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ONE HUNDRED FIFTY CASES PER YEAR: SOME  
IMPLICATIONS OF THE SUPREME COURT'S  
LIMITED RESOURCES FOR JUDICIAL REVIEW  
OF AGENCY ACTION

*Peter L. Strauss\**

Recent writing about the Supreme Court has stressed the implications of the extraordinary growth in the Court's docket—and, even more, the growth in the overall level of judicial activity in the nation's courts—for its performance of its judicial task.<sup>1</sup> Generally, this writing seeks first to determine whether the Court has been forced to bypass questions it ought normally to hear (for example, square conflicts between two of the federal circuits),<sup>2</sup> editorializes about the increasing

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\* Betts Professor of Law, Columbia University School of Law. A.B., Harvard, 1961; LL.B., Yale, 1964. This analysis owes much to the many participants in faculty workshops at Columbia and William & Mary, to Owen Fiss, Ronald Levin, Richard Posner, and Edward Foley, a former student.

1. Two very recent commentaries, Baker & McFarland, *The Need for a New National Court*, 100 Harv. L. Rev. 1400 (1987) and Ginsburg & Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417 (1987), collect the relevant literature. What follows has been particularly informed by S. Estreicher & J. Sexton, *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process* (1986); R. Posner, *The Federal Courts: Crisis and Reform* (1985); Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 Notre Dame L. Rev. 947 (1985) [hereinafter *Case Selection*]; Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795 (1983) [hereinafter *Error Correction*]; Hellman, *The Supreme Court, The National Law, and the Selection of Cases for the Plenary Docket*, 44 U. Pitt. L. Rev. 521 (1983) [hereinafter *The Supreme Court*]; and Kurland & Hutchinson, *The Business of the Supreme Court*, October Term 1982, 50 U. Chi. L. Rev. 628 (1983).

For recent judicial statements on the problem, see (in addition to the works of Court of Appeals Judges Ginsburg and Posner, already cited) Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 *Judicature* 230 (1982-83); Burger, *The Time is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86; Powell, *Are the Federal Courts Becoming Bureaucracies*, 68 A.B.A. J. 1370 (1982); Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U.L. Rev. 1 (1986); Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177 (1982); White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. St. B.J. 346 (1982).

2. Most of the works in the preceding footnote address these questions. The studies undertaken by Professor Hellman and by Professors Estreicher and Sexton are noteworthy for their efforts at disciplined and catholic analysis. The testimony of judges themselves has often been that conflicts are too frequently passed by, and that testimony has, in itself, been convincing to some. See, e.g., the congressional testimony of Judge Robert H. Bork of the United States Courts of Appeals for the District of Columbia Circuit, quoted in Baker & McFarland, *supra* note 1, at 1415 n.77.

bureaucratization of the Court,<sup>3</sup> and passes on to normative questions about what if anything ought to be done to ease the Court's burden. Scholars debate how many conflicts are being let slide, sometimes reaching the reassuring conclusion that the number is little if at all larger than the number of cases unwisely or unnecessarily heard.<sup>4</sup> They worry about the impact on the general quality of the Justices' intellectual efforts of having more law clerks to supervise and less time per vote to consider the matters on their plate.<sup>5</sup> Contention then turns to whether we should have an intercircuit tribunal to resolve questions that are important (but not *too* important);<sup>6</sup> how such a tribunal ought to be arranged in relation to the Court; or whether, perhaps, the real solution lies in specialized appellate tribunals<sup>7</sup> or in more thoughtful efforts by Congress to prevent statutory controversy by careful drafting or periodic legislative revision.<sup>8</sup>

This Article is principally concerned with a question that seems not to have been much asked in these debates: whether, and in what ways, the stresses on the Court might be manifesting themselves in its opinions and, particularly, in doctrine. It starts with a brief presentation of the Court's well-known caseload problems, presenting them in relation to the overall dimensions of the judicial system in the United States. Looking beyond the Court's success in identifying and resolving particular, actual conflicts among the lower courts, this perspective treats as the central problem of interest the Court's shrinking opportunity to contribute discipline, cohesion and control to the nation's law. The essay then examines three different respects in which it might be thought the natural limits on the Court's opportunities to speak are shaping the character of the legal order.

First, and most generally, these limits contribute to a manner of

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3. See, e.g., R. Posner, *supra* note 1, at 102-19; Kurland & Hutchinson, *supra* note 1, at 636; Fiss, *The Bureaucratization of the Judiciary*, 92 *Yale L.J.* 1442 (1983); Monaghan, *Taking Supreme Court Opinions Seriously*, 39 *Md. L. Rev.* 1, 16-25 (1979).

4. See, e.g., Hellman, *Case Selection*, *supra* note 1, at 1014-20, 1048-49; Hellman, *Error Correction*, *supra* note 1, at 853-77; S. Estreicher & J. Sexton, *supra* note 1, at 91-103, finding the problem within manageable dimensions. However, Baker & McFarland, *supra* note 1, at 1406, report 40 dissents from denial of certiorari on "conflict" grounds during the 1985 Term; they also refer to an unpublished study by L. Beck, in the office of the Administrative Assistant to the Chief Justice, appearing to identify 82 unreachd conflicts between the circuits during the 1984 Term, and an additional 200 characterized as possible, but uncertain or jurisdictionally remote, matters.

5. See *supra* note 3; Kester, *The Law Clerk Explosion, Litigation*, Spring 1983, at 20. Baker & McFarland, *supra* note 1, at 1403, are graphic on the dimensions of the enterprise, even allowing for some padding in some of the numbers—for example, by including pages in petitions for review that are formally required but rarely, if ever, require study.

6. The literature on the intercircuit tribunal is most recently collected in Baker & McFarland and Ginsburg & Huber, *supra* note 1.

7. See, e.g., Griswold, *Helping the Supreme Court by Reducing the Flow of Cases into the Courts of Appeals*, 67 *Judicature* 58, 65-66 (1983).

8. Ginsburg & Huber, *supra* note 1, at 1429-34.

speaking that emphasizes the enunciation of doctrine over the resolution of disputes. That is, faced with a controversy over a subject it is likely to see but once or twice a decade, the Court will tend to write an essay on that subject—hoping to put that part of the law's house in order—rather than simply decide the case in the most direct manner possible. The structural basis of this incentive to write expansively challenges widely accepted models of and justifications for judicial decision.

Second, the Court's awareness how infrequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law. The Court not only expects the lower courts to vary in their judgments, but also knows that it may not reach these unresolved conflicts for years, until they have proved their importance. In particular, it has allowed federal agencies that fail to secure immediate Supreme Court review of an important point to continue to pursue their position for at least as long as that position holds reasonable prospects for success. The result puts added stress on some ideas about obedience to law and on the uniformity of national law administration.

Third, the Court's opinions on the merits may be influenced by its management dilemmas. It may choose outcomes that tend to make its control over the appellate courts more effective; or that tend to reduce the opportunities those courts might enjoy for adventurism free of close supervision by the Court; or that tend to shape lower court results to reduce the likelihood of conflicts requiring Court intervention. Five notable recent developments in Supreme Court decision seem explicable in these terms: the Court's new stress on statutory language as central to resolution of issues of statutory interpretation; its repeated expressions of concern for disturbing "complex" and/or "intricate" statutory regimes; its increased reluctance to use regulatory statutes as the basis for inferring new private causes of action; its otherwise surprising decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>9</sup> requiring lower courts to accept "reasonable" agency interpretations of statutes on questions that could not be said "directly" to have been resolved by Congress<sup>10</sup>; and its decision a year earlier in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*<sup>11</sup>; to endorse relatively aggressive "hard look review" of agency action by the lower federal courts.

For the moment, this analysis is strictly impressionistic. No claims can be made about empirical verification. Yet the dimensions of the Court's problem are such as virtually to compel the hypothesis that some such effect must be occurring. And this analysis has the advan-

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9. 467 U.S. 837 (1984).

10. *Id.* at 842-45.

11. 463 U.S. 29 (1983).

tage of permitting the reconciliation of the last two cases—cases that many observers, strikingly including several judges of the federal courts of appeals, have asserted to be inconsistent. For the Court to be deciding cases so as to ease its management problems, moreover, may only underscore the importance of its caseload crisis. Any such influence is an artifact, unconnected with the parties' claims to justice or the nation's claim to sound judgment on the merits of an important legal issue. To the extent the analysis validly explains the observable phenomena of the Supreme Court's decisions, then, it only underscores the need for more fundamental attention to the problem that generates it.

### I. COMMON GROUND: THE EVER-EXPANDING DOCKET

"From Taft onward, the Justices have emphasized that the function of the Supreme Court is not to correct errors in the lower courts, but to 'secur[e] harmony of decision and the appropriate settlement of questions of general importance.'"<sup>12</sup> With the tremendous expansion of federal judicial business, academic writers and Justices alike have stressed that working for the general coherence of the national legal system is the only possible function of the Court, and have raised doubts whether any institution of nine mortals can make significant progress even to that end.<sup>13</sup> This is a counsel of practicality; the enormousness of the Court's potential docket prohibits it from serving the function, simply, of a court of errors. Rather than say whether particular decisions are right or wrong, the Court can afford only to identify those settings in which a national system of law demands its intervention, for example to avoid systematic variation in the application of national law. In general, we think it more aggravating if citizens of Maine and Florida are threatened with having to live under different understandings of the same federal statute (as put in place by the judgments of their respective courts of appeals) than if citizens of Illinois are faced

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12. Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 *Judicature* 28, 30-31 (1983) (quoting Chief Justice Hughes, 20 *A.B.A. J.* 341, 341 (1934)); see also Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 182 (1982) (Supreme Court should shape national law, not correct errors).

13. See *supra* note 1. For a more skeptical view, see Ginsburg & Huber, *supra* note 1, at 1434-35:

It is good for the Supreme Court to turn its attention away from philosopher-king problems and toward the pedestrian statutory staples of the lawyer's craft, just as it is useful for the lower courts to be reminded periodically that their decisions, both large and small, must be woven harmoniously into a single, national, legal fabric. But the Court is not required to resolve intercircuit conflicts, nor should that task loom too large on its agenda. The national court, is above all, a court, not a standing committee responsible for the rationalization and revision of federal statutes. No second national court is needed to assist the Supreme Court in doing better what it already does quite well and often enough.

with a unique, and possibly erroneous, reading of another statute. As an ideal, we assert that each court seeks fidelity to law in its judgments. Recognizing that that effort may not lead all judges to reach identical conclusions, we seek to direct the Supreme Court's resources into avoiding incoherence.<sup>14</sup>

This managerial perspective, as it has recently been characterized,<sup>15</sup> embodies a vision we intuitively accept over the whole range of judicial action. The most elementary principles of justice, the idea of the common law, the supremacy clause of the American Constitution—all speak of an integrated and coherent body of law, and justify judicial pronouncements of law as maintaining that coherence. Less noticed is that the managerial perspective parallels descriptions often given of judicial review in relation to agency action. In his classic work *Judicial Control of Administrative Action*, Louis Jaffe characterized the constitutional courts as “the acknowledged architects and guarantors of the integrity of the legal system . . . integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built.”<sup>16</sup> Like the Supreme Court in relation to it, a reviewing court of appeals is not to sit over an agency as a court of errors, but as an enforcer of the agency's rationality and coherence. The rationales for this relationship, too, are cousins of the reasons given for the managerial judicial role: that the volume of agency activity and the sporadic nature of review, in practice, permit no stronger relationship. Yet that relationship appears sufficient to engender the agency's respect for and adherence to “law” that marks the central premise of our governmental order.<sup>17</sup>

To be effective, however, even a role described in management terms requires a certain immediacy of contact with the institutions being managed, a believable presence that reinforces the willingness to accept direction. The question about the ever-expanding docket is, in effect, a question about whether (or under what circumstances) that immediacy of contact can be maintained in the face of the enormous growth in the nation's judicial business. Since adoption of the Judges'

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14. Whether and to what extent the Court is responsible for securing change in national law, independent of what may be required of it in the continuing search for coherence, is not addressed here.

15. S. Estreicher & J. Sexton, *supra* note 1, at 4.

16. L. Jaffe, *Judicial Control of Administrative Action* 327 (1965).

17. *Id.* at 320–37. Testing the sufficiency of this relationship would be difficult. Nonetheless, it seems clear that the courts (and for that matter thousands of government lawyers striving to connect their agencies' work to “law”) imagine that it exists. The cultural premise that law constrains is what holds the delegation doctrine at bay; were a court to conclude in any case that an agency had passed beyond legal control—that there existed “no law to apply,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410–13 (1971), in a situation that required such controls—“delegation” would immediately reappear in full fury.

Bill of 1925<sup>18</sup> (itself a response to judicial overload) put the modern regime in place, for example, the business of the federal appellate and district courts has expanded dramatically, while the Supreme Court's capacity for work has increased hardly at all. Among the many ways in which that expansion has been described, the following paragraphs seem particularly likely to convey the dramatic change in the management challenge facing the Supreme Court:

In 1925, there were 42 circuit judges and 128 district judges; thus, each Supreme Court Justice represented 4.7 circuit judges and 14.2 district judges. In 1987, 156 circuit judgeships and 563 district judgeships are authorized; each Supreme Court Justice now represents 17.3 circuit judges<sup>19</sup> and 62.6 district judges.<sup>20</sup> While the hierarchical relationship between circuit judge and district judge has not much changed in sixty years (1:3 in 1925; 1:3.6 in 1987), Supreme Court Justices are four times as remote from the rest of the federal judiciary today as they were when the Judges' Bill of 1925 was passed.<sup>21</sup>

"In 1924, the Court reviewed about one in ten decisions of the courts of appeals. . . . [I]n the 1984 Term the Court was able to review only 0.56% of court of appeals decisions. . . . [T]hese courts of error, at least for practical purposes, have become the final expositors of federal law in their geographical region in all but a miniscule number of cases."<sup>22</sup> If a court of appeals judge participates each year in about 125 cases with signed opinions, writing the opinion in one third of those,<sup>23</sup> Supreme Court review of one in ten would put her in direct

18. Pub. L. No. 415, 43 Stat. 936 (1925).

19. 28 U.S.C. § 44(a) (Supp. III 1985).

