binding effect throughout the whole country . . .”).

105. See *Slip Track Sys. Inc. v. Metal-Lite, Inc.*, 304 F.3d 1256, 1262 (Fed. Cir. 2002) (citing *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574–75 (Fed. Cir. 1984)).

## B. CIRCUIT SPLITS AND SLIPS

Given the differences among circuits and the limited capacity of group decision making processes to achieve consistent results over time—especially on complex, multi-faceted, and contested legal issues involving statutes susceptible to multiple readings—it should come as no surprise that the laws of the circuits are not consistent.<sup>106</sup> Circuit splits abound in federal labor law.<sup>107</sup> Furthermore, the fragmentation of the law does not end with failures of initial decision-making and the absence of intercircuit stare decisis. It also occurs within the law of a circuit. There is, in fact, considerable irony in the extremity and sanctimony of the appellate courts' avowed commitment to the principle of the "law of the circuit," because in practice that principle bows on occasion to judicial preference, judicial imperfection, or the sheer impossibility of making clear and correct law the first time, every time.

Appellate courts engage in their own form of internal nonacquiescence when they distinguish away or ignore their own circuit precedent without bothering with en banc review.<sup>108</sup> This phenomenon has not escaped the

106. See *supra* Part I.A, including the discussion of *United States v. Mendoza*, 464 U.S. 154 (1984). As the Court explained in *Mendoza*:

A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. . . . Indeed, if nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government's petitions for certiorari.

464 U.S. at 160–61.

107. See *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 986–87 (D.C. Cir. 2001); *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 739 (D.C. Cir. 2000); *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 961 (6th Cir. 1998); *Fieldcrest Cannon v. NLRB*, 97 F.3d 65, 81 (4th Cir. 1996); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001).

108. See *Frantz v. Village of Bradford*, 245 F.3d 869, 881 (6th Cir. 2001) (Gilman, J., dissenting) (criticizing the majority's holding as inconsistent with long-established precedent of the circuit); *Action for Children's Television v. FCC*, 564 F.2d 458, 474 (D.C. Cir. 1977) (stating that a rule established in a prior decision "should not apply—as the opinion clearly would have it—to every case of informal rulemaking"). As Patricia M. Wald observed when she was serving on the United States Court of Appeals for the D.C. Circuit:

Many opinions of yesterday, whose tone or precedent are not acceptable to newer judges today, can be ignored, or distinguished away if not precisely on point. . . . But nowadays in our court, this kind of 'cabining in' sometimes occurs surprisingly soon after issuance of the opinion. Unpopular precedent will be distinguished away or 'limited to its facts' in its infancy with severe doubts left as to its ability to survive.

Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 490–93 (1986) (footnotes omitted).

attention of nonacquiescing agencies.<sup>109</sup> Even more egregious are the cases following the initial failures of intracircuit stare decisis when a later panel will acknowledge the existence of contrary circuit precedent and simply choose the precedent it prefers.<sup>110</sup> (Nor is this failing unique to the courts of appeals, which suffer their own trials with this sort of supervisory arbitrariness—sometimes in the company of the NLRB—at the hands of the Supreme Court.<sup>111</sup>)

None of which is to say that the appellate courts are falling down on the job merely because as a group they are internally inconsistent. By such an unreasonably strict standard, every appellate opinion that inspires a dissent relying on circuit precedent is a failure of coherence in the law of the circuit.<sup>112</sup> Courts are subject to Arrow's Theorem,<sup>113</sup> and therefore, it is unrealistic to expect that they could achieve perfect consistency in the law of the circuit even if they wanted to.<sup>114</sup> Moreover, judges do not always succeed in formulating statutory interpretations that accommodate all future factual permutations; thus "in areas where traditional tools of analogical reasoning have limited utility (cases presenting binary, rule-setting questions, for instance), even traditionalists may agree that appellate panels should be cautious about binding all future circuit panels."<sup>115</sup> This is, in essence, a recognition that dialogue among panels, over time, can be used as a sort of small-scale, informal version of the "percolation" that occurs among the circuits to signal important or difficult issues that merit consideration by the Supreme Court—a practice of which the high court approves.<sup>116</sup>

109. See IRS General Litigation Bulletin No. 485, 2001 GLB LEXIS 9, at \*4-5 (Apr. 27, 2001) (announcing nonacquiescence with *Vinick v. United States*, 205 F.3d 1 (1st Cir. 2001), on the ground that "it conflicts with prior, undisturbed First Circuit precedent"); see also *Vinick*, 205 F.3d at 20-21 (Lynch, J., dissenting) (noting the majority's failure to reconcile its holding with circuit precedent).

110. See *Field v. Trump*, 850 F.2d 938, 950 (2d Cir. 1988).

111. See *Hudgens v. NLRB*, 424 U.S. 507, 517-18 (1976) (overruling a prior Supreme Court decision which the Court of Appeals for the Ninth Circuit relied on).

112. See *In re Osborne*, 76 F.3d 306, 311 (9th Cir. 1996) (Rymer, J., dissenting).

113. Kenneth Arrow is the author of the classic formulation of the paradox of sequential voting, in which democratic outcomes can vary not with changes in the preferences of voters, but rather with changes in the sequence in which the decision-making body takes up the available alternatives. See Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 984-90 (1989).

114. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (applying public choice theory to majority-vote decision making at the Supreme Court in a manner equally applicable to the federal courts of appeals).

115. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 26 (2000). This problem may be especially severe in the context of the federal labor laws due to declining substantive experience on the federal bench. See *Conference Report: Appellate Judges Have Less Expertise in Labor Law as Cases Decline*, Lynch Says, Daily Lab. Rep. (BNA) No. 38, C-1 (Feb. 26, 2002).

116. See *supra* Part I.C.

While “percolation” within and among the inferior federal courts may be a useful labor-saving device for overworked Supreme Court justices, it is not at all clear that it results in law-clarifying “dialogue” among the lower courts. As a practical matter, in day-to-day litigation, most judges have little time to spare for contemplation of the utility of percolation or dialogue as a tool for developing a coherent body of law.<sup>117</sup> Instead, each court must decide the case on the facts and law before it, and each court is as certain as the next of its own wisdom and rectitude. Opinions from other jurisdictions may provide useful information, but they receive no deference, and only collegial respect. As Judge Alex Kozinski has observed, “[c]iting a precedent is, of course, not the same as following it; ‘respectfully disagree’ within five words of ‘learned colleagues’ is almost a cliché.”<sup>118</sup> Moreover, as Professors Linda Cohen and Matthew Spitzer have convincingly argued, neither the courts nor the federal agencies have the right incentives to engage in constructive percolation.<sup>119</sup>

It is against this background of strong commitment by the courts to the concept of “the law of the circuit,” combined with substantial intercircuit inconsistency and some smaller amount of less easily measured intracircuit inconsistency, that the courts impose the “law of the circuit” on the NLRB and other federal agencies.<sup>120</sup> Like everyone else who falls under the jurisdiction of a federal appellate court, federal agencies’ operations—including litigation—are subject to the law of that circuit.<sup>121</sup> As the Third Circuit explained in a leading NLRB case, “[a] decision by this court, not

117. But perhaps not all. Judge Richard Posner has noted the process:

An issue that provokes a conflict among the circuits that is not immediately eliminated by one circuit’s receding from its previous position is likely to involve a difficult legal question; and 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.

RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORMS* 163 (1985).

118. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

119. Linda R. Cohen & Matthew L. Spitzer, *The Government Litigation Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 418–20 (2000).

120. Although, as Professors Estreicher and Revesz point out:

A consistent Board practice of acquiescence in the law of the circuit where the [unfair labor practice] occurred might . . . induce . . . other circuits to forgo an independent consideration of the applicable law [i.e., the law of their own circuits]. See *United Steelworkers v. NLRB*, 377 F.2d 140, 141 (D.C. Cir. 1966) (“we certainly cannot hold the Board to have been in error when it decided to follow a decision of a Court of Appeals, especially of the circuit in which the relevant affairs occurred”).

*Nonacquiescence*, *supra* note 8, at 710 n.162.

121. *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (“Administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit, unless the [agency] has a good faith intention of seeking review of the particular proceeding by the Supreme Court.”).

overruled by the United States Supreme Court,” is “binding on all inferior courts and litigants in the [courts of appeals], and also on administrative agencies.”<sup>122</sup>

On those occasions, which make up the vast majority of cases, when a federal court of appeals determines that the NLRB has not engaged in nonacquiescence and has interpreted the federal labor laws in a reasonable way, the court’s deference to the Board on both substantive and remedial questions is profound.

#### IV. DEFERENCE

“An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . and priorities.”<sup>123</sup>

Notwithstanding their enormous, if geographically limited, power, the federal appellate courts are obliged to follow the Supreme Court’s numerous decisions establishing broad areas of deference to federal agencies, including the NLRB. This means that an agency’s interpretation of the federal law for which it is responsible has at least as much authority in any given court of appeals as the interpretation of that same law by a neighboring court of appeals.<sup>124</sup>

##### A. THE AUTHORITATIVE NLRB

Thus, an NLRB interpretation of ambiguous language in the NLRA is entitled to “considerable deference so long as it is rational and consistent with the Act, . . . even if [the reviewing court] would have formulated a different rule had [the reviewing judges] sat on the Board”<sup>125</sup>—an acknowledgment of Board authority and expertise that lower courts<sup>126</sup> and scholars<sup>127</sup> alike have equated with *Chevron* deference,<sup>128</sup> and which the

122. *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979).

123. *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985)).

124. *Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 997–98 (7th Cir. 2000).

125. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 775, 787 (1990) (citations omitted).