20. 28 U.S.C. § 133 (Supp. III 1985).

21. This is, to be sure, a crude measure of change. It might be argued that the relevant exposure is to decision units (panels) rather than individual judges and that it should include the states. Taking the Supreme Court as one panel, and the courts of appeals as representing a third as many panels as judges, the ratios of Supreme Court Justices to circuit judges to district judges in 1925 were 1:14:128, with one court of appeals panel for each 9 district judges; in 1987, 1:52:563, with one court of appeals panel for each 11 district judges. For the states, the number of high court panels has remained essentially constant, although their level of work has escalated (and has been purified by the adoption of discretionary review measures), and the proportion of their work that could reach the Supreme Court has almost certainly increased. Perhaps the effective change in the Court's exposure is not as great as that from 1:14 to 1:50; then one could say that the Court's remoteness from decisionmakers on federal law has not increased by quite as much, overall, as the text figures appear to suggest. Note, however, that the figures given in the next paragraph in text are specifically federal in their orientation, suggesting that the remoteness in fact from lower federal court decision is greater than the change in panel ratios alone would suggest.

22. Baker & McFarland, *supra* note 1, at 1405-06.

23. R. Posner, *supra* note 1, at 69, reports 5572 signed opinions for the courts of appeals in 1983. Assuming them to have been evenly distributed among 45 panels of three means approximately 125 opinions per panel, 42 per judge. Given the participation of senior judges and other factors, the actual numbers are lower.

intellectual contact with the Court several times over the course of a year; review of one in 200 suggests that even her panel votes will not be reviewed as often as once a year, and her opinions, on average, will come under scrutiny only two or three times in a decade.

Seeing the Supreme Court's changed circumstances just in relation to the lower federal judiciary leaves out a good deal, such as the increasingly federal business of the state courts. For an administrative lawyer, perhaps the most striking change in the dimensions of the judicial pyramid at whose apex the Court sits is the enormous body of adjudication assigned during and after the New Deal to article I adjudicators, such as bankruptcy judges or administrative law judges. Here, the overblown dimensions of the judicial pyramid are yet further enlarged. While 277,031 cases were filed in United States District Court in 1983,<sup>24</sup> that year saw 391,108 new filings with the potential for requiring hearings referred to the federal government's 1121 administrative law judges.<sup>25</sup> Virtually no such filings were part of federal judicial business in 1925. Within the Department of Health and Human Services alone, 760 administrative law judges (themselves confronting a caseload much winnowed by prior proceedings at the state level) faced 363,533 possible hearings on welfare and disability benefit issues.<sup>26</sup> And much administrative action occurs in a less formal setting, yet also within the pyramid of judicial supervision and control that ends at the Supreme Court. In the early 1970s, the Department of Labor's Wage and Hour Division responded to 750,000 inquiries per year about the meaning of a single program, with 10,000 of those responses the result of a process sufficiently formal to warrant the administrator's signature.<sup>27</sup> In both settings, a proportion of the administrative outcomes is important enough to the parties to reach the federal courts each year,<sup>28</sup> yet only a handful get the attention of the Supreme Court.<sup>29</sup>

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24. R. Posner, *supra* note 1, at Appendix B.

25. Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 *Fed. B. News & J.* 383, 384 (1984).

26. *Id.* at 384.

27. *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971).

28. In 1983, there were 821 Fair Labor Standards Act and 20,309 Social Security Act filings in district courts; 47 and 992, respectively in the courts of appeals. R. Posner, *supra* note 1, at 64. That year, the Supreme Court issued no FLSA decisions, and just one reviewing the Department of Health and Human Services. The Supreme Court, 1982 Term—Leading Cases, 97 *Harv. L. Rev.* 300 (1983). In the following year the numbers were 1 and 2, respectively. The Supreme Court, 1983 Term—Leading Cases, 98 *Harv. L. Rev.* 312–14 (1984).

29. Westlaw reported 21 FLSA cases involving wages and hours disputes over the last three decades, less than one each year. (An additional number treat antidiscrimination statutes.) Sorting out welfare or disability cases in the same manner proved more difficult.

Professor Hellman's studies, perhaps the most careful longitudinal studies the Supreme Court's use of certiorari jurisdiction has ever received, show what ought not to

Independent of the size of its intellectual task, the Supreme Court is the prisoner of the time available to its members.<sup>30</sup> For good reason, to enhance its status as the final arbiter of legal disputes, we wish the Court to sit as a single panel, with each member hearing every case. Time constraints thus sharply limit the number of cases the Court can hear. In recent years, it has been hearing about 150 cases annually. Another way of saying this, of course, is that the Justices have only 150 full<sup>31</sup> opportunities yearly to carry out their function. No one suggests this number could be increased very much. Given the steady, if not explosive, growth of the Court's potential docket, each of these 150 cases represents an increasingly precious opportunity for the Court to perform its supervisory task.

## II. THE MODERN LAW-GIVER

In light of the foregoing, it should not be surprising that management concerns have come to dominate both the selection of cases and the writing of opinions.<sup>32</sup> The premise of certiorari jurisdiction is that

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be a surprising variation in the intensity with which the Court involves itself in different statutory schemes. He found Labor Board cases and employment discrimination cases arising under title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (1982), frequently represented on its docket; but the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1982 & Supp. III 1985), and the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 (1982 & Supp. III 1985), two other labor statutes generating large amounts of litigation in the lower courts, rarely appear there. Tax decisions, too, appear only infrequently in relation to their general importance to federal litigation. See Hellman, *The Supreme Court*, supra note 1, at 609-14, 631-33; Hellman, *Case Selection*, supra note 1, at 1051-55.

30. A particularly compelling account appears in Baker & McFarland, supra note 1, at 1401-04; see also other sources listed supra note 1.

31. For strong criticism of even this much activity as defeating the possibility of disciplined Supreme Court action, see Kurland & Hutchinson, supra note 1, at 643-44; Monaghan, supra note 3, at 22-23. Justice Stevens in particular has objected vigorously to this practice. See, e.g., *Board of Educ. v. McCluskey*, 458 U.S. 966, 972 n.4 (1982). Rather than heed these criticisms, however, the Court has apparently been increasing the number of occasions on which it speaks, by deciding matters without full briefing on the petition for certiorari. This practice is not only questionable in terms of the Court's readiness to decide, but also counterproductive. It gives the writers of certiorari petitions (and oppositions) just the wrong incentives. See *Montana v. Hall*, 107 S. Ct. 1825 (1987) (Marshall, J., dissenting).

32. The Justices are routinely criticized for taking cases for error correction rather than serving a management function. Commonly this occurs in the course of finding that, if the Court were only more rigorously self-disciplined in its case selection, it would find that it had all the resources it needed to deal with serious intercircuit conflicts and other occasions for management intervention. See S. Estreicher & J. Sexton, supra note 1, at 91-103; R. Posner, supra note 1, at 164; Kurland & Hutchinson, supra note 1, at 644-46. Professor Hellman seems more philosophical:

[I]n a larger sense [the Court's failure of self-discipline is] a source of reassurance. The Court is not a computer. . . . Half or more of its cases will receive plenary consideration in response to the exigent needs of the legal system—needs that would draw a similar response from almost any group of justices.

the Court will select for hearing those cases whose resolution is likely to make the largest contribution to the uniformity and cohesion of national law. While the Court may not often be as candid as the New York Court of Appeals once was about the programmatic character of its certiorari decisions,<sup>33</sup> it should hardly be surprising that its opinions tend to stress law pronouncement over dispute resolution. Perceived function and the imperatives of limited capacity to perform that function, naturally enough, are shaping style.

Consider, in this light, the complaint of a recent, unjoined concurrence by the nation's newest Supreme Court Justice:

There are proper occasions for alternative holdings, where one of the alternatives does not eliminate the jurisdictional predicate for the other—though even in that situation the practice is more appropriate for lower courts than for this Court, whose first arrow runs no risk of being later adjudged to have missed its mark. But where, as here, it is entirely clear that an issue of law is not presented by the facts of the case, it is beyond our jurisdiction to reach it. . . . It has never been suggested . . . that the constitutional prohibition upon our rendering of advisory opinions is a doctrine of convenience.<sup>34</sup>

Justice Scalia's criticism of his majority colleagues' excessive writing reflects a familiar view of judicial function and, in particular, of the source of judges' authority to "make law." Under this traditional model, parties bring a case to the court to resolve a live dispute that exists between them, one they have been unable to resolve by less formal means. The judge is obliged to decide between them, and to do so by applying the established matrix of the law to the fresh facts the parties bring before her. On this view, new or changing law is a by-product of the pattern of decision over time, of the accidental insufficiencies of existing patterns to resolve the dispute. The judge's obligation to

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But the remainder of the plenary docket is shaped in large part by the interests and predilections of the justices now sitting. In short, the Burger Court, like its predecessors, is a very human institution. And although it performs a unique lawmaking function—a function that quite properly dominates the selection process—it is also a Court whose members care about doing justice in individual cases and elaborating upon precedents in the common law tradition. This is not a tidy arrangement, but it is one that has worked remarkably well for nearly two hundred years.

Hellman, Case Selection, *supra* note 1, at 1048–49.

33. "We granted leave to appeal in order to take another step toward a complete solution of the problem partially cleared up in *Greenberg v. Lorenz*, 9 N.Y.2d 195, and *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5 (both decided after the making of the Special Term and Appellate Division orders here appealed from)." *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 434, 191 N.E.2d 81, 81, 240 N.Y.S.2d 592, 593 (1963). The court's parenthetical remark makes emphatically clear just who is making the law here; there can be no pretense that this litigation is a natural outgrowth of its earlier decisions.

34. *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 697–98 (1987) (Scalia, J., concurring).

decide, and her (and the parties') focus on the concrete dispute, justify the pronouncement of law; and the justification reaches no further. Not only is the judge not supposed to write beyond the case ("dictum" is the nasty word used to describe the result when she does), but later judges—even those in ostensibly inferior tribunals—are under no obligation to respect such statements. Learning the distinction between "holding" and "dictum" remains the *rite de passage* for the neophyte law student, the skill that qualifies him as a case lawyer.

A certiorari jurisdiction limited to producing 150 opinions from several thousand petitions (themselves considerably winnowed by appreciation of the odds, especially among repeat litigators)<sup>35</sup> requires quite a different view about what courts are supposed to do and why. It is the court that chooses the cases, not the dispute that forces itself upon the judges' attention. As the pool of cases from which to choose increases, and the number selected remains constant, the Court's freedom of choice and the stakes in making a given selection are also enhanced. Failure to choose a case has no significance for the parties, since their dispute has already been provisionally resolved by lower tribunals.<sup>36</sup> The issue for the Court is not the parties' individual claims to justice, but the marginal cost to its central function of the opportunity it foregoes by choosing *this* case instead of that one.<sup>37</sup> The failure to choose a case may have large implications for the coherence and uniformity of the body of law for which the Court is responsible, depending upon the relative importance of the legal issue involved.

On the whole, then, the Court's docket is characterized by active reexamination and reshaping of the existing matrix of law. In this sense, one can say that the enunciation of law is its *raison d'être*. This aspect of judicial function has been recognized and used programmatically by some institutional litigants to spectacular effect, and an interesting literature has grown up attempting to put those developments side-by-side, as it were, with the traditional model.<sup>38</sup> Yet if one looks at the Supreme Court, it is apparent that the traditional model of judging

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35. Of the 5158 cases on the Supreme Court's docket in its 1985 Term, Baker & McFarland, *supra* note 1, at 1401, 2571 were paid petitions, The Supreme Court, 1985 Term—Leading Cases, 100 Harv. L. Rev. 100, 308 (1986), suggesting at least some level of concern about the possible return a client could expect for additional legal services cost. See also *infra* note 62 and accompanying text. 5158, then, is a number that is at once too large and too small.

36. This assumes that the losing party will not be estopped to make its legal arguments again, should the issue arise anew in litigation against a different party. See *infra* notes 73–95 and accompanying text.

37. Judge Posner's elegant discussion of holding and dictum, *supra* note 1, at 247–58, interestingly (for an economist) does not account for these incentives.

38. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302–04 (1976); Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 2–5 (1979); Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 Wis. L. Rev. 655, 655–59.

cases has all but disappeared.<sup>39</sup>

While it is conceivable that, having chosen their cases on managerial premises, the Justices would then address them in the traditional mode, the realities and expectations reflected in the selection process make this outcome unlikely. If the undertaking from the start were to address legal uncertainties of a general character, simply resolving the dispute in such a case would be an admission of defeat. Even if such an undertaking were not explicit, the case before them could appear to the Justices as their one chance in five years to address this particular corner of the law, impelling them to take some pains for the guidance of lawyers and the lower courts.

Consider, for example, two cases from last term. In *Clarke v. Securities Industry Association*,<sup>40</sup> a majority of the Court engaged in an elaborate discussion of the "zone of interests" test for standing, when the case could easily have been decided on narrower grounds.<sup>41</sup> Ignoring Justice Stevens' plea in concurrence simply to affirm the lower court's correct handling of the case, the majority noted commentators' demands for clarification<sup>42</sup> and possible confusion in the courts of appeals in other cases<sup>43</sup> among its reasons for going into detail. Justice Stevens surely was right in characterizing the Court's opinion as unnecessarily broad. Similarly, in *Pennsylvania v. Ritchie*,<sup>44</sup> the Court found a state supreme court remand to be a final judgment for purposes of its review of the defendant's constitutional claims. The majority argued in part that "if this Court does not consider the constitutional claims now, there may well be no opportunity to do so in the future."<sup>45</sup> Justice Stevens again objected, here in dissent, saying the Court should honor "our long tradition of avoiding, not reaching out to decide, constitutional decisions when a case may be disposed of on other grounds."<sup>46</sup>

Once a case has been taken, it can be dealt with expansively, for the resources available for writing opinions in a justice's office are not limited as sharply as the justice's own time. Today, four law clerks are ready—eager—to assist in work that twenty-five years ago occupied only two, and twenty-five years earlier, only one. While the political realities of managing an enlarged office necessarily consume some proportion of a justice's personal time,<sup>47</sup> the overall effect has been to in-

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39. While stated in terms of the Supreme Court, this analysis seems equally applicable to courts of last resort in state law systems, to the extent that they too are faced with growing dockets, increasingly complex law, and a discretionary jurisdiction with which to attempt to keep the whole under discipline.

40. 107 S. Ct. 750 (1987).

41. *Id.* at 755-59.

42. *Id.* at 756 n.11.

43. *Id.* at 757 n.15.

44. 107 S. Ct. 989 (1987).

45. *Id.* at 997 (footnote omitted).

46. *Id.* at 1011.

47. Supervising four clerks takes more time than supervising one or two, sug-

crease the resources available for any one decision. Each law clerk has perhaps four chances to assist in drafting opinions for the Court during her term in office, where her predecessor assisted in eight. As one might expect, while the number of cases decided by the Justices each year has stayed essentially constant over the past several decades, the number of pages per decision has more than doubled.<sup>48</sup> Moreover, the increasing presence of the law clerk seems likely to reinforce, not to check, the Court's incentive to use its opinions for expository purposes. Her intellectual background is generally one of unusual success at an elite university, not practical experience. That will make doctrinal explication far more comfortable ground than dispute resolution. Work for the Law Review characterizes her history in dealing with cases. Thus, unless her justice were to insist upon it, it is unlikely she would feel that the parties' dispute rather than the opportunity to elucidate doctrine was the primary focus.<sup>49</sup>

Some controls on expansive opinion writing might be expected from the need to secure colleagues' concurrence. Here, too, however, one can imagine that circumstances often conspire in the opposite direction. All face the same incentives, and the prevailing culture, liberal and conservative, appears not to resist them. Any justices seeking to make their own doctrinal contributions when opportunity permits will see an advantage in permitting others such freedom, in order themselves to win more tolerance from their colleagues. Perhaps most importantly, by imposing more rigorous intellectual demands, a practice of writing relatively elaborate opinions dense with law shapes both the review that other offices can give to drafts and the nature of their response.<sup>50</sup> Other justices' time remains limited, and while their law clerks can be asked to review in greater detail, their incentives seem

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gesting greater freedom for the clerks and less for the Justice. See R. Posner, *supra* note 1, at 102-04. The need the Justice may feel to spend time maintaining office morale points in the same direction.

48. The number of full decisions and U.S. Reports full opinion pages for Supreme Court decisions over the past six decades are:

Term and Volumes	Opinions	Pages	Ratio
1925 (269-71 U.S.)	210	1788	8.5
1935 (296-98 U.S.)	145	1858	12.8
1945 (326-28 U.S.)	131	2046	15.6
1955 (350-51 U.S.)	94	1165	12.4
1965 (382-84 U.S.)	107	2185	20.3
1975 (423-28 U.S.)	159	4359	27.4
1983 (464-68 U.S.)	163	4410	27.1

See also R. Posner, *supra* note 1, at 114 (reporting growing number of opinions and words per justice).

49. Judge Posner expresses a particularly sour view of the impact of law clerks on the quality of judicial opinions. See *supra* note 1, at 106-19.

50. While the overall number of separate opinions issued by the Justices is increasing, R. Posner, *supra* note 1, at 114, this may be due to time pressures that make the negotiations that can resolve disagreement more difficult. Review of drafts, rather than

likely to be, at best, mixed—accepting of the general enterprise of catholic statement and quarrelsome only about particulars. It should not be surprising, then, that deciding “more than we have to” does not appear that often in the pages of the U.S. Reports as grounds for special concurrence. And even when it does, we often have reason to suspect that more than objection to judicial excess lies behind its invocation.<sup>51</sup>

### III. CONFLICT BELOW THE TOP

Appreciation of what a small proportion of lower court decisions the Supreme Court's resources allow it to review contributes in a number of ways to increasing the incoherence of federal law. The simplest effect is to permit a tendency toward geographical dispersion in federal law: the infrequency of Supreme Court review combines with the formal independence of each circuit's law from that of the other circuits to permit a gradual balkanization of federal law. A second, related effect is that litigants who must appear in more than one circuit are able (or even required) to govern their conduct by standards that differ from place to place. Of course, this is a familiar enough proposition for matters governed by state law, but for law that we think of as federal—that is, nationally uniform—it is at least unusual; the limits on the Court's resources undercut the instinctive response, which is to seek resolution at the Court. And a third, yet more troubling, effect emerges when this multicircuit litigant is a governmental agency charged, with greater or lesser explicitness, to administer a national program in a uniform way. Such an agency may be tempted, even feel obliged, to maintain its national understanding of that law even when its judgment will probably be reviewed in one or more circuits that have already disagreed with its view. Such “nonacquiescence” reflects a direct and disturbing collision between competing views of the obligations of adherence to law; again, the Court's resource problems forbid the easy answer of compelling the agency to seek Court resolution.

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face-to-face discussion, constitutes the principal conversation between Justices about the details of deciding cases. See Monaghan, *supra* note 3, at 16–25.

Professor Hellman argues, however, that the available evidence does not support the idea that a smaller docket would produce greater unanimity. Hellman, *supra* note 12, at 32 & n.10.

51. While Justice Stevens and more recently Justice Scalia have sounded this note with some consistency, others' adherence seems to have a possible relation to the merits. In *Clarke v. Securities Indus. Ass'n*, 107 S. Ct. 750 (1987), for example, Justice Stevens' concurrence was joined by Justice O'Connor and the Chief Justice. For them, it may have been important that the majority used its “elaborate” opinion to explain a 1984 opinion by Justice O'Connor that signalled a conservative approach to public participation in judicial review of administrative proceedings. See *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). The majority's explanation sent the opposite signal; hence the need for a special concurrence on the merits. Similarly, in *Pennsylvania v. Ritchie*, 107 S. Ct. 989 (1987), the expansive majority opinion has a law-and-order cast to it. Here, the Chief Justice and Justice O'Connor joined the opinion, while Justices Brennan and Marshall, part of the willing *Clarke* explainers, were counted with Stevens in dissent.

Simple geographical variation is the first of these effects. At the court of appeals level, the vanishing chance that any given opinion will be reviewed by higher authority ought to have a corresponding impact on the discipline of decision, reducing virtually to altruism and professional habit the impulse to seek uniformity and coherence on a national scale. Twelve United States courts of appeals, with their respective district courts, decide the legal issues raised before them for their geographical areas only. For a United States district court sitting in Virginia, the views of the courts of appeals in the Ninth Circuit, the Third or the District of Columbia are interesting, but only the Fourth Circuit controls. Indeed, the enormity of some circuits<sup>52</sup> and the clumsiness of the en banc device have generated significant concerns about securing even intracircuit uniformity.<sup>53</sup> One of the impacts of the tremendous growth in judicial business has been to make it less necessary, perhaps even less feasible, to become aware of what coordinate courts are doing elsewhere in the country. As long ago as 1972, when circuit court business was less than half the current level, one of the nation's most respected court of appeals judges remarked,

The volume of precedents in each circuit and in the Supreme Court has become so great that only rarely is it necessary to rely on opinions of other circuits, and a district court opinion is not likely to have an impact merely as authority unless it comes from a judge enjoying special esteem. The circuits have become increasingly ingrown or, if one prefers a less pejorative term, self-contained.<sup>54</sup>

Consider, for example, *Fiber Glass Systems v. NLRB*,<sup>55</sup> a case that seemed ordinary enough to the Fifth Circuit panel deciding it to have been placed on the summary calendar. A central issue was whether "in all the circumstances" an employer's interrogation of his employees had been coercive or threatening, warranting the Labor Board's unfair labor practice determination.<sup>56</sup> The Fifth Circuit refused to enforce the Board's order on account of the Board's failure to explain its decision in a format the court had previously said should be followed. "This Circuit has developed a list of eight factors . . . to determine whether an interrogation tends to be coercive or threatening in light of the total circumstances. . . . Both the ALJ and the Board failed to apply these factors . . . ." <sup>57</sup> It may be, of course, that the Board had so failed

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52. The Ninth Circuit now contains 28 judges, 28 U.S.C. § 44(a) (Supp. III 1985), fully two-thirds the entire circuit court judiciary at the time of the Judges' Bill of 1925.

53. The assumption that the availability of en banc consideration assures intracircuit uniformity is heroic for any circuit so large or geographically dispersed that any two of its judges do not often sit together in panel. See R. Posner, *supra* note 1, at 102.

54. Friendly, *The "Law of the Circuit" and All That*, 46 *St. John's L. Rev.* 406, 413 (1972) (footnotes omitted).

55. 807 F.2d 461 (5th Cir. 1987).

56. *Id.* at 463.

57. *Id.*

to articulate its reasoning that no reviewing court would have been able to understand how it had reached its conclusion, even granting such presumptive regularity as might be appropriate for such a judgment. The point here, however, is that the reviewing court found it so obvious that the Board ought to apply Fifth Circuit criteria in reaching its conclusion when it was deciding cases to be reviewed in the Fifth Circuit.<sup>58</sup>

This geographical dispersion of federal law is not to be measured simply by counting the number of actual conflicts among the circuits the Court declines (or is unable) to reach in any given year.<sup>59</sup> Many matters will not be presented to the Court because, on balance, an institutional litigator such as the Solicitor General believes it inappropriate.<sup>60</sup> More important, invocation of the Court's supervision, and effective use of that invocation, are less likely when the sources of diversity are more subtle, as when geographical factors influence the ways in which courts view facts or weigh the various considerations affecting the resolution of a complex dispute.<sup>61</sup> Attorneys well aware that one court of appeals is more receptive than another to a particular kind of argument, may still be hard put to demonstrate the disagreement in principle between two or more holdings that marks a persuasive certiorari petition. Such influences can be sharply felt by litigants, yet not easily rendered by a petition or disciplined by a Supreme Court opinion.<sup>62</sup>

The second effect is that litigants whose activities cross circuit boundaries may find themselves subject to conflicting regimes of federal law. The Supreme Court's own recognition that an important conflict between two or more lower courts is a virtual necessity for (but no guaranty of) securing review promotes understanding of litigant ac-

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58. See *infra* notes 76–80 and accompanying text. Only Fifth Circuit cases are cited in the court's discussion of the coercion issue; as to none is there any indication that certiorari was sought.

Scanning the pages of F.2d advance sheets, the author has noted similar patterns of behavior in review of disability benefits claims.

59. See sources cited at *supra* note 4.

60. See *infra* notes 63–64 and accompanying text.

61. See generally R. Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (1983) (describing varied court interpretations of environmental laws).

62. An example may be found in the government's submission on the petition for a writ of certiorari in what became *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). The Solicitor General opposed the writ, on the conventional ground that the court of appeals had not acted with sufficient clarity to make the case appropriate for review. *Id.* at 540, n.15. The Court, though, disagreed, granted the writ, and reversed unanimously in one of the sterner rebukes it has delivered to the D.C. Circuit in recent years. To the commentators, the impact the D.C. Circuit's continual second-guessing of agency procedural choices was having on agency decisionmaking was clear. See, e.g., Scalia, *Vermont Yankee: The APA, the D.C. Circuit and the Supreme Court*, 1978 *Sup. Ct. Rev.* 345, 365–68. Yet, the opposition from the government's principal appellate litigator suggests there may be a real difference between understanding a legal defeat and demonstrating it in terms of legal principle.

tions that have the potential for generating conflicts. A court of errors, knowing that any case can be brought to it, may have little patience for a litigant who fails to appeal her loss in one case, and then reasserts her position in another, even against a different party. A Court that knows it can hear fewer than one in each one hundred cases decided in the lower tribunals is more likely to wish the litigant to forebear from troubling it and to prefer her to reassert her (losing) position below. Then, she either will be persuaded to abandon it by successive failures, or her persistence and partial success will mark it as one of the limited number of disputes the Court ought to entertain.

For federal agencies facing unfavorable lower court rulings, the problem of gaining the Court's attention is compounded by the need to secure the permission of the Solicitor General even to seek a writ of certiorari. In exercising his office's control over that question, the Solicitor General considers not only the abstract legal merits of cases proposed for a petition, but also the Court's limited resources to entertain disputes. He knows that the Court relies heavily on his discretion. In the long run, his refusal to permit agencies to seek review in marginal cases builds his credibility with the Court and thus is in the government's interest.<sup>63</sup> Accordingly, he will often be in the position of advising government agencies that they may not now seek review of a troubling loss, but instead should continue to press their views below in the hope of developing a conflict or, even where one exists, a more compelling presentation.<sup>64</sup>

Examining the question only from the perspective of the Supreme Court's function, Professors Samuel Estreicher and John Sexton of New York University Law School were undisturbed by the prospect of a litigant having to live with conflicts among the circuits.<sup>65</sup> Their analysis

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63. The author's personal experience with the Solicitor General's office in the mid-1970s, when he was general counsel for a federal agency seeking access to the Court, suggests the error in believing that the resulting winnowing is only of unmeritorious cases. On three of the four occasions when the agency sought permission to invoke the Court's review, the Solicitor General denied permission to do so. Private parties did petition in these cases, and a government response was filed stating the agency's position. The three cases resulted in a summary reversal, a grant of certiorari eventually vacated as moot, and a unanimous opinion on the merits, reversing the judgment below. *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am.*, 423 U.S. 12 (1975); *Allied-General Nuclear Serv. v. Natural Resources Defense Council*, 430 U.S. 944 (1977), vacated on suggestion of mootness, 434 U.S. 1030 (1978); *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519 (1978). For a proposal to enhance the Solicitor General's ability to solicit meritorious cases, see Scalia, *supra* note 62, at 373-75.