126. *See Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001).

127. *See 2 THE DEVELOPING LABOR LAW* 2589–91 (Patrick Hardin et al. eds., 4th ed. 2001).

128. *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984). The Supreme Court states:

[w]hen 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. If, however, 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 an administrative interpretation. Rather, if the statute

Supreme Court has implied as well.<sup>129</sup> In a statute consisting almost entirely of terms that the courts at least sometimes treat as ambiguous, this form of deference is on its own a very deep bow to the power of the Board to say what the national labor law is.<sup>130</sup>

Related interpretive canons tailored to the NLRA, such as the rule that exemptions from the protections of the Act shall be construed narrowly against employers seeking to assert them,<sup>131</sup> stretch the meaning of the Act in ways that also extend the power of the Board. So, too, in considering NLRB determinations regarding the definition of behavior that constitutes an unfair labor practice, courts “must defer to the requirements imposed by the Board if they are rational and consistent with the [National Labor Relations] Act.”<sup>132</sup>

All of these forms of deference spring from a more general proposition that the Supreme Court has found to be implicit in the simple fact of the passage of the NLRA, as well as the overall content of the Act: Congresses passed the NLRA and its amendments and Presidents signed them into law in order to create a national body of labor law to be administered by a nationwide agency—the NLRB. Thus, as the Supreme Court has repeatedly explained:

[I]n many . . . contexts of labor policy, “[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.”<sup>133</sup>

Finally, and most importantly for the purposes of remedial nonacquiescence, there is no area in which the courts are more deferential to the Board than in its selection of remedies once it has found that an employer or union is guilty of engaging in unfair labor practices. Deference in this area is based on section 10(c) of the NLRA, which provides:

If upon the preponderance of the testimony taken the Board shall

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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 842–43.

129. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89–90 (1995).

130. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996); *NLRB v. Health Care & Ret. Corp. of America*, 511 U.S. 571, 579 (1994).

131. *Holly Farms*, 517 U.S. at 399.

132. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998) (internal punctuation marks omitted).

133. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (quoting *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957)); see also *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 413 (1982).



be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .<sup>134</sup>

The Supreme Court has consistently interpreted this provision to compel substantial judicial deference to the Board's choice of remedy. In the leading case on NLRA remedies, *NLRB v. Gissel Packing Co.*, the Court stated:

It is for the Board and not the courts, however, to make [the] determination, based on its expert estimate as to the effects . . . of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10 (c) of the [National Labor Relations] Act (29 U.S.C. § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency."<sup>135</sup>

As the run of labor cases before the Supreme Court over the past half-century reveals, until very recently the federal appellate courts have generally been wrong when they refuse to defer to the Board.<sup>136</sup> The fundamental lesson for the appellate courts appears to be that they should proceed with care when rejecting NLRB interpretations of the NLRA.<sup>137</sup>

#### B. *THE OCCASIONALLY UNREASONABLE, NONACQUIESCENT NLRB*

It remains, however, for the inferior appellate courts to determine how to apply the deference mandated in *Gissel* to the stream of individual NLRB cases that come before them. While there is no language in *Gissel* or other potentially applicable Supreme Court precedent that would support reduced deference for especially broad remedies, some courts of appeals have tended to scrutinize more closely Board remedial orders that cover broad ranges of activities regulated by the NLRA, or that extend outward beyond the geographic limits of the federal court of appeals whose role it is

134. 29 U.S.C. § 160(c).

135. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969) (citations omitted).

136. See Letter from Jeffrey D. Wedekind, Acting Solicitor, NLRB, to Patricia S. Connor, Clerk, U.S. Court of Appeals for the Fourth Circuit 11–13 (Feb. 6, 1997) (on file with author).

137. Whether the reversal of fortunes between the Board and the appellate courts in the Supreme Court (see note 45) is a result of rising labor-law sophistication on the part of the courts—an unlikely prospect according to one federal appellate judge (see note 115)—or a decline at the Board is an open question that is beyond the scope of this Article.

to grant or deny enforcement of those remedies. As the Sixth Circuit explained:

Courts usually afford deference to the Board's determination of appropriate remedies because, as the *Gissel Packing Co.* court noted, "[i]n fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own[.]" 395 U.S. at 612 n.32. However, this court "has exercised less deference to the Board and scrutinized its decision more closely when it has imposed the very strong remedy of issuing a bargaining order without holding a new election. *Rexair*, 646 F.2d at 250."<sup>138</sup>

More generally, although the courts of appeals are bound to defer to reasonable NLRB decisions, the courts do not view nonacquiescence as reasonable. They are committed to the proposition that the law of the circuit, once established, precludes deference to the Board.<sup>139</sup> Thus, while the Board may enjoy broad deference in the absence of circuit precedent,<sup>140</sup> once that precedent is in place, deference generally is out the window.<sup>141</sup> As

138. *NLRB v. Ky. May Coal Co.*, 89 F.3d 1235, 1244 (6th Cir. 1996). *But see* *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 826 (7th Cir. 2000) ("With respect to the remedy that the Board chose [a broad, company-wide, nationwide order], our review is also quite deferential.").

139. *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1066–67 (D.C. Cir. 2001).

140. *See* *Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1096 (D.C. Cir. 2001).

141. There may be an exception to this rule in cases where a circuit's precedent is based solely on a decision to defer to an earlier Board interpretation. Under these circumstances, some courts have concluded that simply shifting from one reasonable interpretation of the labor laws by the Board to some other, superior interpretation of those laws by the Board does not constitute a change in the law of the circuit, at least for purposes of invoking en banc review or decrying nonacquiescence. See, for example, the line of cases responding to the Board's shift from one interpretation of § 8(f) of the NLRA to another in *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), *enforced*, *Int'l. Ass'n of Bridge, Structural & Ornamental Ironworkers v. NLRB*, 843 F.2d 770 (3d Cir. 1988); *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1134–35 (9th Cir. 1988) (en banc) ("We hold, therefore, that if prior decisions of this court constitute only deferential review of NLRB interpretations of labor law, and do not decide that a particular interpretation of statute is the only reasonable interpretation, subsequent panels of this court are free to adopt new and reasonable NLRB decisions without the requirement of en banc review."). *But see* *Indus. Turnaround Corp. v. NLRB*, 115 F.3d 248, 254–55 & n.2 (4th Cir. 1997) (listing circuits accepting the Board's shift as reasonable and other circuits, including itself, declining to follow the Board's changed interpretation in light of circuit precedent consistent with the Board's original interpretation). Since the cases treating *Deklewa*, however, this form of subsequent deference has been limited to instances in which the earlier circuit precedent contained no independent exercise in statutory interpretation whatsoever by the earlier court. *See, e.g., id.*; *TCI West, Inc. v. NLRB*, 145 F.3d 1113, 1117 (9th Cir. 1998) (reading *Mesa Verde* narrowly to apply only to precedents based "solely" on an earlier Board interpretation of the labor laws, and, in addition, relying on the counter-canon that inconsistent policymaking by the Board may itself result in a denial of deference); *see also* *Neal v. United States*, 516 U.S. 284, 295 (1996) (in the face of precedent, deference is irrelevant because "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that

a result, there is no such thing as remedial nonacquiescence in a case where a court concludes that the Board is engaged in traditional nonacquiescence against the law of that circuit (known as “intracircuit nonacquiescence”), because in such a case the court will deny enforcement, and with that denial the Board’s broad remedy will fail as well. It is this very pattern of rejection of traditional nonacquiescence by the courts that generates remedial nonacquiescence’s reason for being, and adverse court judgments based on traditional nonacquiescence provide a roadmap for the exercise of remedial nonacquiescence. Thus, remedial nonacquiescence is only possible in cases of traditional nonacquiescence in which the “law of the circuit” that is being ignored is the law of a circuit other than that of the reviewing court (known as “intercircuit nonacquiescence”), and where there is such adverse “law of the circuit” to evade.

#### V. THE NLRB’S TRADITION OF NONACQUIESCENCE

The NLRB’s long tradition of nonacquiescence is perhaps best viewed as a by-product of the Board’s commitment to act on its own interpretation of the federal labor laws, come what may from the federal courts of appeals.<sup>142</sup> Beyond that initial commitment to Board law, arguably the most important effect of traditional nonacquiescence is to change the law of a circuit so that it will conform to the law of the land, as defined by the NLRB.<sup>143</sup>

##### A. THE NLRB AND THE THREE TYPES OF NONACQUIESCENCE

Under traditional nonacquiescence, this change in adverse “law of the circuit” can come about in one of three ways. First, the NLRB can issue an order that is contrary to the law of a particular circuit and then, when the award is reviewed in that same circuit, the court will see the error of its ways, overrule its contrary precedent, and adopt the Board’s reading of the relevant portion of the federal labor laws. This is known as “intracircuit nonacquiescence.” Second, the NLRB can issue an order that is contrary to the law of a particular circuit and then, when the order is reviewed and enforced in a different circuit that has law that is neutral or favorable to the Board’s position, the favorable judgment (favorable because the reviewing court does not treat the law of the circuit with contrary precedent as binding) will have some persuasive effect on the first, recalcitrant circuit in later cases. This is known as “intercircuit nonacquiescence.” Third, the Board can engage in either form of traditional nonacquiescence on an ongoing basis until the dispute between the Board and those circuits with

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settled law”); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536–40 (1992) (reversing enforcement of an NLRB order).