64. Among the Solicitor General's formal responsibilities is that of instructing other divisions of the Department of Justice in what arguments they may make when appealing to the circuit courts. See 28 C.F.R. § 0.20(b) (1986). It is unclear, however, how widely used, well-coordinated, or well-enforced this authority is.

65. *Supra* note 1, at 50-52. An earlier version of their work appeared as Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984).

focused on the Court's immediate business of selecting cases within its certiorari jurisdiction. Naturally enough from that angle, they viewed with a certain equanimity the prospect that, for a time, American law could be unsettled, or even vary from place to place within the country, reflecting the geographical organization and (to a certain extent) disposition of the lower judicial system. From a management perspective, it is useful to permit issues to "percolate" through the system for a time, taking them at the Supreme Court level only when it is evident both that uniformity is required and that lower tribunals will not themselves reach that outcome, without guidance from above.

In *United States v. Mendoza*,<sup>66</sup> the Supreme Court endorsed this view, relying in part on the limitations of its own position. There, it unanimously found the government not estopped to make legal arguments it had previously lost in lower court proceedings against other parties.<sup>67</sup> Government litigation, the Court said, frequently involves issues best resolved by allowing "thorough development" through "litigation in multiple forums," not by "freezing the first final decision."<sup>68</sup> Moreover, the Court explicitly noted that its own certiorari practice relies on the benefits of percolation and conflicts among the circuits.<sup>69</sup> Control of litigation, most notably including the filing of certiorari petitions in the Supreme Court, is an executive branch responsibility. The Court would certainly have been aware how responsive the executive branch had been, in exercising that responsibility, to the Court's own limitations. For it to have reached a result that in effect required the government to pursue each lost issue to the Supreme Court or else surrender its position, when the Court can review less than one percent of courts of appeals decisions, would have been extraordinary.<sup>70</sup>

In their defense of percolation, Professors Estreicher and Sexton do not account for the additional strains that arise when a case comes to the judicial system from a bureaucratic structure Congress created specifically to encourage national uniformity in law administration. The Tax Court, for example, is a national court for the resolution of disputes about application of the tax laws; its judgments (like those of most administrative agencies) are reviewable in the appellant's local court of appeals. For Estreicher and Sexton, any difficulty presented by

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66. 464 U.S. 154 (1984).

67. *Id.* at 155. Compare *Mendoza* with *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984), decided the same day, in which the government sought to relitigate in the Sixth Circuit an issue it had lost in litigation against the same private party in the Tenth and was held bound by the prior result—at least, in the absence of an existing conflict within the new circuit.

68. *Mendoza*, 464 U.S. at 160–63.

69. *Id.* at 160.

70. Much of the criticism of *Mendoza* arises out of the unarticulated premise that Supreme Court correction of error is in fact a reasonable possibility. See, e.g., Note, *Collateral Estoppel and Nonacquiescence, Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 *Harv. L. Rev.* 847 (1986).

disagreement between the national Tax Court and the local court of appeals about the proper reading to be given a provision of the Internal Revenue Code is resolved by the Tax Court's practice of deciding cases consistently with the law of the circuit from which the dispute arose.<sup>71</sup> This permits percolation in the years following, as the Tax Court reexamines its position and perhaps seeks to make its own view prevail in other circuits. While noting the possible invitations for forum shopping and complications for tax planning by particular individuals, Estreicher and Sexton appear relatively unconcerned with the national discontinuities thus permitted, namely that percolation may result for a time in citizens of Alabama paying taxes on a different basis than citizens of California, Minnesota or Rhode Island despite the existence of a national tribunal capable of avoiding this problem. They do not differentiate this problem from similar intercircuit diversity on questions that begin in court, and for which the Supreme Court is therefore the only possible unifier.<sup>72</sup>

This brings us to the third and most troubling of the postulated effects of the Court's limited caseload, nonacquiescence. Here the litigant, for our purposes a government agency, not only continues to act in *other* parts of the country in ways a given circuit has found unlawful (perhaps hoping to generate a conflict among the circuits), but also continues its behavior within that circuit in all cases other than the particular one adjudicated against it. It accepts finality as to the parties, but not as to the law, asserting as its justification a competing (and in its view trumping) programmatic responsibility for uniform national administration of law. This appears truly destructive to the ideal of agency obedience to law expressed in the hierarchical relationship between agencies and courts. Also, persons living within the circuit can obtain compliance with circuit precedent only by litigating, a burden of promoting government legality we ordinarily (and emphatically) think unjust.<sup>73</sup> Yet the agency position is not without support; its dilemma is made genuine by a legal obligation of uniformity in administration, and

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71. S. Estreicher & J. Sexton, *supra* note 1, at 57 (citing *Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971)).

72. In the particular case of tax administration, the equitable argument for uniform national law seems particularly strong. Yet, it must be conceded that Congress itself did not clearly adopt this rationale when it created the Tax Court. It also permitted tax issues to be raised in the Claims Court (with an appeal to the Court of Appeals for the Federal Circuit) and in the ordinary district courts, albeit with differing procedural arrangements for each. These three systems can be unified only at the Supreme Court. On other issues, for which Congress has provided only a single, national administrative adjudicator in preference to the courts, the choice for uniformity seems clear.

73. A House Report deeply critical of the Social Security Administration's nonacquiescence practice excoriated the justice of a "distinction between those beneficiaries with the resources and fortitude to pursue their claims, and those who accept the government's original denial in good faith or because they lack the means to appeal their case." H.R. Rep. No. 618, 98th Cong., 2d Sess. 25 (1984). Cf. *Cooper v. Aaron*, 358 U.S. 1 (1958) (state officials cannot nullify federal court order); the comparison with

by its overall responsibility for a program whose full dimensions a particular trial judge or appellate panel is unlikely to understand. The only source of *national* law for the agency is the Supreme Court, an authority that in practice—precisely because of its limited resources—cannot often be invoked.

Two agencies are commonly given as examples in the growing and generally anguished literature about nonacquiescence,<sup>74</sup> although other examples exist.<sup>75</sup> *Fiber Glass Systems*, the case briefly discussed above,<sup>76</sup> involves the first, the National Labor Relations Board. On a number of matters, the Board has lost an issue in several circuits and yet maintained its position until a Supreme Court ruling could be had.<sup>77</sup> Agency decision has often been described as having the greatest worth on precisely such subjective questions as the one central to *Fiber Glass Systems*, the coerciveness of an employer's interrogation; such issues involve inferences likely to be informed both by frequent experience and, more important, by a position on the proper direction of national labor policy.<sup>78</sup> Although the court's factors appear sensible enough to one not schooled in labor law, the striking fact is that they are the *court's* factors, by which a national program is to be administered when it touches this court's domain. In this light, "the Board's refusal to adhere to our guiding precedent,"<sup>79</sup> while frustrating to the Fifth Circuit, may not seem surprising. Moreover, the issue here is not simply the NLRB's responsibility for uniform national labor policy. For the Board, federal venue provisions make review possible in more than one circuit, so that even if it were disposed to follow the law of the circuit, it could be hard put to decide, in advance of review having been

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state "nullification" of federal law was made explicit in *Lopez v. Heckler*, 713 F.2d 1432, 1441 (9th Cir. 1983) (Pregerson, J., concurring).

74. In addition to Note, *supra* note 70, see Levin & Leeson, Issue Preclusion Against the United States Government, 70 Iowa L. Rev. 113 (1984); Note, Administrative Agency Intracircuit Nonacquiescence, 85 Colum. L. Rev. 582 (1985) [hereinafter Note, Intracircuit Nonacquiescence]. More open than most to the possibility of a second side in the nonacquiescence debate is an excellent student work, Note, "Respectful Disagreement": Nonacquiescence by Federal Administrative Agencies in United States Courts of Appeals Precedents, 18 Colum. J. L. & Soc. Probs. 463 (1985) [hereinafter, Note, Respectful Disagreement], which conveys a sturdy sense of the frequency of and reasons for such behavior.

75. The Postal Service appears to have litigated its immunity from state garnishment proceedings at least 20 times in district courts and 10 in the courts of appeals before the Supreme Court finally decided the issue, *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 515, 519 n.12 (1984).

76. 807 F.2d 461 (5th Cir. 1987). See *supra* note 55 and accompanying text for discussion of case.

77. Note, *Respectful Disagreement*, *supra* note 74, at 480-83.

78. *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977); *NLRB v. Golub Corp.*, 388 F.2d 921, 930 (2d Cir. 1967) (Hayes, J., dissenting); *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 432 (2d Cir. 1951) (Frank, J., concurring).

79. 807 F.2d at 463.

obtained, just which circuit's law that would be.<sup>80</sup>

The second example is the Department of Health and Human Services' administration of disability insurance, which generated tremendous controversy during President Reagan's first term. The Department refused to acquiesce in particular views of governing law on which it had repeatedly lost in reviewing courts.<sup>81</sup> The Department does not share the Board's venue problems, but does face a major administrative challenge. Its implementing statute specifically requires it to assure uniform national administration of the disability program;<sup>82</sup> indeed, we would expect a reviewing court to reverse unexplained departures from uniformity. The Department's task is complicated by the need to supervise and guide a complex bureaucracy of state as well as federal officials. Whatever one thinks of its particular performance in the face of repeated losses on the issue in question,<sup>83</sup> one can understand that the Department faces a genuine dilemma. Varying instructions from different courts of appeals not only interfere with the instruction to achieve uniformity, but also make it more difficult for the agency to manage its own resources and to guide and motivate the enormous bureaucracy for which it is responsible.<sup>84</sup> Rarely able to secure the intervention of the Court, such an agency is torn between implementing its own views with uniformity (at the cost of ignoring one or

80. Venue for review might have been placed elsewhere: in the D.C. Circuit, or in any other circuit in which Fiber Glass Systems did business. 29 U.S.C. § 160(e), (f) (1982); see Note, *Intracircuit Nonacquiescence*, *supra* note 74, at 604-05.

81. The circuits ruled that disability benefits could not be terminated unless the government produced evidence of material medical improvement. Note, *Respectful Disagreement*, *supra* note 74, at 477-80. The Social Security Administration's policy placed it in conflict on one issue with every circuit court but one (which had not ruled), and with several circuits on another issue. H.R. Rep. No. 618, *supra* note 73, at 24.

82. 42 U.S.C. § 421(a)(2) (1982).

83. Professor Wechsler remarked in addressing a related problem, When [the chance for an overruling] has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation?

The answer here, it seems to me, must be affirmative, both as the necessary implication of our constitutional tradition and to avoid the greater evils that will otherwise ensue.

Wechsler, *The Courts and the Constitution*, 65 *Colum. L. Rev.* 1001, 1008 (1965).

84. J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983) elegantly describes the dimensions, successes, failures and dilemmas of the bureaucratic system, stressing the importance of its morale in a unified task.

Note that while Congress agreed with the courts of appeals in 1984 about the specific matter respecting which the Department was then pursuing its nonacquiescence policy, Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (codified at 42 U.S.C. § 1305 (1984)), it failed to adopt proposed measures to eliminate or regulate the nonacquiescence generally. Cautioning against any inference that it approved of nonacquiescence, a conference committee reported finding "legal and Constitutional issues" that "can only be settled by the Supreme Court." H.R. Conf. Rep. No. 1039, 98th Cong., 2d Sess. 38 (1984). The committee noted a "congressional intent that the Secretary resolve policy conflicts promptly in order to achieve consistent

more courts of appeals) and administering national law with geographical variation in a way that violates its statutory obligation, complicates its administrative problems and, in an important sense, takes policy responsibility from it.

The difficulty here springs from an unresolved tension between two forms of organization for the resolution of legal questions, national and geographical. The geographical organization of the federal courts is, of course, only one choice. It may be compelled in a few respects—for example, by the sixth amendment's requirement that criminal trials (but not appeals) occur in the vicinity of the crime. In other respects, however, the use of geography suggests choices about what characteristics seem most important in courts: that they be generalist rather than specialist institutions; that they be located where the users are; that they reflect to some degree the political tone of their community.<sup>85</sup> Like the Tax Court or the Claims Court, both of which entertain disputes arising throughout the country, a system of federal trial courts could be organized along subject-matter lines. Like the Court of Appeals for the Federal Circuit, or the D.C. Circuit for a limited number of agencies and issues, subject-matter organization of appellate jurisdiction could also be provided. In the ordinary case, however, geographical organization is the choice we make.<sup>86</sup>

When one takes the federal administrative agencies to be a part of the judicial pyramid,<sup>87</sup> one sees that in fact the principle of specialist

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uniform administration of the program" that would be better served by seeking Supreme Court review or legislative revision than relitigation. *Id.* at 37–38.

Subsequently, the Secretary adopted a new procedure under which state officials would be instructed to act in accordance with uniform national standards, irrespective of circuit law; departmental administrative law judges, however, would be instructed to apply circuit law to any proceedings brought before them, flagging cases in which that would produce results inconsistent with departmental policy; and the Department's Appeals Council would then consider, in each such case, whether to acquiesce in the circuit's law or to persist in departmental policy. See *Judicial Review of Agency Action: HHS Policy of Nonacquiescence*, Hearings Before the Subcomm. on Admin. Law and Gov'tal Rel. of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 8–9 (1985).

85. See R. Posner, *supra* note 1, at 156. The appointment process, as it works in fact, provides this element. The requirement that district judges reside in their district, and the involvement of state senatorial delegations in appointments to both the district courts and the courts of appeals, assure that federal judges for courts in all but the politically powerless (and nationally important) District of Columbia will be named from the communities where they are expected to sit.

86. See R. Posner, *supra* note 1, at 147. Compare *id.* with Griswold, *supra* note 7, at 65–66 (proposing additional specialist courts).

87. Whether agencies should be regarded as being in *formal* terms a part of the judiciary (or either of the other two branches of government) is of course an arguable proposition. See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573 (1984) [hereinafter Strauss, *The Place of Agencies*]. They are often enough referred to as article I courts. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 113 (1982) (White, J., dissenting). More recently, in *Schor v. Commodity Futures Trading Comm'n*, 106 S. Ct. 3245 (1986), Justice O'Connor described them as "non-Article III tribunals." *Id.* at

organization is very frequently employed. Three propositions seem unexceptionable: that agency adjudication substitutes for adjudication that could otherwise be assigned the geographically organized courts; that in choosing to make that substitution, Congress has empowered centralized, national determination of any legal or policy questions at issue; and that the nearly universal provisions that Congress has made for judicial review of agency adjudication transfer to the courts some part of the obligation to produce consistent and coherent results in the areas of the agencies' responsibility. In this sense, one can see that Congress has frequently chosen subject-matter specialization as the principle of organization for the initial adjudication of matters falling within the Supreme Court's ultimate responsibility for the coherence of national law. And the demands of uniformity and of hierarchical obedience simply cannot be reconciled below the Supreme Court level.

While nonacquiescence is an unsettling response to the tension between geographically organized courts and specialist agencies, alternative approaches have their problems as well. Thus, it is too simple to ascribe one's reaction just to agency behavior (refusing to be bound, nationally, by an adverse ruling in one circuit), and to deny the existence of judicial elements. If the agency is dissatisfied with the law pronounced as national law, this argument would go, it should seek Supreme Court review. At the least, it must accept potential geographical diversity in the law it administers as the cost of its own unwillingness to take (or failure in taking) that step. It should be apparent, however, that one consequence of the Supreme Court's limited resources is that the agency cannot expect a prompt national resolution of its problem. Consequently it is misleading to fault the agency on this account.

Simply accepting the first court of appeals ruling is no more appropriate. Such an approach would not be consistent with the agency's responsibility, for it assumes that the decision of one point of law is an

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3260. And see Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence*, 39 *Admin. L. Rev.* 83 (1987). On some occasions they have been talked about as if an even stronger, adjunct relationship to the article III courts were required. *Crowell v. Benson*, 285 U.S. 22 (1932); see Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *Cornell L. Rev.* 488, 509 (1987) [hereinafter Strauss, *Formal and Functional Approaches*]. Yet they are in the same sense article I executives and (the metaphor breaks down here) article I legislators.

Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

*FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting). Whatever formal definition of governmental structure is employed, however, their place in the pyramid seems secure.

isolated, independent rule to which the agency can easily conform. But the programs for which an agency is responsible are more aptly viewed as a fabric, within which a decision on any given issue is likely to have implications for aspects not directly involved.<sup>88</sup> Integration of the whole, even so preliminary a matter as a comprehensive view of the whole, is the agency's continuing responsibility. The episodic intervention of a particular panel of three of the nation's 156 circuit judges, pressed to decide a particular point on particular facts, is unlikely to generate an integrated view. If it cannot be pretended that the panel will have either the perspective or the responsibility for integration, then accepting its ruling as a definitive point that must be accommodated is inviting a crazy and tattered quilt. From this perspective, a formal policy of nonacquiescence is an understandable outcome.

Yet another alternative would be to substitute a specialist court, like the Court of Appeals for the Federal Circuit, a body that appears to have been dramatically successful in restoring discipline to the resolution of patent issues. Often discussed, in particular, are the possible advantages of a special national tribunal for disability cases.<sup>89</sup> Specialist organization, however, would introduce its own distortions, as the experience of the agencies themselves attests. While structured to provide uniform resolutions of the particular questions within their authority, they are also (by the very reason of their specialization) less capable of grasping the larger context within which those questions arise. In grappling with broad legal issues outside their particular responsibility, they face significant handicaps. In addition to their obvious inexperience with these questions, the agencies' daily focus on specialist issues and their natural disposition to regard such issues as centrally important can give them a distorted perspective. Agencies face larger risks of politicization, and are less likely to take a sympathetic view of those citizen claims that are opposed to the achievement of programmatic goals.<sup>90</sup> The Merit Systems Protection Board, reviewable only in the Federal Circuit, is not often reversed there<sup>91</sup>—perhaps evidence of the success of that court's guidance, or of a civil service system that is capable of disciplining only the most unfit of public servants; but perhaps, also, an indication of just this problem. Our preference for having the

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88. Consider, as one example, an agency with finite resources presented with a judicial order requiring consumption of some of those resources—say, to analyze an issue or even to report its findings in a more elaborate way than the agency itself would choose to do. Cf. *Fiber Glass Sys. v. NLRB*, 807 F.2d 461 (5th Cir. 1987) (establishing elaborate criteria for determining employer coercion). It can spend those resources *here*, only at the cost of withdrawing them from use *there*. See *Heckler v. Chaney*, 470 U.S. 821 (1985) (limiting judicial review of agency inaction partly in deference to agency resource allocation prerogatives).

89. See Strauss, *Formal and Functional Approaches*, *supra* note 87, at 505 n.78.

90. See R. Posner, *supra* note 1, at 147–60.

91. U.S. Merit Systems Protection Bd., *Study of MSPB Appeals Decisions for FY1985 4 (1986)* (94% of decisions sustained).

courts perform the larger functions of integration within the legal system is solidly based in this reality. Unavoidably, each style of organization, geographical and specialist, presents its own risks to the uniformity and coherence of national law.

Nor is it reasonable to expect that these problems can be cured at the source by more proficient legislation.<sup>92</sup> As the legal system increasingly becomes the complex product of a torrent of politically generated statutes and rules, the idea that its elements are coherent-in-fact, never more than an aspiration, becomes indefensible. It is unrealistic to expect legislatures to be aware of all that has gone before; legislative purpose to create new institutions and rules compatible with the existing body of law is a fictive construct. Legislators deal with the problem at hand, on the basis of such information and experience as they can readily garner, and notably free of any significant obligation to achieve coherence. At best, one can think them willing to have the courts pick up the pieces and attempt to put them into an appropriate shape.<sup>93</sup> Moreover, to the extent Congress is aware of the need for the coordinating and unifying functions its own processes have not permitted, it often places (or tolerates the assumption of) responsibility for significant aspects of those functions elsewhere. With the continuing growth of executive, regulatory government, the judiciary's responsibility for the overall shape of the legal order has been correspondingly diminished.

The point here is not that we should not be troubled by the Court's explicit endorsement of percolation and the implicit approval that this carries for nonacquiescence. These are troubling developments for a nation committed, as ours is, to the rule of law. The point is rather that we have yet to come to grips with the problem of which these developments are merely a symptom. The simple response of the most outspoken critics of nonacquiescence—that the government's only proper recourse to a disappointing legal outcome lies in the Supreme Court—fails to account for the unavailability of that remedy, for the resulting incentives to disorder in the courts of appeals, and for the agencies' law-driven reasons for resisting the episodic and irresponsible<sup>94</sup> interventions of geographically limited intermediate courts in the programs for which they bear national responsibility. As *United States v. Mendoza*<sup>95</sup> makes clear, these developments are a natural outcome of the Supreme Court's current dilemma in managing national law.

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92. See Ginsburg & Huber, *supra* note 1.

93. *Industrial Union Dep't v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974), is one eloquent example. R. Katzmann, *Institutional Disability: The Saga of Transportation Policy for the Disabled* (1986), details another.

94. That is, the courts are not responsible for overall administration of programs, as agencies are, but only for the just outcome of the particular case before them—a case whose equities and presentation may be dramatically distorting of the program as a whole.

95. 464 U.S. 154 (1984).

## IV. DOCTRINAL IMPLICATIONS

If the Supreme Court's limited resources make it incapable of itself remedying all the distortions introduced into national law by the competition between geographical and specialist institutions, one might expect to see the development of rules that put aside the usual dominance of the geographical units, the courts, when specialist decisions seem more likely to produce uniformity and coherence. If the Court cannot itself control the system, that is, perhaps it can manage the system by allocating functions between agencies and courts so as to reduce the chance that the lower courts will introduce undesirable geographical diversity into national law, thus reducing the number of occasions when the Court must intervene. It will be required to police only the understanding of this allocational rule, not particular outcomes.

Recent changes in the Court's approaches to the use and interpretation of statutes might be understood in just this way. These changes include an increased reluctance to use regulatory statutes as the basis for inferring new federal judicial causes of action;<sup>96</sup> new stress on the words of statutes as primary sources of meaning;<sup>97</sup> reliance on the "complexity" of federal regulation as a basis for judicial reluctance to intervene;<sup>98</sup> and, perhaps especially, the recently stated requirement that lower courts accept an agency's interpretation of its constitutive statute if Congress cannot be said "directly" to have anticipated and resolved the matter and if the agency's interpretation is a "reasonable" one.<sup>99</sup>

For students of administrative law, the last of these developments—signaled by the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>100</sup>—has seemed to create a curious tension in the Court's jurisprudence concerning judicial review of administrative action. While this decision appears to direct courts away from a function they perform particularly well, determining issues of law, the Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,<sup>101</sup> just one year earlier, had endorsed quite aggressive review of agency reasoning as a general matter. This "hard-look review," some believe, invites courts to perform a

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96. *Cort v. Ash*, 422 U.S. 66 (1975); *Touche, Ross & Co. v. Redington*, 442 U.S. 560 (1979) (no congressional intent to allow private remedy under § 17(a) of the Securities and Exchange Act of 1934); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (no private remedy under § 206 of Investment Advisors Act of 1940); see also *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) (recounting development of doctrine).

97. See Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892 (1982).

98. *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984).

99. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

100. 467 U.S. 837 (1984).

101. 463 U.S. 29 (1983).

function they cannot carry out well, one that threatens judicial usurpation of what is properly for the agency. The Court has gotten it backwards, they say; it should aggressively review legal issues and defer on policy questions.<sup>102</sup> Viewing the two cases from a managerial perspective, however, suggests a resolution of this seeming paradox. Hard-look review of particular outcomes can be thought to promote adherence to law, while presenting less danger of generating unmanageable incoherence than does judicial review of statutory meaning.

A. *Chevron v. NRDC: Giving Up the Illusion of Statutory Precision*

A good example of the workings of an allocational rule, although not a rule concerned with promoting the coherence and uniformity of national law as such, can be found in the requirement that courts of appeals uphold agency decisions reached in on-the-record proceedings if those decisions are supported by substantial evidence on the record as a whole. In *Universal Camera Corp. v. NLRB*<sup>103</sup> and a limited number of later cases, the Supreme Court explained how this substantial evidence test was to be understood. It did not, however, ever seek itself to apply that rule—to determine whether substantial evidence did, or did not, support a particular agency decision. It is well understood at the Supreme Court bar that an asserted error in result in applying the substantial evidence test will never be considered a sufficient basis for granting a writ of certiorari, however clear the error or important the outcome. What must be shown to gain the writ is that the court of appeals misunderstood the test—that it articulated its general responsibilities in a manner inconsistent with the Court's explanations. Misapplication of the test to particular circumstances does not suffice.

This allocational function of some Supreme Court decisions is suggested by its otherwise somewhat surprising *Chevron* ruling. A statute empowered the Environmental Protection Agency to adopt regulations governing the emission of air-borne pollutants. The EPA adopted a regulation that, among its provisions, permitted a large factory site to treat all of its emissions as if they emanated from a single source (a "bubble") rather than having to control its emissions smokestack by smokestack, as some argued must be done. The Court concluded that the statute empowering the agency to regulate was entirely unclear whether agency use of the bubble concept had been authorized; it could be read in either way, and the history of the statute was inconclusive.<sup>104</sup>

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102. Judge Steven Breyer of the First Circuit is an especially articulate proponent of this view. See Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363 (1986); see also the works cited *infra* note 164.

103. 340 U.S. 474 (1951).

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

The Court might have reacted to this conceded legislative failure by disapproving the agency's action—saying, for example, that the agency's authority was not sufficiently clear to uphold it. Or it might itself have resolved the disputed question of statutory meaning, so that it could be known for the future whether the bubble approach was or was not to be used. These two choices had faced the Court when it reviewed two OSHA rulemaking proceedings early in the 1980s.<sup>105</sup> In those cases, the Court had chosen to construe the statute itself rather than find an unlawful delegation of legislative authority to the agency. Justice Stevens, as author of the plurality opinion in the first of those cases, in effect set that style.

In *Chevron*, however, with Justice Stevens now writing for a unanimous (but somewhat depleted) Court,<sup>106</sup> the Justices made neither of these choices. Instead, their opinion stressed the range of discretion agencies may be recognized to have.<sup>107</sup> The Justices agreed that the power to construe the statute lay *in the agency*. The courts were required to accept the reading of the statute that the agency had chosen, so long as it lay within the bounds of linguistic possibility, purpose, and reason (as this reading did).<sup>108</sup> Implicit in this judgment was the proposition that if, at some future point, the agency changed to another reading of the statute that also met these tests, that reading too would have to be accepted. Thus, the Court appears to have recognized as valid a delegation to the agency of authority to determine, within bounds, the meaning of the statute itself.<sup>109</sup>

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the agency, must give effect to the unambiguously expressed intent of Congress.