142. See Letter from Jeffrey D. Wedekind to Patricia S. Connor, *supra* note 136, at 2.

143. *Id.* at 3.

contrary law becomes sufficiently prominent to attract the attention of the Supreme Court, and with it an authoritative resolution of the issue. This is known as “percolation.”<sup>144</sup>

As explained in Part II above, there is a third reason (in addition to commitment to Board law and commitment to changing contrary circuit law) for engaging in traditional nonacquiescence: uncertainty. Even if the Board wanted to acquiesce in the “law of the circuit,” it cannot do so when there are inconsistencies in the laws of the various circuits and at the same time uncertainty about which circuit court will review a Board order due to the many venue choices afforded by the NLRA.

However, as explained in Part III above, the deference the NLRB normally enjoys in the courts of appeals disappears when the Board disagrees with a reviewing court about an issue that has already been decided in that court’s “law of the circuit.” Given the age of the NLRA (sixty-seven years at this writing) and the large though diminishing flow of cases heard each year under one body of Board law and twelve different bodies of circuit law interpreting the Act, it should come as no surprise that the NLRB encounters disagreement in the federal courts of appeals with not inconsiderable frequency. The Board does not publish statistics about its nonacquiescence success and failure rates, but any regular reader of the *Daily Labor Report*<sup>145</sup> knows that the Board is engaged in a still-lively, decades-old series of skirmishes with the courts for control of federal labor law.<sup>146</sup>

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144. Historically, the NLRB has cited its success rate in the Supreme Court as evidence that circuit courts should defer to the Board when it nonacquiesces, the idea being that because the Board has prevailed in the Supreme Court in the past, it will continue to do so in the future, and therefore the circuit courts should recognize that resistance is futile once the Board has reached a decision about the proper interpretation and application of the federal labor laws. See *Nonacquiescence*, *supra* note 8, at 708–09 & n.154. As Professors Cohen and Spitzer have explained, however, there are good reasons to believe that the fact that the Board’s batting average in the Supreme Court has been greater than .500 is not a good indication that the Board is actually correct more than half the time. See Cohen & Spitzer, *supra* note 119, at 391. Moreover, prior results are no guarantee of future performance or success, and the Board’s success rate in the Supreme Court in recent years has not been up to historical standards. See *supra* note 45.

145. Published by the Bureau of National Affairs, Inc.

146. The NLRB is not alone. Other agencies are more or less open about their own nonacquiescence practices. For example, the Internal Revenue Service and the Social Security Administration announce at least some of their decisions to nonacquiesce. See, e.g., *St. Jude Med., Inc. v. Commissioner*, 34 F.3d 1394 (8th Cir. 1994), *action on dec.*, 1999-52 (Dec. 27, 1999); *Hosp. Corp. of Am. & Subsidiaries v. Commissioner*, 109 T.C. 21 (1997), *action on dec.*, 1999-52 (Dec. 27 1999); *Vulcan Materials Co. & Subsidiaries v. Commissioner*, 96 T.C. 410 (1991), *action on dec.*, 1992-52 (Dec. 27, 1999); 20 C.F.R. 410.670c (2002) (black lung benefits); 20 C.F.R. 416.1485 (2002) (old age and disability benefits); INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL, pt.39, Technical Ch. 11, *Announcements of Acquiescence or Nonacquiescence*; see also *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc).

B. THE PERSISTENT FEARLESSNESS OF THE NLRB

The NLRB is not only not afraid to ignore the “law of the circuit,” no matter the circuit; it insists that its ALJs do so as well.<sup>147</sup> Recently, for example, the D.C. Circuit resignedly observed, “In remanding the NLRB’s decision to impose a bargaining order, we cannot help but feel a sense of *déjà vu*”:

The Board, inexplicably, has once again defied the law of this circuit and failed to offer an adequate justification for the bargaining order sanction imposed against [the charged party]. We therefore find ourselves in the all-too-familiar position of having to remand this case to the Board for adequate justification of the proposed affirmative bargaining order, thus further delaying relief for the employees the Board purports to protect.<sup>148</sup>

Furthermore, the Board often acts in ways that make clear that its primary goal is simply to see its interpretation of the federal labor laws prevail in as many cases as possible, rather than to change contrary law in particular circuits or to serve as a percolator for the Supreme Court. For example, rather than identifying points of disagreement with the circuit courts—behavior that would be consistent with efforts to change the minds of circuit court judges or catch the attention of the Supreme Court—the Board’s orders are frequently silent about nonacquiescence.<sup>149</sup> Some of this behavior can be put down to the impossibility of (crisply) distinguishing nonacquiescence from good faith differences between the Board and a reviewing circuit court over the law of the circuit. But some of the Board’s exercises in nonacquiescence are so elliptical as to be irritating and unilluminating nose-thumbing rather than useful signaling: “I am aware that certain circuit courts of appeal have rendered declarations different from the Board upon the focal issues represented. Though I respect the courts’

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147. As the standard manual for ALJs puts it:

A few words are necessary concerning the relationship which the decision should bear to the established policies of the agency. . . It is the Judge’s duty to decide all cases in accordance with agency policy. . . First, court decisions (other than those of the Supreme Court) may have found the agency’s policy or view to be erroneous, but the agency disagrees and announces its “nonacquiescence.” In this case, the agency takes the position that the judge is bound to apply the agency view if the agency has authoritatively declared nonacquiescence.

MORELL E. MULLINS, MANUAL FOR ADMINISTRATIVE LAW JUDGES 107 (3 BOR 45.4 2d ed. 1993).

148. *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1067 (D.C. Cir. 2001).

149. *See Douglas Foods Corp.*, 330 N.L.R.B. 821 (2000) (providing no mention of nonacquiescence or of seven previous cases in which the Board had been reversed by the D.C. Circuit on the same issue), *enforcement denied, Douglas Foods Corp.*, 251 F.3d at 1067. It may be that the Board only identifies instances of Board-court conflict when they are raised by a party. This seems like a feeble excuse, however, given the Board’s status as the national expert on the state of federal labor law and as the number one repeat player in nonacquiescence. It is especially dubious in cases where the contrary precedent is from the Supreme Court, and recent. *See Public Serv. Co. v. NLRB*, 271 F.3d 1213, 1219–21 (10th Cir. 2001).

opinions and authority, it is my obligation to apply Board precedent unless overruled by the Supreme Court."<sup>150</sup>

In the end, nonacquiescence is primarily an exercise in the Board's assertion of its views of the law without regard to contrary circuit precedent and with an eye to prevailing in each case. Larger-scale theories of institutional dialogue and deliberation come in second.

## VI. REMEDIAL NONACQUIESCENCE

Remedial nonacquiescence is perhaps best viewed as a by-product of the NLRB's commitment to impose remedies on charged parties that will compel them to conform ever after and everywhere to the Board's interpretation of the federal labor laws, come what may from the federal courts of appeals. Beyond that initial commitment to Board-designed remedies, the most important effect of remedial nonacquiescence is to extend the law and authority of one circuit (of which the NLRB approves) into the territory of one or more other circuits (of which the Board either disapproves or is uncertain) with respect to a charged party or group of charged parties. In other words, the function of remedial nonacquiescence is to extend the law of the land (as defined by the NLRB), party by party, circuit by circuit, through the use of one accommodating circuit's contempt power. In this sense, remedial nonacquiescence, with its focus on cornering the market for law with respect to individual litigants, is a more nearly perfect vehicle for implementing the core function of traditional nonacquiescence than traditional nonacquiescence itself. Remedial nonacquiescence is well suited to winning particular cases in the future, but has little promise for more speculative opportunities to change the law of circuit where that law does not conform to the Board's own views.

### A. LEVERAGING THE PUZZLE OF VENUE CHOICE

Remedial nonacquiescence boils down to a simple exercise in Board leverage against the broad venue choices provided by the NLRA. The NLRB uses its success on the merits in one circuit court with favorable law to bring in a broad remedial order that gives the Board the option to circumvent NLRA venue choice by bringing future allegations of unfair labor practices to the court that originally enforced that order. When, in those future contempt cases, the enforcing court considers the Board's arguments, it will consider them in the context of the law of its own circuit, not the law of the circuit in which the alleged unfair labor practices occurred.<sup>151</sup> Thus, the original broad remedial order gives the Board the option to engage in nonacquiescence in the law of the circuit in which an unfair labor practice

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150. *S.M.S. Auto. Prod., Inc.*, 282 N.L.R.B. 36, 37 (1986) (neglecting to identify any of the adverse law, or even any of the adverse courts).

151. *Fla. Steel Corp. v. NLRB*, 713 F.2d 823, 828-33 (D.C. Cir. 1983).

occurs, and to do so without the usual high risk of reversal in that circuit, and even without the uncertainty of perhaps having to defend the order in some other circuit court that might or might not enforce the order.<sup>152</sup>

The NLRB appears to be well aware of the power of this approach to the dual puzzles of the “law of the circuit” and expansive venue choice under the NLRA. Consider the Board’s own interpretation of its recent victory in the *Beverly* cases,<sup>153</sup> a victory that included a broad companywide, nationwide order directing the charged party to cease and desist from engaging in a long list of unfair labor practices at any of its hundreds of facilities and “[i]n any other manner interfer[ing] with, restrain[ing], or coerc[ing] its employees in the exercise of their Section 7 rights.”<sup>154</sup> After the Seventh Circuit enforced the Board’s remedial order,<sup>155</sup> the Board issued a press release describing the implications of the order and its enforcement:

The U.S. Court of Appeals for the Seventh Circuit has approved a corporate-wide, cease-and-desist order by the National Labor Relations Board against Beverly California Corp. The decision, issued on September 13, is the culmination of two Board proceedings consolidating numerous unfair labor practices committed at Beverly facilities around the country that have been litigated since 1987.

Under the corporate-wide order, Beverly is required to post a remedial notice at all of its facilities. The Board will have authority to prosecute future unfair labor practices committed at any Beverly facility as contempt of the Court’s order—and not simply as additional unfair labor practices.

The Court’s decision imposes broad remedial provisions on Beverly and all of its more than 600 nursing homes. The decision also enforces over 100 unfair labor practice findings, chronicled in the Board’s *Beverly II* and *Beverly III* decisions, issued in 1998.<sup>156</sup>

Under this interpretation of the *Beverly* order, the NLRB now has access to the Seventh Circuit for review of all alleged unfair labor practices by Beverly—a nifty end-run around the broad venue provisions of the NLRA.

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152. This is especially helpful to the NLRB, given its longstanding practice of filing its petition for enforcement with the court in whose circuit an unfair labor practice occurred. *See Arvin Auto.*, 285 N.L.R.B. 753, 754 n.2 (1987).

153. *See Beverly Cal. Corp. v. NLRB*, 227 F.3d 817 (7th Cir. 2000); *Beverly Cal. Corp.*, 334 N.L.R.B. 713 (2001).

154. *Beverly Cal. Corp.*, 334 N.L.R.B. at 721 (2001).

155. *NLRB v. Beverly Cal. Corp.*, Nos. 01-3197 & 01-3289, 2001 U.S. App. LEXIS 25079 (7th Cir. Nov. 20, 2001).

156. Press Release R-2405, Office of the General Counsel, NLRB (Sept. 15, 2000), <http://www.nlr.gov/press/r2405.html> (on file with the Iowa Law Review).

Moreover, the NLRB need not seek a contempt judgment in the Seventh Circuit every time it identifies what it believes to be an additional unfair labor practice by Beverly. Rather, the Board is free to file for contempt in the Seventh Circuit when Seventh Circuit law favors the Board, and in other cases in which Seventh Circuit precedent is unhelpful the Board is free to engage in the normal process of unfair labor practice adjudication, with its broad venue choices—outcomes we should expect to see if the Board is engaging (intentionally or not) in remedial nonacquiescence.<sup>157</sup>

In fact, we do. Since the Seventh Circuit's *Beverly* decisions, the NLRB has pursued additional allegations of unfair labor practices against Beverly through a mixture of new administrative actions and threats of contempt. For example, in *Beverly Health and Rehabilitation Services, Inc.*, 335 N.L.R.B. No. 54,<sup>158</sup> the Board cited Beverly for numerous new unfair labor practices. The Board has not sought contempt sanctions in the Seventh Circuit for these violations, however, perhaps because the Seventh Circuit might be sympathetic to the dissent of Board Chairman Hurtgen.<sup>159</sup> At the same time, the Board is in some instances abjuring new administrative actions and instead pursuing contempt, notwithstanding the fact that the alleged contempt occurred outside the Seventh Circuit's geographic jurisdiction.<sup>160</sup>

Importantly, the Board now has the benefit of the chilling effects of contempt.<sup>161</sup> No longer is there a need for the Board to go to the trouble of starting at the bottom of the process described in Part II, *supra*. No longer is there a risk of encountering a court skeptical about wrongdoing on the part of the charged party. And no longer is the Board constrained by the remedies available for an initial unfair labor practice. In a contempt proceeding, the available remedies are more varied and potentially more

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157. Questions about whether Beverly qualifies as a nasty or nice employer under the federal labor laws and related questions about the appropriateness of retrospective and prospective remedial actions taken by the Board and the courts against Beverly over the company's long history of conflict with the Board are irrelevant to the issues addressed in this Article. Rather, the questions here are, first, whether the Board does have opportunities to evade conventional judicial scrutiny via remedial nonacquiescence, second, whether remedial nonacquiescence is good or bad, and third, whether there is anything that can or should be done about remedial nonacquiescence.

158. Cases 6-CA-27873, et al., 2001 NLRB LEXIS 720 (NLRB Aug. 27, 2001).

159. *Compare id.* at \*53 (Hurtgen, dissenting in part) (dissenting on the grounds that "if [an] employer, after contract expiration, continues to act consistently with those practices [followed under the contract], it has not 'changed' the status quo and it has not violated violated Section 8(a)(5)."), with *NLRB v. Lewis Univ.*, 765 F.2d 616, 624, 627 (7th Cir. 1985) (denying enforcement of a Board order on grounds similar to those relied on by Board Member Hurtgen).

160. See Letter from NLRB Region 4 (Philadelphia) to Beverly Enterprises, (Feb. 13, 2003) (reciting the history of the Seventh Circuit decision and "recommending to the General Counsel that civil contempt proceedings be instituted in the subject cases") (on file with the Iowa Law Review).

161. See *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087, 1094 (7th Cir. 1982).



severe.<sup>162</sup> With the big stick of contempt at hand, the Board is likely to find itself suddenly more persuasive.

### B. LEVERAGING THE REMEDIAL RELATIONSHIP

Once the Board has engaged a court of appeals in the process of enforcing a broad remedial order, the court may develop a sufficiently strong sense of responsibility for supervision of the party to be willing to hear contempt petitions for actions falling outside the geographic scope of the original broad order. This was the case in *J.P. Stevens & Co.* in the Second Circuit.<sup>163</sup> The original order enforced by the court was explicitly limited to all forty-three of J.P. Stevens's facilities in North and South Carolina, rather than just the twenty facilities in those two states where the Board found that the company had engaged in unfair labor practices.<sup>164</sup> After several years of additional litigation, including at least one civil contempt judgment against J.P. Stevens & Co. and several of its employees,<sup>165</sup> the Second Circuit had apparently developed a proprietary interest in making sure that J.P. Stevens was treated in accordance with the court's interpretation of the federal labor laws and the company's long history of unfair labor practices. When J.P. Stevens filed a motion seeking "an order 'implementing the geographic limitations applicable to contempt proceedings' in this case,"<sup>166</sup> the court responded:

We reject this argument and deny the motion. Our cease and desist orders made no reference to any specific geographic location, and until this motion, both parties had interpreted the orders as applying, at least, to Stevens's plants in North and South Carolina. Even if it were to be assumed *arguendo* that this court's cease and desist orders should have been limited geographically, those orders issued approximately ten years ago, and the Company's motion must be denied as a collateral attack upon these decrees.<sup>167</sup>

This sort of judicial rhetoric can only serve to enhance the chilling effect of the threat or even the unspoken prospect of contempt sanctions.

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162. See, e.g., *Bldg. & Constr. Trades Council of Phila. v. NLRB*, 64 F.3d 880, 882-84 (3d Cir. 1995) (imposition of large fines on both the organization and its officers as individuals); *NLRB v. Trailways, Inc.*, 729 F.2d 1013, 1023-24 (5th Cir. 1984) (listing requirements for removal of contempt and possible sanctions for contempt); Press Release R-2214, Office of the General Counsel, NLRB (Apr. 1, 1997) (on file with the Iowa Law Review); Kenneth C. Crowe, *NLRB Gets Indictments on Brotherly Scofflaws*, NEWSDAY (New York), Jan. 10, 1997, at A51.

163. 380 F.2d 292 (2d Cir. 1967).

164. 380 F.2d at 303-05.

165. *NLRB v. J.P. Stevens & Co.*, 464 F.2d 1326, 1329 (2d Cir. 1972) (per curiam).

166. *NLRB v. J.P. Stevens & Co.*, 563 F.2d 8, 14 n.6 (2d Cir. 1977).

167. *Id.*

*C. A FREESTANDING FORM OF NONACQUIESCENCE*

In fact, remedial nonacquiescence is sufficiently oriented to future cases, rather than the immediate dispute of which the critical initial broad remedial order is a part, that it does not even necessarily rely on traditional nonacquiescence. Consider this hypothetical scenario:

The First and D.C. Circuit Courts of Appeals have not developed any law on the hiring of replacement workers during a strike. There is no precedent in either court to which the NLRB might be subject on this issue.

The Second through Eleventh Circuit Courts of Appeals have held that hiring of replacement workers is not a violation of the NLRA.

Employer A operates six plants, all within the First Circuit.

Union B, which represents Employer A's employees, calls a strike.

Employer A hires replacements—an act that takes place entirely within the First Circuit.

Union B files a charge against Employer A for hiring the replacements, the General Counsel issues a complaint, and an ALJ finds that Employer A's hiring of replacements was an unfair labor practice and recommends a broad remedial order barring Employer A (which has been the subject of several previous complaints and the losing party in two earlier NLRB cases on other issues) from violating its employees rights under the NLRA "in any other manner."

The Board adopts the ALJ's findings and recommended order.

Employer A petitions for review in the D.C. Circuit, and the Board cross-petitions for enforcement in the First Circuit.

The JPML sends the case to the First Circuit (or to the D.C. Circuit—it does not matter for purposes of this exercise, the point being that the only two circuits in which review or enforcement is available are the courts with no precedent on the subject that might inspire traditional nonacquiescence by the NLRB), which accepts the Board's reasoning on the statutory unfairness of hiring replacements for strikers and grants the Board's petition for enforcement.

The First Circuit, outraged by yet another unfair labor practice by Employer A, also enforces the broad remedy ordered by the Board, concluding that "nothing less than a corporate-wide order would do the job of correcting the proclivity this company has shown for

committing or tolerating unfair labor practices at a significant number of its facilities.”<sup>168</sup>

Later, after several more years of back-and-forth between Employer A and the NLRB, some of which takes place in the First Circuit’s courtroom, Employer A opens a new plant located within the territory of the Second Circuit.

Almost immediately, Employer A is in conflict with Union B at the new plant, a strike ensues, and Employer A hires replacements.