*Chevron*, 467 U.S. at 842–43. See *infra* note 107.

105. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980).

106. Justices Marshall, Rehnquist, and O'Connor did not participate.

107. Thus, the Court continued from the sentences quoted *supra* note 104: 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 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.

*Chevron*, 467 U.S. at 843.

108. "In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Id.* at 865.

109. When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

This insistence that the agency's reading of the statute be accepted, if reasonable, may seem surprising in light of a line the Supreme Court often quotes from its early, and foundational, decision about judicial review, *Marbury v. Madison*:<sup>110</sup> "It is emphatically the province and duty of the judicial department to say what the law is."<sup>111</sup> From time to time, the Court has even suggested that courts have plenary authority to determine legal questions as a matter of constitutional necessity.<sup>112</sup> As a statutory matter, it is unmistakably endorsed by the language of section 706 of the Administrative Procedure Act, which sets the general standards for judicial review of administrative action.<sup>113</sup> Both the preamble to section 706 and its paragraphs 2(B), 2(C), and 2(D) stress the primacy and independence of judicial judgment on questions of law.

In a formal sense, the *Chevron* approach can be reconciled with this traditional judicial primacy. The process of independent review itself is what may lead a court to conclude that a given statute places in an agency, to some extent, the responsibility to say what the statute means. It is the court, not the agency, that decides when and under what constraints such authority has been conferred. This analysis, however, better explains earlier cases of this character, such as *NLRB v. Hearst Publications, Inc.*<sup>114</sup> The Court concluded that the particular statute in question in *Hearst* commanded agency responsibility for interpretation (within limits) of the statutory language at issue. *Chevron* appears to reach this conclusion as a general imperative of judicial behavior, unconnected to congressional wishes reflected in any given law.

Moreover, it should be apparent that any such conclusion crosses a significant threshold. In the usual setting in which courts talk about deferring or attaching weight to agency judgments about statutes, the court seeks guidance from administrative conduct, yet nonetheless remains responsible for deciding the meaning of the statutory language in question.<sup>115</sup> The question of meaning is then fixed by the court's decision, unless later reexamined by another court or by the legislature. Under the *Chevron* approach, what appears as a question of statutory interpretation is given to the agency. Judicial review is limited to deter-

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Id. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

110. 5 U.S. (1 Cranch) 137 (1803).

111. Id. at 177.

112. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932). Whether this aspect of *Crowell* has survived the Court's recent decisions in *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568 (1985), and *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986), is open to some question. See Strauss, *Formal and Functional Approaches*, supra note 87, at 524-26; Bruff, *The Constitutionality of Arbitration in Federal Programs* (on file at the Columbia Law Review).

113. 5 U.S.C. § 706 (1980).

114. 322 U.S. 111, 131 (1944).

115. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 325 (1933); *SEC v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935).

mining whether the choice it has made is a "reasonable" one, and other "reasonable" choices remain available to the agency if it decides to pursue them in the future.<sup>116</sup>

The suggestion here is that it is helpful to view *Chevron* through the lens of the Supreme Court's severely restricted capacity directly to enforce uniformity upon the courts of appeals in those courts' review of agency decisionmaking. When national uniformity in the administration of national statutes is called for, the national agencies responsible for that administration can be expected to reach single readings of the statutes for which they are responsible and to enforce those readings within their own framework. A demonstrated failure to do so would itself be grounds for reversal on judicial review. If, however, one accepts not only that language is imprecise, but also that congressional language (in particular) is frequently indeterminate,<sup>117</sup> it follows that that reading could never be demonstrably correct, but merely reasonable if within the range of indeterminacy, or incorrect if beyond it. Any reviewing panel of judges from one of the twelve circuits, if made responsible for precise renditions of statutory meaning, could vary in its judgment from the agency's, and from the judgments of other panels in other circuits, without being wrong.<sup>118</sup> The variance might even occur in predictable ways, if simple diversity were overlaid by geographical bias. The Supreme Court's practical inability in most cases to give its own precise renditions of statutory meaning virtually assures that circuit readings will be diverse.<sup>119</sup> By removing the responsibility for precision from the courts of appeals, the *Chevron* rule subdues this diversity, and thus enhances the probability of uniform national administration of the laws.

Rather than see *Chevron* just as a rule about agency discretion, in other words, it can be seen as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy. The tendency produced by

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116. See generally Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549 (1985) (usefully framing these issues in terms of comparative competence).

117. The *Chevron* opinion is dramatic in its acceptance of these propositions: Congress . . . [did not legislate] on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred. 467 U.S. at 865; see also Ginsburg & Huber, *supra* note 1, at 1420-24.

118. See *State Dep't of Ins. v. Insurance Serv. Office*, 434 So. 2d 908, 927-29 (Fla. Dist. Ct. App. 1983) (Smith, J. dissenting).

119. Cf. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 n.6 (1980) (vague statute interpreted many ways by appellate courts).

having courts in Maine, Florida and California each believe that, absent *clear* statutory resolution of an issue, it must accept the Administrator's "reasonable" judgments about statutory meaning is to make it more likely that the statute will have the same effective meaning in each circuit. First, judges are more likely to reach agreement in identifying a range of indeterminacy that Congress did in fact create, than they are in searching vainly for a specific answer that Congress did not provide. Beyond that, even assuming that the ranges of indeterminacy identified by a series of differing panels will vary in some particulars, one now has the potential for overlap. An agency's judgment may be able to satisfy all the varying but overlapping courts of appeals' ranges, as it could not fit all the varying courts of appeals' efforts at precise readings. In crude geometrical terms, the agency's point of judgment may well fall on all of a series of lines identified by the courts of appeals as the range of indeterminacy though it could not coincide with more than one of a varying series of courts of appeals points. Freed by *Chevron* from the diversity of point judgments that could prompt its own need to intervene, the Supreme Court may find it sufficient, as in *Universal Camera*, simply to assure itself that the rule of approach has been understood.<sup>120</sup>

This view of *Chevron*, finally, makes possible more careful assessment of nonacquiescence. While nonacquiescence may have some intuitive force for an agency faced with a court decision that it is wrong under a precise decision model, it seems far less acceptable if a court has found an agency's interpretation to be beyond the zone of reasonableness.

### B. *Some Implications of Giving Up the Illusion of Statutory Precision*

*Chevron's* premises about the legislative process and the possibilities of point judgment seem relevant to the general question of statutory interpretation as well as to the special case in which an agency is available to make the first choice among the reasonable possibilities of meaning left open by Congress' words. That Congress may not have

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120. This is not to suggest that the analogy is a comfortable one. The substantial evidence test concerns appellate review for factual error. Few other than the losing party will care if the Supreme Court does not review a circuit court decision to see whether there actually was or was not "substantial evidence" in the record.

But *Chevron* cases involve more than the particular dispute before the court on this one occasion. Even granting the fact of statutory indeterminacy and the presence of a healthy admixture of program-oriented policy judgment, the issues resolved in a case like *Chevron* have the generality of application we ordinarily associate with questions of law. To think that the Supreme Court will — or must — disengage itself from review of such issues, except to the extent of determining whether the lower appellate court properly understood the methodological formula for engaging in this legal inquiry, is disturbing. It in effect removes the Court from the business it has identified as the most important "province and duty of the judicial department." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137,177 (1803).

“directly addressed the precise question at issue,”<sup>121</sup> so that a statute’s meaning may be indeterminate, is a realistic assessment for *all* questions of statutory meaning. Pretending that statutory meanings are congressionally fixed may appear to solve some problems in the relationship between legislature and court: it fixes the courts in an apparently subservient role and operates as an ostensible check upon judicial subjectivity. Whether this discipline on their relationship is real or merely apparent,<sup>122</sup> and whether if real it is wise,<sup>123</sup> are themselves valid questions. Assume that courts understand and experience some check on their freedom of decision, however, and the approach has costs, perceptible in recent decades, of inviting unwanted behavior in the legislative realm. The courts have begun to express realistic concern that, with the growth of congressional staff, the materials courts commonly rely on for legislative history are being manipulated for effect by these and other persons, having no claim to legislative voice.<sup>124</sup>

A perceptive student note, published two years before *Chevron*, spoke of a new tone of literalism in Supreme Court statute reading and the problems it connoted for those settings where literalism could provide no sensible answer.<sup>125</sup> The *Chevron* two-stage analysis suggests a line of response to these concerns that also may reduce the urgency for Court intervention when the courts of appeals disagree within the area of indeterminacy. Giving up the idea of attributing a precise answer to Congress in all statutory interpretation, of course, will not produce uni-

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121. *Chevron*, 467 U.S. at 843.

122. See Note, *supra* note 97, at 902–03 (collecting sources).

123. See, e.g., G. Calabresi, *A Common Law for the Age of Statutes* 182 (1982) (endorsing judicial updating of obsolete statutes).

124. *National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 828 (D.C. Cir. 1980). The problem could be conceptualized as the congressional equivalent of the Court’s, with its roots also in the tremendous expansion of the nation’s legal agenda and governmental apparatus over the past decades. Congressional committee staff that in the 1940s numbered in the hundreds, now is well into the thousands; twice as many serve on personal staffs. Thus, the legislative process, like the judicial, has become bureaucratized, perhaps even more so. M. Malbin, *Unelected Representatives* 240, 242–44 (1980). We know that the image of the elected legislator debating and persuading her fellows, or even reasoning with her elected colleagues over the contents of a pending committee report, is no longer accurate. Bureaucrats and lobbyists produce those reports; the debates are often scripted for their future influence on courts (or voters) rather than for present persuasion of colleagues. The time of members of Congress, too, has been exhausted by the demands placed on it; and it should not be surprising to find courts slowly taking note of the resulting changes and attendant risks for the manipulation of their own processes.

125. Note, *supra* note 97. The Note placed the trend as a reaction to a “golden rule” of statutory interpretation associated with H. Hart & A. Sacks, *The Legal Process* (tent. ed. 1958), seeking coherence through judicial explication of “what meaning *ought* to be given to the directions of the statute” as a function of the problem it addresses, its general purpose, its relation to the larger body of law, and so forth. Note, *supra* note 97, at 893. The author saw this approach as pro-regulatory, and suggested that the renewed emphasis on “clear statement” could be understood both as defusing judicial power and as generally deregulatory, protective of individual autonomy. *Id.* at 910–12.

formity; once the Second and Seventh Circuits decide that Congress has not directly spoken on the issue, each will be free to go its individual ways unless checked by the Court. But the question is now reduced, in essence, to one of common law.

So conceptualizing the question in the first instance would be healthy in its candor. It would acknowledge the reality that for some purposes statutes will be indeterminate. Within the zone of indeterminacy, it would invite courts to respond from their strengths, building on all the matters that common-law courts commonly take into account: What are the strong policies available for judgment? (The statute will provide the bulk of them.) What are the possible implications of judgment, one way or another, for future behavior? What is the force of the particular facts that have generated the particular dispute?

Moreover, this realism about what the courts are doing within the zone of indeterminacy should change the prospects for Supreme Court review when a conflict among the circuits develops. One may ask why a court any more than an agency is bound to create a fixed solution within that zone. Acknowledging that legislative imprecision creates settings within which solutions must be found by experience and approximation turns diversity of result from undoubted cost to possible benefit. Even the congressional choice to leave working out the solution to the geographically dispersed courts rather than to a national agency can be seen in some respects as a legislative statement about the relative importance of uniformity. The Supreme Court should tolerate the gradual accretion of circuit interpretations of indeterminate statutes, focusing its attention instead on lower court diversity about issues on which Congress appears to have "directly spoken." Again, this view reduces the need for the Court to exercise direct control.

None of this, of course, suggests that it will always be easy to apply the two-stage *Chevron* analysis. At the first stage, in particular, judges may disagree whether "traditional tools of statutory construction" reveal that "Congress had an intention on the precise question at issue."<sup>126</sup> Some evidence of this problem appears in the Supreme Court's closely divided decision this spring in *Immigration and Naturalization Service v. Cardoza-Fonseca*.<sup>127</sup> The question there was whether two statutory standards in the Refugee Act of 1980 were identical in their meaning, as the Bureau of Immigration Appeals had decided. Justice Stevens, writing for a bare majority of five, undertook a lengthy analysis of legislative history as well as text to demonstrate that, as a matter of congressional purpose, the two standards were not identical. Justice Scalia, concurring, insisted that the Court's reference to the legislative history was uncalled for, that it should return to use of a plain meaning approach to statutory language: "Judges interpret laws rather than re-

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126. *Chevron*, 467 U.S. at 843 n.9.

127. 107 S. Ct. 1207 (1987).

construct legislators' intentions."<sup>128</sup> Justice Powell, for himself, the Chief Justice and Justice White, found the BIA's action to be within the area of indeterminacy, and, in effect reaching *Chevron's* second stage, said its action was "reasonable."<sup>129</sup>

The dispute between Justices Stevens and Scalia concerned the intensity of the first-stage *Chevron* review and highlights an important potential for confusion on the question whether and to what extent deference is owed to agency views. The traditional tools of statutory construction have long included reliance (among other indications of meaning) on agency constructions given the statute in other proceedings—as, for example, in litigation under the Fair Labor Standards Act.<sup>130</sup> Like the testimony of involved executive branch officials at congressional hearings<sup>131</sup> or the initial interpretations given a statute by the responsible agency,<sup>132</sup> an agency interpretation that has remained consistent over the years can plausibly be regarded as evidence of what is assumed to be a determinate congressional meaning, one to be found out by the courts.