The NLRB finds that this new round of replacement-hiring is an unfair labor practice, and it files a petition in the First Circuit seeking a contempt judgment against Employer A.

Employer A responds with a motion of its own, however, asking the First Circuit to dismiss the contempt petition on the ground that the underlying unfair labor practice is outside the scope of the original remedial order.

The First Circuit, even more outraged than it had been when it enforced the Board’s original remedial order many years ago, denies the motion, saying, “Our cease and desist orders made no reference to any specific geographic location . . . . Even if it were to be assumed *arguendo* that this court’s cease and desist orders should have been limited geographically, those orders issued approximately ten years ago and the Company’s motion must be denied as a collateral attack upon these decrees.”<sup>169</sup>

This fairly extreme hypothetical<sup>170</sup> shows the potential for remedial nonacquiescence to operate side-by-side with apparently overwhelming adverse precedent, yet without engaging in traditional nonacquiescence. The Board and the courts do agree, however, on the meaning of the federal labor laws much of the time, and under those circumstances the courts do grant the Board considerable deference in its choice of remedies.<sup>171</sup>

The power of remedial nonacquiescence is the opportunity it gives the NLRB to exert considerable control over who will say what the law is by placing itself in a position, through the vehicle of a broad remedial order, to direct certain cases in the future to certain courts of appeals that can be relied upon to favor the Board’s position on certain issues. And the Board

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168. *Beverly California Corp. v. NLRB*, 227 F.3d 817, 847 (7th Cir. 2000).

169. *NLRB v. J.P. Stevens & Co.*, 563 F.2d 8, 14 n.6 (2d 1977).

170. Based on the long-followed but still-controversial decision in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (explained in *NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775, 790 (1989)).

171. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

can engage in this practice without directly nonacquiescing to the law of any circuit.

#### D. NO MENS REA REQUIRED

It may, however, be unfair to the NLRB to suggest that it is intentionally engaged in remedial nonacquiescence. After all, the Board's press release in the wake of the *Beverly II* and *Beverly III* decisions is the only explicit statement by the Board indicating that it is aware of the power of remedial nonacquiescence.<sup>172</sup> It is possible that the Board engages in remedial nonacquiescence today without even knowing it is doing so; awareness of the concept of nonacquiescence is not necessary to capitalize on its power. Recall that remedial nonacquiescence begins with the Board's success on the merits when an order is reviewed by a court of appeals. Once that court has determined that the Board is right on the substantive law, the court reviews the propriety of the remedial portion of the Board's order deferentially under *Gissel* or some comparable authority, and perhaps in some circuits with some added scrutiny for extraordinarily broad remedies.<sup>173</sup> If the Board consistently issues broad remedial orders whenever they might reasonably be appropriate, it has already maximized its opportunities for access to those orders. If the Board simply brings future unfair labor practice charges that fall within the scope of a broad remedial order to the enforcing court as petitions for contempt except if in those cases where the law of the circuit of the enforcing court is against the Board, then, again, the Board will be making the most of its opportunities to engage in remedial nonacquiescence.

Thus, there are far more opportunities to affect the outcomes of future cases through remedial nonacquiescence than through traditional nonacquiescence, although the sweep of the impact of any particular instance of remedial nonacquiescence will almost certainly be less dramatic.

#### E. BAD REMEDIAL NONACQUIESCENCE

However attentive or ignorant the NLRB may be regarding the existence of remedial nonacquiescence, and however skillful or clumsy or lucky it may be in engaging in such a practice, the Board undermines the purposes of the NLRA and the traditional forms of nonacquiescence whenever it engages in remedial nonacquiescence.

Remedial nonacquiescence serves none of the beneficial functions of traditional nonacquiescence. By concealing at least some future disputes from appellate courts that might have jurisdiction and something useful to

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172. See Press Release R-2405, *supra* note 156.

173. Compare *N.L.R.B. v. Ky. May Coal Co., Inc.* 89 F.3d 1235, 1244 (6<sup>th</sup> Cir. 1996) (extra scrutiny in the Sixth Circuit), with *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 826 (1999) (standard deference in the Seventh Circuit).

say, remedial nonacquiescence cuts back on opportunities for the NLRB and the courts to communicate and contest about the optimal reading of a statute with an eye to eventually either achieving consensus at the Board-appellate level or, failing that, transmitting clear signals for review and the full range of the best judicial thinking to the Supreme Court. Specifically, remedial nonacquiescence does not signal to the Supreme Court the existence of problematic and contentious issues in federal labor law. Instead, by eliding differences among the circuits by addressing novel or contentious issues via contempt procedures and related informal dealings with affected parties, the Board hides problems from the Court. Thus, remedial nonacquiescence reduces beneficial percolation; if applied universally, it would eliminate percolation altogether.

Similarly, by avoiding the process of circuit-by-circuit treatment of an issue, remedial nonacquiescence reduces the rethinking of federal labor issues as each circuit considers a problem. This stunts the development of alternative lines of thinking that can benefit the reasoning of appellate courts considering an issue for the first time, appellate courts reconsidering an issue when it comes up via intracircuit nonacquiescence or some other means, and the Supreme Court when it decides to settle an issue.<sup>174</sup>

Finally, there is no particular reason to believe that remedial nonacquiescence reduces administrative costs overall. It may enable the NLRB to impose its will more cheaply and consistently on some parties, especially in two sharply different contexts in which the use of conventional processes would be a complete waste of resources because either: (a) the charged party is an inveterate bad actor who will inevitably lose and may be inspired to better behavior by the prospect of swifter and harsher justice or (b) the behavior the Board disapproves of is perfectly legal in the jurisdictions in which it would normally be subject to review and thus the Board will inevitably lose if it cannot evade that law. But some, all, or perhaps even more than all of those cost savings are surely offset by the associated prolongation of confusion and division among the circuits, with the associated costs to the Board of litigation postponed rather than eliminated. More significant is the undoubted additional costs to the regulated community. In addition to imposing costs on parties directly affected by specific acts of remedial nonacquiescence, it also increases uncertainty in the law by potentially bringing divergent interpretations of circuit courts to bear on parties without reference to their relative location, thereby disrupting consistent behavior of employers and unions in local and regional markets. This feature of remedial nonacquiescence imposes costs on the court system as well.

For the same reasons, remedial nonacquiescence facilitates unequal treatment of the law. For example, under remedial nonacquiescence,

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174. *Nonacquiescence*, *supra* note 8, at 736.

neighboring employers or unions could find themselves subject to widely differing statutory obligations if at least one of them is subject to a broad remedial order. This treatment of a party seems especially obnoxious in light of the fact that in a companion case to *Mendoza*, the Supreme Court barred the government from relitigating an issue it had lost in another circuit against the same party.<sup>175</sup> Remedial nonacquiescence amounts to an end-run around that policy.

The only benefit of remedial nonacquiescence is a superficial one. By reducing the occasions on which the Board engages in traditional venue choice or intracircuit nonacquiescence, remedial nonacquiescence may reduce friction between the courts of appeals and the NLRB. But the negative effects of remedial nonacquiescence are too high a price to pay for a little more chumminess between judges and Board members. In any event, even that benefit is illusory. When a judge catches the Board in an act of remedial nonacquiescence, there is every reason to believe that the response will be strong and negative.<sup>176</sup>

The bottom line is that traditional nonacquiescence is worthwhile if it enables the Board and the federal courts to engage in percolation and dialogue, and enables the Board to operate efficiently, without causing too much harm to the individual parties who are the medium through which percolation, dialogue, and administration of the national labor laws occurs. Thoughtful legislators, judges, bureaucrats, and scholars differ on the propriety of nonacquiescence generally and with respect to the scope of its various traditional forms.

Regardless of whether the signaling, percolation, and administration functions described in Part I justify traditional nonacquiescence or not, however, remedial nonacquiescence removes those benefits from the equation. The whole point of remedial nonacquiescence is to nonacquiesce without signaling.

In other words, while successful traditional nonacquiescence is a costly way of eventually achieving a uniform national labor law, successful remedial nonacquiescence is a costly way of never achieving a uniform national labor law.

## VII. RESPONSES

Notwithstanding the pernicious effects of remedial nonacquiescence, the Supreme Court has given no sign that it would be willing to find the Board's behavior to be per se unlawful. First, there is nothing in the general law governing federal contempt actions that requires the Board to investigate and prosecute a post-enforcement unfair labor practice

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

176. *See Lopez v. Heckler*, 725 F.2d 1489, 1497 & n.5 (9th Cir. 1984); *see also* H.R. REP. NO. 106-976, at 48 (2000).

allegation via contempt proceedings, since as a general matter “[t]he complaining party controls the course of the proceeding,” at least in civil contempt proceedings.<sup>177</sup> “Indeed, where the party aggrieved elects not to go forward with a civil contempt application, it has been said, the court may proceed no further.”<sup>178</sup> Second, there is nothing in federal labor law that limits the Board to contempt actions for unfair labor practices alleged against parties subject to broad nationwide enforcement orders. Rather, under the NLRA the Board has “the sole authority to secure” compliance with an enforcement order via initiation of contempt proceedings,<sup>179</sup> and it has the authority to pick and choose which unfair labor practices should be addressed through the standard administrative process and which should be addressed via contempt proceedings.<sup>180</sup>

Thus, the decision whether to engage in remedial nonacquiescence by bringing an action for contempt rests entirely and lawfully in the Board’s discretion. This is not to say, however, that there is no stopping remedial nonacquiescence. Four groups could respond in some significant way to increased awareness of the existence of remedial nonacquiescence: federal legislators, litigants, the Board itself, and the appellate courts.