At one point in his argument, responding to a government argument for deference to an INS conclusion that the two terms at issue had identical meaning, Justice Stevens remarked:

An additional reason for rejecting the Government's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.<sup>133</sup>

This is a perfectly orthodox and valid argument at the first, judicially dominated stage of *Chevron* review. In that context, one can sensibly speak of giving the agency interpretation special weight as an indicator of congressional meaning and of giving it less deference when the agency's interpretation has been inconsistent.

The quoted language is not a proper argument, however, once a court has concluded that a statute lacks determinate meaning in some respect and thus has reached *Chevron's* second stage. The very meaning of the second stage, emphasized in *Chevron*, is that within the zone of indeterminacy, an agency is free to change its view—and the obligation of the courts to accept the changed view is not altered by the fact of the change.<sup>134</sup> One senses that Justice Scalia's strong reaction to the elab-

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128. *Id.* at 1224 (Scalia, J., concurring).

129. *Id.* at 1225 (Powell, J., dissenting).

130. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); see also *Lukhard v. Reed*, 107 S. Ct. 1807 (1987) (a contemporary example in the AFDC context).

131. See, e.g., *SEC v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935).

132. See *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933).

133. 107 S. Ct. at 1221 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981) and citing other cases).

134. The possibility that some persons may have acted in reliance on an established

orateness of the majority's first-stage analysis was animated in good part by fears that use of agency views as an element in determining whether there exists a determinate congressional meaning, however conventional, would threaten continued acceptance of the second-stage proposition. The problem lies in the use of the word "deference" to describe what is to occur at the second stage. That usage suggests an ultimate judicial responsibility for the outcome that the analysis in *Chevron* in other respects repudiates. Acceptance subject to reasonableness review, not deference, is the necessary posture here. A change not well explained might be rejected as unreasonable and returned to the agency for further consideration; but one would never reach the point at which a court, declining to defer to the agency's view, supplied its own meaning for the statute.<sup>135</sup>

C. *Promoting Coherence: Understanding Complex and Interrelated Schemes*

The Supreme Court may be allocating functions to agencies and reducing the role of lower courts not only to preserve uniformity in federal law, but also to ensure effective enforcement of complex statutes.<sup>136</sup> Here one can compare the sporadic and case-specific character of judicial encounters with issues of statutory meaning, with an agency's continuing responsibilities and policy-implementing perspectives. Just as the generalist courts have particular strengths in dealing with issues, such as constitutional questions, that involve integration between an agency's specialty and the general legal structure, agencies are especially well-placed to appreciate the interrelationships of issues and the impacts of alternative approaches within the framework of statutes specifically under their charge. Courts lack responsibility for the general success of the statutory scheme; they are, of necessity, focused on individual rights rather than on the functioning of the system. The more complex the statutory scheme and the more intricate the interrelationships, the larger the risks detailed judicial involvement will present. From this perspective, it is significant that *Chevron* arose in the

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interpretation suggests a fairness reason for courts to preclude at least retroactive application of a changed view. But for his conclusion that this factor was present, it is hard to make Justice Stevens' lone dissent from *Commissioner v. Fink*, 107 S. Ct. 2729, 2738 n.7 (1987), consistent with his *Chevron* opinion, 467 U.S. at 837. Tax cases, as *Fink* was, do occur in a context marked by both unusually active congressional oversight and a strong need for confident forward planning by affected individuals; yet this does not preclude a future-regarding change of view by Treasury officials of the appropriate interpretation of a less than clear statute. See *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-01 (1939).

135. An indication of possible court of appeals confusion respecting *Chevron* and *Cardoza-Fonseca* appears in two very recent D.C. Circuit opinions. *American Mining Congress v. EPA*, No. 85-1206, slip. op. at 4 (D.C. Cir. July 31, 1987) (Mikva, J., dissenting); *Union of Concerned Scientists v. N.R.C.*, No. 85-1757, slip op. at 3 (D.C. Cir. Aug 4, 1987) (Williams, J., concurring).

136. On the themes of this section, see especially their elegant treatment in Diver, *supra* note 116.

context of environmental regulation, an area generally characterized by statutes of substantially greater complexity and technical detail than those of an earlier generation. In such cases, a judge's limited resources, his only occasional opportunities to seek understanding, and the often distorting character of the litigation perspective relative to administration,<sup>137</sup> can lead him to fear that his decision will be more disruptive than helpful to the statutory scheme.

Similarly, lower courts may introduce unruly elements into national law administration by implying a common-law judicial remedy for behavior that seems also to be the subject of agency regulation. Not so long ago, implication of such remedies was viewed as the paradigmatic contribution of a common-law court and was actively encouraged in the federal context by the Supreme Court. Along with active development of tort liability for governmental officials under the twin heads of the Civil Rights Statute for state officials<sup>138</sup> and the constitutional tort theory of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>139</sup> for federal officials, the Court appeared to invite lower federal courts to imply private tort remedies parallel and supplementary to the administrative remedies of regulatory statutes.<sup>140</sup> To create such private rights of action, lower courts did not need to find specific congressional expectation or intent, but merely that "damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute."<sup>141</sup>

Recent years have seen a striking retrenchment from this expansive view,<sup>142</sup> along with some hesitation about the Civil Rights Act<sup>143</sup> and

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137. By and large, litigation presents only a parade of the most dissatisfied. When the administration of disability insurance laws is at its most successful, for example, its errors will be concentrated around the line of hard judgment; persons close to the line, but denied benefits, will have the largest motivation to seek judicial review. Judges will then face a series of appealing denials of benefits (that is what "close to the line" means) without ever seeing or being asked to correct the agency's equally (and marginally) questionable grants of benefits, or to evaluate the agency's performance systemically—in such terms as the avoidance of gross error, balance at the margin, and so forth. See J. Mashaw, *supra* note 84.

138. 42 U.S.C. § 1983 (1982).

139. 403 U.S. 388 (1971).

140. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

141. *Borak*, 377 U.S. at 433. As Justice Harlan later remarked on citing this passage in his separate opinion in the *Bivens* case, "[t]he exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction, . . . nor did the *Borak* Court purport to do so. . . . The notion of 'implying' a remedy, therefore . . . can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." *Bivens*, 403 U.S. at 402-03 n.4 (Harlan, J., concurring).

142. See cases *supra* note 96.

143. 42 U.S.C. § 1983 (1982). See in particular *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981), stressing the general complexity and sensitivity of the comprehensive regulatory enforcement scheme at issue; see

*Bivens*<sup>144</sup> remedies. This retrenchment is easily enough seen as an expression of the conservatism and deregulatory bent of the times, and as reflecting a loss of confidence in the common-law generative capacities of courts.<sup>145</sup> However, one might also find two other specific and related contributors to this phenomenon: first, an understanding that a common-law process for generating national remedial standards is impaired by the Court's inability to speak with frequency as the national body responsible for coordinating those standards; second, a developing realization that, in particular, judicial lawmaking can serve as a disruptive force when it occurs circuit by circuit, in competition with agencies that are able to generate national standards. The Court's negative expressions about implying remedies, along with other surprising refusals to extend traditional forms of judicial relief,<sup>146</sup> consistently draw support from perceptions of the complexity or elaborateness of the administrative scheme. Strikingly, the Court does not suggest that an agency must take the same conservative attitude towards its authority; *Chevron*<sup>147</sup> is precisely the contrary, encouraging agencies to treat their enabling statutes as constitutions even as it instructs the courts to step back.<sup>148</sup>

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generally Sunstein, Section 1983 and the Private Enforcement of Federal Law, 49 U. Chi. L. Rev. 394 (1982) (discussing when the creation of a statutory enforcement mechanism preempts usual operation of § 1983).

144. *Bivens*, 403 U.S. at 388. *Bush v. Lucas*, 462 U.S. 367 (1983), is particularly suggestive for the current discussion. The *Bush* Court refused to imply a *Bivens* remedy for alleged first amendment violations by a federal supervisor in demoting a federal employee, in the presence of statutory remedies for wrongful demotion under the Civil Service Act, 5 U.S.C. §§ 7511-7514 (1987). Acknowledging that the Civil Service Act itself did not answer the question whether a judicial remedy should be implied, the Court found its reason not to make the implication in the existence of "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 388. Judicial improvisation—with, one might add, its inevitable variability in administration from place to place—presented risks to "the efficiency of the civil service" that the Court could not effectively assess; "we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating [an auxiliary judicial remedy]." *Id.* at 389-90.

145. See, e.g., Note, *supra* note 97.

146. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 348 (1984) (barring consumer suits on federal milk marketing program, as they would "disrupt [a] complex and delicate administrative scheme").

147. *Chevron*, 467 U.S. at 837.

148. Thus, the attitude toward development of the law expressed in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), and subsequently rejected for the courts in *Cort v. Ash*, 422 U.S. 66 (1975), and its sequelae, see *supra* note 96, seems just the attitude *Chevron* requires courts to respect in agencies. The contrast interestingly appears concerning the Food and Drug Administration, in Hutt, *Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act*, 28 Food Drug Cosm. L.J. 177, 179 (1973) ("that Congress simply has not considered or spoken on a particular issue certainly is no bar to the Food and Drug Administration exerting initiative and leadership in the public interest") and Austern, *Philosophy of Regulation: A Reply to Mr. Hutt*, 28 Food Drug Cosm. L.J. 189, 192 (1973) ("as a lawyer I look at Section 301 to see what Congress has specifically made a prohibited act").

Perhaps one ought to understand these opinions as statements about judicial capacity rather than (or as well as) legislative purpose. What is important is not merely that by providing one forum for relief Congress has implicitly excluded others, but that the complexity of the scheme may lead the Court to fear that a judicial remedy would block rather than effectuate congressional policy. The Court presents the judiciary as the bull in the legal china shop, that may clumsily interfere with the attainment of legal ends more likely to be secured by other means. One has the strong sense that the Court is not referring only to itself, to its own capacity to marshal understanding at the apex of the judicial process for focusing issues.<sup>149</sup> It is speaking at least as much about the geographically dispersed and disparate lower courts, which the Supreme Court understands it does not fully control, and which operate in variable competition with the nationally organized agency.

D. *A Residual Role for Judicial Activism?* Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.

The understanding of *Chevron*<sup>150</sup> suggested here may also make it possible to resolve the asserted tension between that case and *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,<sup>151</sup> a strong endorsement of quite aggressive judicial review of agency action decided only a year earlier.<sup>152</sup> *State Farm* was the judicial review proceeding successfully challenging the Department of Transportation's attempted rescission of a rule requiring the use of passive restraints such as pre-attached belts and air bags in the front compartment of all passenger vehicles. The rule had been adopted during the previous administration after lengthy and harrowing rulemaking proceedings. In rescinding it, the new Secretary of Transportation relied on studies indicating that pre-attached belts would be the near-universal mode chosen for compliance, and many drivers would disable these belts. She expressed doubt whether the safety benefits from a requirement that could so easily be defeated would exceed the costs of installing these belts in all cars.<sup>153</sup> This is just the kind of decision the Secretary is authorized to make, and it would be hard to say in the abstract that the underlying facts compelled a decision one way or the other.

Reversing, the Supreme Court expressed some doubts whether the studies the Secretary relied upon supported her judgments.<sup>154</sup> More

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149. To be sure, even at the Court, the episodic character of judicial intervention may give rise to reasonable fears whether judges can expect to understand well the interrelations of a complex statutory scheme, which an agency administers daily.

150. 467 U.S. at 837.

151. 463 U.S. 29 (1983).

152. See supra note 101 and accompanying text.

153. 463 U.S. at 34-40.

154. Id. at 51-52.

important, the Court pointed to two failures of reasoning. First, the Secretary had failed to consider whether, if seat-belts could be so easily defeated, the better alternative would not be to require air bags or other less easily defeated devices.<sup>155</sup> Second, she had not considered the effect of driver inertia on the use rate of even the pre-attached belts; that is, even though they could be disabled, the belts would remain in place until someone took the trouble to disable them. Moreover, if ever reattached—say, for a longer trip—they would remain in use until, again, someone affirmatively undid them.<sup>156</sup>

The result did not deny that the Secretary might on a proper showing be able to rescind the rule. Rather, the Court found that she had failed to give adequate justification for her decision to do so, and must reconsider the matter.<sup>157</sup> The result was to place the imprimatur of the Court on the so-called "hard-look" doctrine, by which the courts of appeals (notably but not exclusively the D.C. Circuit) have placed strong obligations upon the administrative agencies to explain their actions.

The tension between *Chevron* and *State Farm* has been widely noted,<sup>158</sup> perhaps especially by courts of appeals judges, whose review of administrative action both opinions govern.<sup>159</sup> *Chevron* counsels a limited judicial role in determining questions of statutory meaning that, given their law-declaring character, are traditionally viewed as central to the judiciary's role. *State Farm*, on the other hand, appears to endorse aggressive judicial review of agency policymaking decisions, matters often characterized as appropriate for the application of administrative expertise. A leading figure on the D.C. Circuit, to which both the *Chevron* and the *State Farm* signals were sent, was heard to complain soon afterwards that the Court ought to decide which it preferred, strong or deferential review.<sup>160</sup> Judge Breyer of the First Circuit asked if the Court did not have its priorities precisely backwards.<sup>161</sup>

Yet, from the management perspective offered here, the two cases can be seen as not only consistent but also complementary. To understand *Chevron* as a statement about the allocation of some functions between court and agency is not to identify the judicial role as a weak one.

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155. *Id.* at 46–51.

156. *Id.* at 51–56.

157. *Id.* at 57.

158. See, e.g., Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505 (1985); Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1 (1985).

159. See, e.g., Breyer, *supra* note 102; Mikva, *The Changing Role of Judicial Review*, 38 Admin. L. Rev. 115 (1986); Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283 (1986).