#### A. BLUSTERING CONGRESS

Congress might add remedial nonacquiescence to the agenda for its next round of hearings on nonacquiescence. Nothing has come of congressional attention to nonacquiescence, but there is little reason to expect results from that quarter, with the exception of some vigorous jawboning of the Social Security Administration (“SSA”) in 1984.<sup>181</sup> At the time, controversy was brewing over the SSA’s persistent nonacquiescence over changes in the agency’s requirements for renewal of disability benefits. The Ninth Circuit had gone so far as to issue an injunction barring further nonacquiescence on the issue anywhere in that court’s jurisdiction.<sup>182</sup> Then Justice Rehnquist granted the SSA’s motion for a stay of the injunction.<sup>183</sup> While the respondents’ motion to vacate the stay was pending in the Supreme Court, both houses of Congress passed Social Security reform bills.

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177. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL § 2960, at 375 (2d ed., 1982).

178. *In re Welling*, 40 F. Supp. 2d 491, 494 (S.D.N.Y. 1999).

179. *Amalgamated Util. Workers v. Consol. Edison Co.*, 309 U.S. 261, 270 (1940).

180. NLRB, *supra* note 67, § 101.15.

181. There is nothing special about Congress’s failure to act on this particular aspect of federal labor law. As Professor Estlund recently observed, “a longstanding political impasse at the national level has blocked any major congressional revision of the basic text since at least 1959.” Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). For a thoughtful discussion of the general problems with legislative change to labor law at the national, state, and local levels, see *id.* at 1532–44, 1569–79.

182. *Lopez v. Heckler*, 725 F.2d 1489, 1508–09 (9th Cir. 1984).

183. *Heckler v. Lopez*, 463 U.S. 1328 (1983).

The House version included a mandatory acquiescence provision, but it was removed by the conference committee, which merely included a strong recommendation in its report that the SSA temper its nonacquiescence policy.<sup>184</sup> The agency did so, and the Supreme Court denied the motion to vacate the stay.<sup>185</sup> Thus did the SSA nonacquiescence crisis pass.

Since then, Congress has only occasionally held hearings on several Federal Agency Compliance Acts,<sup>186</sup> but with sufficient frequency so that the Justice Department has begun recycling its pro-nonacquiescence position paper.<sup>187</sup> The hearings have borne no fruit, and it is difficult to see how some attention to remedial nonacquiescence would change that.

It may be that the affected constituencies are different. Broad remedial orders of the sort that invite remedial nonacquiescence must, by definition, be effective against charged parties with employees or members in more than one circuit. It may be that employers and unions fitting that profile are sufficiently large and important to their representatives in Congress to inspire some real movement toward a legislative fix for remedial nonacquiescence. However, the information costs associated with such a difficult-to-nail-down regulatory problem, combined with the organization costs associated with bringing together big labor and big business interests in an area—labor-management relations—where their history has been almost invariably adversarial,<sup>188</sup> may be all but prohibitive.<sup>189</sup> Although such groups have managed to cooperate to some extent on high-priority legislation such as protection of domestic steel production,<sup>190</sup> there is little reason to hold out much hope that they would be able to coordinate on a matter directly associated with labor-management relations in the absence of a national commercial crisis of the sort that brought labor and management together to negotiate the Railway Labor Act of 1926.<sup>191</sup>

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184. H.R. CONF. REP. NO. 98-1039, at 37 (1984); Security Disability Benefits Reform Act, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

185. *Heckler v. Lopez*, 464 U.S. 879 (1983).

186. H.R. 1544, 105th Cong. (1997); S. 1166, 105th Cong. (1997); H.R. 1924, 106th Cong. (1999); *Federal Agency Compliance Act: Hearing on H.R. 1924 Before the Subcomm. on Commercial and Administrative Law of the Committee on the Judiciary*, 106th Cong. (1999) [hereinafter *Federal Agency Compliance Act*].

187. See *Federal Agency Compliance Act*, *supra* note 186, at 15–20 (testimony of Deputy Assistant Attorney General William B. Schultz).

188. See Estlund, *supra* note 181, at 1540 (“Legislative inaction stems primarily from the fact that, for many decades, both organized labor and especially employers have had enough support in Congress to block any significant amendment that either group strongly opposes.”).

189. See Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 46–51 (1988).

190. See Walter Adams and James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 268 (1995).

191. See Charles M. Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, in *THE RAILWAY LABOR ACT AT FIFTY* 1-10 (Benjamin Aaron et al. eds., 1977).



### B. SELF-INTERESTED PARTIES

Charging parties are, by statutory definition, on the same side as the Board, which may mean that they will have an interest in helping the Board to garner broad remedies. A charging party, however, is only on the Board's side with respect to a particular case. In the future, such a party could be charged rather than charging. This prospect alone should be sufficient to make a charging party hesitate to support a broad remedy unless it has reason to be confident that its interests will be aligned with the Board's interpretations of the labor laws in a majority of future cases involving the charged party who would be subject to the broad remedial order. (To the extent that remedial orders already tend to be tailored to the geographic territory of a charged<sup>192</sup> or charging union,<sup>193</sup> union and union-affiliated charging parties may have less of an incentive to invest in broadening orders further.)

Attention to remedial nonacquiescence, and thus to the potential of a broad remedial order to put a charged party more fully at the Board's mercy than the NLRA would seem to contemplate, would probably inspire charged parties to devote more resources to opposing broad remedial orders. More generally, litigants might one day have reasons to try to manipulate remedial nonacquiescence themselves, but not now. To the extent a party engages in forum shopping when filing a charge or seeking review of a Board order, the jurisdictions that are the most appealing on the merits will be the most appealing on the potential for a broad remedy because there will be no chance of a broad remedy unless the forum-shopping party first prevails on the merits. Eventually, someone may develop information about which courts are most likely to enforce or set aside broad remedies ordered by the NLRB, at which point a party could weigh that factor in the balance, but no such information is available now.

### C. UNMOVED BOARD

Finally, the NLRB's response to the suggestion that it engages in remedial nonacquiescence would almost certainly be to continue business as usual. The Board has weathered numerous nonacquiescence storms in the past. In its defense, though, the NLRB would likely cite its 1979 *Hickmott Foods* decision, in which the Board announced a significantly higher standard for broad remedial awards.<sup>194</sup> *Hickmott Foods*, the NLRB would say, shows that the Board has been engaged in an important exercise in self-restraint during the very period in which nonacquiescence has become a more prominent issue in the courts and the academy. As discussed in Part I

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192. *United Mine Workers*, 302 N.L.R.B. 949, 950 (1991).

193. *United States Postal Service*, 303 N.L.R.B. 463, 463 (1991).

194. *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357 (1979); see *supra* note 79 and accompanying text.

above, however, it is not clear that *Hickmott Foods* has had any genuine impact on the decisions coming out of the Board or the courts.

If the NLRB does change its behavior after thinking about remedial nonacquiescence, it will probably be because the Board has never thought about it before. As discussed at the end of Part V above, the Board may not be aware of the opportunity to engage in remedial nonacquiescence, or of how little extra effort it would likely take to reap more of the benefits of the remedial nonacquiescence that is inherent in the Board's existing processes. For example, the Board could create a national database of judicially enforced broad remedial orders and the identity of the circuit in which contempt may be sought under each order. Such a resource would enable the regional directors and the General Counsel to take full advantage of opportunities to manipulate venue to place Board orders before desirable tribunals.

In other words, there is no reason to believe that the Board would reduce its engagement in remedial nonacquiescence—intentional or otherwise—merely because somebody noticed the opportunities that broad remedies give the Board to manipulate venue under the NLRA. To the contrary, the Board—with a perfectly reasonable institutional commitment to vindicating its own interpretation of the federal labor laws—is more likely to make the most of the opportunity.

#### D. HELPLESS COURTS?

If there is a solution to the problem of remedial nonacquiescence, it rests in the federal appellate courts. This seems only fair and practical, in light of the fact that court-made doctrines—the “law of the circuit” and *Chevron*-like *Curtin Matheson*<sup>195</sup> (or perhaps in this context *Gissel*<sup>196</sup>) deference—are critical components of remedial nonacquiescence.<sup>197</sup>

What should be done? The Supreme Court has provided the answer: “The Board’s order will not be disturbed ‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’”<sup>198</sup>

In light of all of the above, remedial nonacquiescence cannot be seen as an attempt to effectuate the policies of the NLRA. The question, then, is how to determine what qualifies as a “patent attempt to achieve [other] ends,”<sup>199</sup> and what to do in the event that such an attempt comes to light.

195. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786–87 (1990).

196. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 612–13 & n.32 (1969).

197. This feature of remedial nonacquiescence distinguishes the call for court action here from the all-too-common reflex to turn to the courts for the answer to a problem when some other private or governmental entity that is the source of the problem might better serve.

198. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (quoting *Virginia Elec. & Power Co. v. Labor Bd.*, 319 U.S. 533, 540 (1943)).

199. *Virginia Elec. & Power Co. v. Labor Bd.*, 319 U.S. 533, 540 (1943).

At common law, conviction for attempting to commit a crime required proof of specific intent to commit the underlying unlawful act and of a substantial step taken by the accused toward commission of the substantive offense.<sup>200</sup> As explained in Part V.E, *supra*, it is quite possible that the NLRB is not aware of the existence of, or opportunities entailed in, remedial nonacquiescence. If this is in fact the case, it would be very difficult for a party opposing enforcement of a broad remedial order to show a patent attempt to achieve other ends. There is, however, no obvious impediment to the law of one or more circuits evolving to account for this impediment—perhaps by permitting a party opposing enforcement to prove intent by showing that the Board was aware at the time it drafted or ratified a broad order that the order would cover jurisdictions with interpretations of the relevant substantive law that conflicted with the law of the circuit in which the Board was seeking enforcement.<sup>201</sup> Showing a substantial step seems less problematic. The act of issuing or seeking enforcement of a broad remedial order of the sort described above would qualify as a paradigmatic substantial step.

Under these circumstances, courts should at least “disturb” a Board order<sup>202</sup> to the extent necessary to limit their enforcement of such an order to those jurisdictions in which the law is not inconsistent with the law of the enforcing court.<sup>203</sup> A more severe version of the same approach would limit enforcement to those jurisdictions in which settled law is already consistent with the law of the enforcing court. The general practice in the federal courts is to remand remedial issues to the Board for reconsideration and correction, and there is no particular reason to think that this process would be less effective in combating remedial nonacquiescence than it would be in most other contexts in which a court finds the Board’s selection of remedies inappropriate.<sup>204</sup> Thus, although courts normally only take on the task of editing NLRB remedies *sua sponte* in “exceptional situation[s] in which crystal clear Board error renders a remand an unnecessary formality,”<sup>205</sup> the courts do retain the power and responsibility to “adjust [Board-ordered]

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200. See *United States v. Ramos-Palomino*, 51 Fed. Appx. 814, 816 (10th Cir. 2002).

201. A low hurdle that a party could pass simply by including a discussion of the relevant precedents in its filings or correspondence with the ALJ or the Board.

202. *Fibreboard*, 379 U.S. at 216.

203. This approach—embodying an effort by the federal appellate courts to avoid inadvertent overreaching via enforcement of broad NLRB remedial orders—would also be consistent with the general national policy of non-intervention by the federal courts in labor disputes. See *Norris-LaGuardia Act*, 29 U.S.C. §§ 101–115 (2000); *Boys Mkts., Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).

204. See *NLRB v. Food Store Employees Union, Local 347, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO*, 417 U.S. 1, 8–10 (1974); *Torrington Extend-A-Care Employee Ass’n v. NLRB*, 17 F.3d 580, 586 (2d Cir. 1994).

205. *Food Store Employees*, 417 U.S. at 8 (citing *NLRB v. Express Publ’g Co.*, 312 U.S. 426 (1941)).

relief to the exigencies of the case in accordance with the equitable principles governing judicial action.”<sup>206</sup> This power and responsibility is apparently broad enough to include adjustments to preclude remedial nonacquiescence.

The courts of appeals might also turn to *Detroit Edison Co. v. NLRB*<sup>207</sup> for an alternative doctrinal hook, although *Detroit Edison* is a relatively weak reed when compared to *Fibreboard*<sup>208</sup>, as discussed above. In *Detroit Edison*, the Supreme Court refused to enforce one NLRB order when the Board “identified no justification for a remedy granting . . . scant protection to the [employer]’s undisputed and important interests,”<sup>209</sup> and the Court refused to enforce another NLRB order when the employer showed that compliance with the order would likely result in some harm to innocent parties, while the countervailing burdens would be “minimal.”<sup>210</sup> Perhaps a charged party could demonstrate to the satisfaction of an appellate court that a broad Board order unjustifiably offers scant protection of the party’s important interest in having its operations governed—at least presumptively—by the law of the jurisdictions in which they occur. So much of a *Detroit Edison* argument would amount to little more than the mirror image of the “patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act” test under *Fibreboard*<sup>211</sup> as detailed above. Under *Detroit Edison*, however, a party would also have to show that the countervailing burdens on charging parties, and perhaps on the Board itself, were “minimal,”<sup>212</sup> a term that the Court has not developed in this context and that would involve, regardless, a difficult negative proof.

Existing broad remedial orders present a more difficult question. As a practical matter, revisiting such orders would in all likelihood involve a simultaneously massive and piecemeal imbroglio of motions by parties subject to enforcement orders seeking modification.<sup>213</sup> In addition, parties,

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206. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939).

207. 440 U.S. 301 (1979).

208. *Fireboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

209. 440 U.S. at 316.

210. *Id.* at 319.

211. 379 U.S. at 216.

212. *Detroit Edison Co.*, 440 U.S. at 319.

213. From 1994 to 1999, Board orders were enforced in full by the courts almost exactly two-thirds of the time, and they were affirmed in part in another 20% of the cases reviewed. The other 13% of Board orders were set aside in their entirety. *The National Labor Relations Board: Recent Trends and Their Implications: Hearing Before the Subcomm. on Education and the Workforce*, H.R. Serial No. 106-123, 106th Cong., 2d Sess. (Sept. 19, 2000) (statement of Leonard Page, General Counsel, NLRB). Presumably, the 13% that were set aside included those cases in which the courts caught the Board in acts of nonacquiescence, and perhaps some nonacquiescence cases fell within the 20% that were set aside in part. It is that one-third portion of the appellate courts’ NLRA caseload that courts and commentators focus on when assessing the pervasiveness and consequences of nonacquiescence.

the Board, and the courts of appeals would be confronted with even more difficult questions about ex post determinations of intent under a *Fibreboard* theory and balancing exercises under a *Detroit Edison* theory.

An intermediate solution would be for the courts to address pre-existing enforcement orders only in the relatively small number of cases in which the Board actually seeks to institute contempt proceedings, under existing broad remedial orders, when the underlying actions of the charged party arose in other jurisdictions with contrary precedent that would weigh against a ruling against the charged party in the appropriate court of appeals. Imposition of a small burden on the Board to show that the law of the circuit in which the allegedly contemptuous actions took place is consistent with the law of the circuit from which contempt sanctions would issue seems like a small price to pay to cut off what would amount to at least a substantial amount of whatever quantum of intentional or incidental remedial nonacquiescence exists today. This approach would also give employers and unions subject to broad remedial orders an opportunity to engage in their own form of remedial nonacquiescence. By complying with the law of a jurisdiction in which it is operating rather than the law of the jurisdiction in which a broad remedial order was issued, an employer or union could test the Board's willingness to risk an adverse judgment based on a finding of remedial nonacquiescence by the Board.

Alternatively, the federal appellate courts might achieve the same result by issuing across-the-board injunctions of their own against remedial nonacquiescence in their respective geographic jurisdictions. Any case in which a court detected an instance of remedial nonacquiescence would provide a sufficient basis for such an injunction.<sup>214</sup> The effectiveness of injunctions of this sort would depend on an empirical question that is beyond the scope of this Article: the extent to which the Board does, in fact, engage in conscious or unconscious remedial nonacquiescence. If the NLRB engages in relatively little remedial nonacquiescence, or if the remedial nonacquiescence in which it does engage saves the Board relatively little in the way of reduced administrative costs and reduced friction with the courts over traditional nonacquiescence, then the impact of such injunctions would be relatively slight—slight enough that a rational Board would conclude that it was more efficient to bow to the courts than risk contempt sanctions (and

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But the NLRB fully prevailed in about 67% of the cases in which the courts reviewed Board orders. That is a very large proportion of the material in the 338 volumes of the Decisions and Orders of the NLRB. It is in that 67% that remedial acquiescence holds the most promise for the Board—that large majority of cases in which the courts have already vindicated both the law of the circuit and the law of the NLRB, and in which they will vindicate that law again when the Board files contempt petitions for unfair labor practices occurring within the territory of other circuits but within the terms of the remedial orders.

214. See *Lopez v. Heckler*, 572 F. Supp. 26, 30, 32 (C.D. Cal. 1983), *stay denied*, 713 F.2d 1432 (9th Cir. 1983), *aff'd*, 725 F.2d 1489 (9th Cir. 1984), *vacated and remanded*, 469 U.S. 1082 (1984).

perhaps other, less concrete but no less consequential sanctions<sup>215</sup>) of its own. If, on the other hand, remedial nonacquiescence is a practice that is of substantial value or importance to the NLRB, then the Board is unlikely to give up without a fight, in which case the issue of remedial nonacquiescence is more likely to end up in front of Congress and the Supreme Court, as the issue of the SSA's strong intracircuit nonacquiescence policy did in the early 1980s.<sup>216</sup> Then, the possibility of a political settlement—followed by another round of adjustment between the agency and the courts—becomes a conceivable, although impossible to specify in advance, outcome.<sup>217</sup>

These intermediate approaches would do little, however, to reduce the excess chilling effects of possible contempt sanctions on parties subject to previously enforced remedial orders.<sup>218</sup> Perhaps the best that can be said on this front is that to the extent the federal appellate courts combine intermediate approaches with firm adherence to a clear and convincing standard for contempt actions, they might reduce excess chilling by making it much more difficult for the Board to prevail on contempt actions that arguably manifest intentional or inadvertent remedial nonacquiescence.<sup>219</sup>

Finally, the courts might balance the chilling effects of prospective remedial nonacquiescence under existing enforced Board orders by applying a chilling effect to the Board under the Equal Access to Justice Act ("EAJA").<sup>220</sup> Just as parties subject to enforced orders might fear remedial nonacquiescent contempt actions by the Board, so might the Board fear that appellate courts concerned about remedial nonacquiescence could award fees and expenses to such parties under the EAJA.<sup>221</sup>

There is reason to hope that the federal appellate courts might be receptive to proposals of the sorts outlined above. They are the institutions with the strongest interest in foreclosing remedial nonacquiescence because of its insidious effects on the "law of the circuit." They are, however, essentially powerless to stop the Board unless they are willing to take the sorts of relatively low-key, incremental steps outlined above to compromise their commitment to the principle of the "law of the circuit" and reduce their deference to the Board's remedial orders.

215. See Abner Mikva, *How Agencies Rule Their Turf*, 3 GREEN BAG 2D 389, 390–91 (2000) (discussing various forms of congressional and judicial oversight).

216. *Nonacquiescence*, *supra* note 8, at 692–704.

217. See *supra* Part VII.A.

218. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42–71 (1991) (discussing intermediate approaches in context of civil rights movement).

219. See *NLRB v. Howard Baer*, No. 94-6260, 1996 U.S. App. LEXIS 42533, at \*57 (6th Cir. June 26, 1996).

220. See 5 U.S.C. § 504 (a)(1).

221. See *Enerhaul, Inc. v. NLRB*, 710 F.2d 748, 751 (11th Cir. 1983).

There are other, more radical measures the courts could take, but they hold less promise.

First, the appellate courts could adopt a practice of national stare decisis with respect to the NLRB. The resulting national law would be essentially immune to remedial nonacquiescence because one circuit would always be as amenable or hostile to the Board as any other, making forum manipulation via contempt proceedings a useless exercise.<sup>222</sup>

There is some support in Supreme Court precedent and legislative history for a form of specialized national stare decisis for labor law. As the Supreme Court noted in 1951 in one of its first decisions interpreting the Taft-Hartley Act of 1947 and the Administrative Procedure Act:

The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. . . . The adoption in these statutes of the judicially-constructed "substantial evidence" test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices.<sup>223</sup>

In addition, as mentioned in Part III.A, *supra*, there is precedent in appellate court tax cases adopting a fairly soft presumption of national stare decisis. As the Eighth Circuit explains, "[t]his court has long taken the position that uniformity of decision among the circuits is vitally important on issues concerning the administration of the tax laws. . . . Thus, the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them."<sup>224</sup>

On the one hand, a system of national stare decisis for labor law would vindicate the NLRB's desire for a unified body of federal labor law. On the other hand, it would put the first-ruling courts of appeals in a position to dictate law for all of the other circuits, as well as create a variety of problems associated with the established judicial hierarchy. For example, national stare decisis would put an end to appellate "percolation" in the service of the Supreme Court.<sup>225</sup>

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222. National stare decisis would also generate a crisis in traditional nonacquiescence because it would, as a practical matter, convert all intercircuit nonacquiescence into far more inflammatory intracircuit nonacquiescence.

223. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951).

224. *Keasler v. United States*, 766 F.2d 1227, 1233 (8th Cir. 1985) (citations and internal quotation marks omitted). The court described this policy as an outgrowth of a more general policy of intercircuit deference bordering on intercircuit stare decisis: "Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among our circuits, wherever reasoned analysis will allow." *Id.* (citations and internal quotation marks omitted).

225. See Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1206-09 (1992) (providing a thorough discussion of a variety of such issues).

In any event, a policy of national labor law stare decisis almost certainly would not eliminate nonacquiescence of either the traditional or the remedial sort. As the Eighth Circuit has conceded, even the relatively flexible tax precedent “rule is not always scrupulously followed.”<sup>226</sup> Moreover, the incentives to engage in the sort of specious distinguishment described by Judge Wald and others would be even stronger in a scheme of national appellate precedent, where the powers of first-moving courts would approach those of the Supreme Court.<sup>227</sup>

Second, the courts could take a much less ambitious approach to national stare decisis for labor law. They could limit the practice not only to labor law, but also to the subset of labor law involving contempt proceedings for unfair labor practices that occurred outside the territory of the court holding the contempt power. That is, the appellate courts could simply adopt a practice of applying the law of the circuit in which the unfair labor practice occurred. They have had plenty of practice with this sort of work under their diversity jurisdiction.<sup>228</sup> This would compromise strict intercircuit independence, but it would preserve the power of each circuit to “say what the law is” within its own boundaries. This is the narrowest solution, and the one that trenches least on the prerogatives of the circuit courts. Therefore, it is the one most likely to succeed.

Moreover, there is precedent for such a modest and constructive approach to restraining the law of the circuit.<sup>229</sup> The United States Court of Appeals for the Federal Circuit has exclusive nationwide jurisdiction over patent appeals.<sup>230</sup> This means that in appeals brought from district courts all over the country,<sup>231</sup> the Federal Circuit has opportunities to impose its views regarding not only patent law but also any procedural issues in those cases, without regard to the laws of the circuits in which those cases arose.<sup>232</sup> Early in its existence, however, the Federal Circuit recognized that asserting its opinion of what the law is on general procedural issues would trap district courts (and the parties before them) between two potentially contradictory sets of precedents—those of the Federal Circuit and those of the home circuit.<sup>233</sup> The court concluded that “[s]uch bifurcated decisionmaking [on procedural matters] is not only contrary to the spirit of our enabling legislation but also the goal of the federal judicial system to minimize

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226. *Keasler*, 766 F.2d at 1233 n.12.

227. See Wald, *supra* note 108, at 490–93 (discussing the practice of circuit judges in selecting topics they wish to decide and those they wish to avoid).

228. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

229. See *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564 (Fed. Cir. 1984).

230. See 28 U.S.C. § 1295(a)(4)(A).

231. See 28 U.S.C. § 1338(a) (indicating that the district courts have original jurisdiction of actions relating to patents).

232. *Panduit Corp.*, 744 F.2d at 1573.

233. *Id.* at 1573–74.



confusion and conflicts.”<sup>234</sup> On that basis, the Federal Circuit held that while it is bound by statute to assert its own interpretations of patent law over those of other courts, it should as a matter of sound public policy follow the procedural precedents of the circuit in which each case arises.<sup>235</sup> The analogy may not be perfect as a matter of substantive law, but it is as a matter of judicial philosophy. In order to “minimize confusion and conflicts” in an area where that goal could only be achieved by relying on the views of other appellate courts, the federal circuit took on the burden of “deciding issues in light of different laws.”<sup>236</sup> The court sensibly observed that this “is no worse than the existing duty of federal judges to decide diversity cases or pendent state matters in view of state law.”<sup>237</sup> The fact that a circuit court has the power to assert its view of the law may not invariably make it wise for the court to do so. The deferential practices of some courts in some limited cases—tax, procedural issues in patent appeals—and the fact that no horrors have paraded after them invites the question whether remedial nonacquiescence deserves the same sort of treatment.

Third, the courts could also attempt to establish a much more searching analysis of broad remedial orders, taking their cue from the Sixth Circuit’s practice of “exercis[ing] less deference to the Board and scrutinize[ing] its decision more closely when it has imposed [a] very strong remedy . . . .”<sup>238</sup> If the courts were to put real teeth into this approach, however, it would almost certainly die a quick death in the form of a reminder from the Supreme Court that the appellate courts cannot combat nonacquiescence by the NLRB by engaging in their own nonacquiescence in the numerous decisions of the Supreme Court mandating deferential review of agency decisions. In any event, the most such an approach could achieve would be to abolish remedial orders that cross the borders of the enforcing circuit court—not a very satisfactory result under a statutory scheme designed to enable the Board to regulate employers with dispersed operations.

#### CONCLUSION

In some ways, the NLRB might have a sympathetic story about remedial nonacquiescence. First, no one likes to get beaten up, and that is what courts tend to do to the Board—sometimes fairly and sometimes not—when they catch it engaging in traditional forms of nonacquiescence. Remedial nonacquiescence is a means of avoiding that kind of trouble. Second, no federal agency, including the NLRB, has a budget big enough to satisfy the

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234. *Id.* at 1573.

235. *Id.* at 1574–75.

236. *Id.* at 1575.

237. *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1575 (Fed. Cir. 1984).

238. *NLRB v. Ky. May Coal Co., Inc.*, 89 F.3d 1235, 1244 (6th Cir. 1996) (citing *NLRB v. Rexair Inc.*, 646 F.2d 249 (6th Cir. 1981)).

demands of Congress (including individual legislators), the Executive, and the interested public. Remedial nonacquiescence saves money for the Board, if not for anyone else. At the very least, remedial nonacquiescence enables the agency to reduce its litigation costs and increase national uniformity of administration. Third, an agency such as the NLRB—allocated limited resources but subject to limitless demands—might lose patience with an unduly persistent opponent, the regulation of whom consumes too much of the agency's resources, and seek some means of bringing the situation under control without causing too much of a fuss. Again, remedial nonacquiescence can be a useful tool.

Sympathy for the Board? Perhaps. Approval? No. The challenges described above might be enough to try bureaucrats' souls, but they are not symptoms of defects in governance requiring resort to measures such as remedial nonacquiescence; rather, these challenges are signs of healthy limitations on the administrative state. First, agencies must answer to (or at least engage) the courts, not resort to subterfuges to avoid separation-of-powers friction, the tempering fire of litigation, and the vaunted percolation of issues to the Supreme Court. Second, agencies must make hard choices among the demands made on their limited resources, or return to Congress for less of the former or more of the latter. That is their job. And third, agencies must not short-circuit the laws they administer at the expense of those subject to regulation (not to mention other institutions such as the courts that share responsibility for enforcement of those laws) merely because opportunity knocks.<sup>239</sup> Traditional forms of nonacquiescence at least arguably satisfy these basic requirements of the administrative state. Remedial nonacquiescence does not.

These sorts of stories at the NLRB, and the associated objections to them, could be attributed to any agency with an opportunity to pull the remedial acquiescence lever. Just how many agencies engage in how much remedial nonacquiescence is a question for another day, but the issues addressed in this Article—the opportunities for remedial nonacquiescence, its understandable appeal to overburdened agencies, its potential impact, the difficulty of detection, and the uncertainty of available solutions—ought to be enough to give us pause.

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239. See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976).