160. Comment by Chief Judge Patricia Wald, U.S. Court of Appeals, District of Columbia Circuit, at program on scope of judicial review, Administrative Law Section, ABA (Oct. 1985).

161. See *infra* notes 179–81 and accompanying text.

Lower court pretense to precision about the detailed meaning of complex statutes threatens to impair the administration of those statutes in ways the Supreme Court will be incapable of policing; and the geographical dispersion of the lower courts supervising national programs threatens to compound that problem by imposing variations from region to region, as different courts attempt to resolve similar issues. The hard-look review endorsed by *State Farm* has its own possible costs—including a tendency to produce excessive agency effort on any given administrative action, to the general prejudice of an agency's level of accomplishment.<sup>162</sup> But any particular example of hard-look review will be less likely to impose demands on the Court's limited resources.

Thus, while an excessively hard judicial look at a particular agency result may defeat, or at least delay, that result, hard-look review of any given agency result should happen just once. Its legal effect, therefore, is limited to the particular administrative proceeding at hand. Once it has become final, the result as to that proceeding is fixed; nonacquiescence in a judgment that the air bag rule is invalid, or a conflict among the circuits on that issue, is difficult to imagine.<sup>163</sup> As long as the practice of hard-look review continues to be accepted, an uncorrected lower court error of this dimension, however costly to the particular enterprise being challenged, presents less of a claim on the Court's limited resources.

This understanding of the relationship between *Chevron* and *State Farm* solves a problem inherent in the analysis offered by Judge Starr, another member of the D.C. Circuit, writing shortly after *Chevron* and focusing attention on the nonjudicial character of the agencies.<sup>164</sup> He reminded us, correctly, that agencies differ from courts in the political relationships they enjoy with President and Congress, and he sought to draw on the paradigmatic relationships courts have with the President and with Congress to suggest limitations on the character and extent of judicial review of administration action. *Chevron*, he wrote, should be understood as we would understand judicial refusal to second-guess a congressional judgment in enacting a statute, or an executive judgment

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162. Mashaw & Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257 (1987).

163. The hard-look rule has been developed and applied in the context of direct judicial review of agency rulemaking, which will occur in a single action.

164. Starr, Judicial Review in the Post-*Chevron* Era, 3 Yale J. on Reg. 283 (1986). This understanding differs as well from the suggestions of Judge Mikva, Mikva, The Changing Role of Judicial Review, 38 Admin. L. Rev. 115, 129-34 (1986), and Merrick Garland, Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 551, 558-59 (1985), that the distinction between the cases lies in the differing quality of decision-making their records revealed, or in differing qualities of statutory mandate. While doubtless these and other matters suggestive of agency competence are important, see Diver, supra note 116, the Supreme Court has at least equal reason to be concerned about the competence and performance of the courts of appeals.

in deciding whether to initiate a prosecution. "[T]he Court, in its checking and balancing relationship with the coordinate branches, is much more deferential than in its role as supervisor of the lower courts."<sup>165</sup> "*Chevron* strongly suggests that courts should see themselves not as supervisors of agencies, but more as a check or bulwark against abuses of agency power."<sup>166</sup>

Viewed in this light, Judge Starr suggested, *Chevron* is consistent with other decisions that distinguish the court-agency relationship from the court-court relationship. The judicial system adopts rules that provide richly for the conduct of proceedings within the judiciary; but *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>167</sup> holds that courts may not create procedures in excess of statutory command to govern agency proceedings. Similarly, an appellate court will review the process by which a lower judge reasons from the basic facts established at trial to its legal conclusions essentially *de novo*; in contrast, agency judgments of this character are to be accepted unless they are "arbitrary [or] capricious."<sup>168</sup> From these developments Judge Starr concludes that "Article III judges lack general supervisory authority over the agencies" and "have a duty . . . to avoid intrusions not clearly mandated by Congress or the Constitution into the processes and decisions of any other branch."<sup>169</sup> "*Chevron* conveyed the clear message to the lower federal courts that theirs is not to supervise the administrative agencies. . . . Policy, which is not the natural province of courts, belongs properly to the administrative agencies, and, ultimately, to the executive and legislature that oversee them."<sup>170</sup>

As this last quotation may suggest, Judge Starr's emphasis on separation of powers led him, not surprisingly, to advocate deferential review of the consistency of agency decisionmaking in *State Farm* cases. He identifies the effort to preserve doctrinal consistency as perhaps the principal characteristic, today, of the Supreme Court's relationship with the lower federal courts. "In contrast . . . , the Court makes no attempt to ensure that presidential policies or congressional decisionmaking are internally consistent" beyond minimal constitutional constraints.<sup>171</sup> While briefly acknowledging that *State Farm* endorses a "searching and careful" review of agency decisions to ensure appropriate explanation and prevent irrationality,<sup>172</sup> Judge Starr appears to believe courts should look little harder at the consistency of products of agency action than they do in the cases of congressional or presidential decision.<sup>173</sup>

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165. Starr, *supra* note 164, at 301.

166. *Id.* at 300-01.

167. 435 U.S. 519 (1978).

168. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1980).

169. Starr, *supra* note 164, at 308.

170. *Id.* at 312.

171. *Id.* at 303.

172. *Id.* at 307.

173. *Id.* at 305; compare, however, the rigorousness of his review efforts for the

This is the most troubling aspect of Judge Starr's analysis, for one is hard put to find in it an understanding of the affirmative judicial role or, to put it another way, what contribution law can make to what he so correctly identifies as a mixed setting of law and politics. The idea that agency changes in position must be explained and justified, and the associated characterization of the judicial role as that of assuring a hard look by the agency at its data and options, are, for him, relics of the inappropriate supervisory role. One would like to believe that he means only to protect the agency's prerogative to change general policy directions within its assigned arena of operation with the political winds; yet one's impression is that he means also to deny the appropriateness of judges' requiring agencies to articulate a policy in order to act, or to demonstrate the consistency of challenged agency action with such agency policy as may already be in place. The result is an impoverished judicial role, indeed.

Understanding *Chevron* as in part a practical statement rooted in the realities of the Supreme Court's limitations as a supervisor of the courts of appeals, rather than as a theoretical statement about separation of powers, permits one still to insist that the agencies behave as if they were constrained by law—to demand greater coherence with previous actions than could ordinarily be demanded of Congress or the President. The agency can change, but it must know that it is changing, have a reason for doing so, and appear to promise that (until the next change) this is the rule that it will now follow. Anyone looking realistically at the winding path from, say, *Maryland v. Wirtz*<sup>174</sup> to *National League of Cities v. Usery*<sup>175</sup> to *Garcia v. San Antonio Metropolitan Transit Authority*<sup>176</sup> will recognize that that demand on the agencies is little different from the vision of law that courts apply to themselves. *Chevron* and *Vermont Yankee*,<sup>177</sup> in this light, acknowledge judicial handicaps, but they do not suppose (as Judge Starr apparently would) that the link between court and agency is any less important to the success of our governmental arrangements than that between Congress and agency, or President and agency.<sup>178</sup>

Judge Breyer's difficulty with *State Farm's* endorsement of the hard-look approach<sup>179</sup> is not as easily countered. That approach, he fears, invites judges to assess reasoning and choice about policy and technological fact, for which they are poorly equipped. The prospect of such review, while imposing no *legal* barrier to agency action, may discour-

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court in *FEC v. Rose*, 806 F.2d 1081, 1087-90 (D.C. Cir. 1986) and *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 883 (D.C. Cir. 1987).

174. 392 U.S. 183 (1968).

175. 426 U.S. 833 (1976).

176. 469 U.S. 528 (1985).

177. 435 U.S. 519 (1978).

178. See Strauss, *The Place of Agencies*, supra note 87; see also Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. (forthcoming).

179. Breyer, supra note 102, at 388-94.

age change from the status quo. An agency's interest in considering a change, he reasonably suggests, will likely be inversely related to the extent of the resources it believes it must commit to the effort. Absent some basis for confidence that such judicial oversight in fact improves agency performance,<sup>180</sup> he argues, these are inappropriate risks to be taking. A recent study of rulemaking by the National Highway Traffic Safety Administration supports Judge Breyer's concern, finding that by the year 1977 rulemaking in that agency had been stymied by the elaborate efforts required to produce an outcome that might survive such review.<sup>181</sup>

It may indeed be that agency inaction is the price of hard-look review, and a higher one than we should choose to pay. Yet Judge Breyer's criticism of *Chevron* still requires him to assume the precise decision model of statutory interpretation, or at least the availability of Supreme Court review. Perhaps these are understandable assumptions, even as amiable fiction, for one who has chosen the judiciary over the academy as the place within which to make his life's mark. Withdraw these premises, however, and the greater capacity of the judiciary to resolve questions of statutory meaning no longer appears. One is driven back to reliance on the general discipline of the courts—indeed, to the contribution to judicial modesty made by the very strength of his proposition about the difficulty of hard-look review.

Thus, one might conclude, the Court's management realities are, indeed, having a significant impact. Judicial attention to such issues as consistency with prior actions and the articulation of appropriate reasoning *need* not take courts beyond their ordinary competence. That judges should refrain from involving themselves directly in agency policy choices is a proposition of long standing — accepted by the Court in *State Farm* and given emphatic statement in *Chevron* and other contemporary decisions.<sup>182</sup> That they should refrain from imposing procedural requirements is, as Judge Starr remarked, established by *Vermont Yankee*.<sup>183</sup> Yet both requirements doubtless can be evaded by an undis-

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180. Compare Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 60 (1975) ("[S]uch judicial opinions . . . give those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not") with R. Melnick, Regulation and the Courts: The Case of the Clean Air Act (1983) (effect of court review on EPA produces conflicting directives, hampering achievement of tasks).

181. Mashaw & Harfst, *supra* note 162.

182. See, e.g., *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983) (sufficient that commission "considered the relevant factors and articulated a rational connection"); see also Professor Koch's recent, interesting and helpful analysis, *Judicial Review of Administrative Discretion*, 54 Geo. Wash. L. Rev. 469 (1986), in particular his suggested distinction between discretion to execute statutes, as by filling in the gaps of an incomplete delegation, and discretion to make policy, as by reaching accommodations of competing social or political factors, *id.* at 479-91. The judiciary is properly much more deeply involved in the former, which closely resembles decision on questions of law.

183. 435 U.S. 579 (1978).

ciplined court persuaded to insert itself in the agency role. And such departures from the appropriate judicial role, like court of appeals misuse of substantial evidence review, will be both hard to detect and unlikely to be persuasive as a reason for the Supreme Court to exercise its review jurisdiction. That rulemaking as a whole is being inhibited will be hard to establish in any given proceeding. That hard look review may have these broader impacts is only one more indication of the difficulties of the Court's position.

### CONCLUSION

As indicated at the outset of this essay, my purpose in writing has largely been a descriptive one—to see whether some interesting changes in the Court's approach to statutory and administrative matters might be explainable in terms of its increasingly marginal grip over the work of the courts of appeals. I think that can be done, and the reader will judge for herself the success of the venture.<sup>184</sup> If she agrees that some of the Court's recent directions are apparent responses to the remoteness of its role, the question remains whether those responses are acceptable ones. I offer no prescription for what ought to be done. It does seem right to conclude, however, with the observation that this stark picture of the Court's problem suggests a much more dramatic response than one might make on the basis of counting the particular conflicts among the circuits that appear to have passed by unresolved.

At root, the issue may be as simple as whether we are prepared for the consequences of a Court four times as remote from the rest of the nation's judiciary as it was when a perceived caseload crisis prompted creation of its current jurisdictional relationships. If not, if it is important to return the courts of appeals to a position in which their discipline by higher judicial authority is a believable prospect, it is hard to imagine that that can be accomplished by such measures as the proposed intercircuit tribunal.<sup>185</sup> A single rotating panel of circuit court judges, hearing far fewer cases than the Court in any given year, and in a complex jurisdictional relationship with the Court that will itself consume time, will not significantly affect a circuit panel's perception of its probable finality or the richness of the body of national law available for its guidance. Nor will it have the constancy of personnel or hierarchical superiority that over time promotes effectiveness and respect.

To achieve significant change in the level of discipline to which the

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184. One may wish to consider as well other possible outcroppings of the suggested phenomenon: the Court's treatment of pornography, of habeas corpus and, most recently, of arbitration are other doctrinal areas readers of early drafts have suggested might be seen in management terms. Its emphasis on defining formulas for deciding constitutional issues such as "compelling state interests," threatens also to place it at some remove from direct consideration of issues of constitutionality. See *supra* note 120.

185. See Baker & McFarland, *supra* note 1; Ginsburg & Huber, *supra* note 1.

courts of appeals are subject, rather, one would have to think of a number of panels in a court intermediate between the circuits and the Supreme Court.<sup>186</sup> Five panels of seven judges each in a new judicial tier would enjoy about the same relationship with today's circuit courts as the Supreme Court had with the circuits in 1925, while also producing opinions at a sufficiently reduced rate to promise significant Supreme Court control of their own output. Perhaps such panels, taking over the troublesome en banc process as well as conflicts within their catchment areas, could effectively discipline the appellate courts, and so encourage consistency.

A new tier of appellate courts would hardly qualify as a panacea. It would make the Supreme Court more remote from the front line of litigation; analagous structural reforms in the executive branch, as it has grown, have failed fully to deliver on their promise of enhanced control.<sup>187</sup> Even if review by a new tier of courts were discretionary, as the Court's is, adding a new judicial step would entail new costs in time and resources. The problem is that without such a change, without interposing a new tribunal of such modest dimensions that the Supreme Court can have some reasonable hope of controlling it, the Court's incentives to a management orientation, with all that entails, will remain unaddressed.

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186. A more complete response to this problem would require considering whether this new level of court might be given initial federal jurisdiction over review of state court judgments as well.

187. H. Kaufman, *The Administrative Behavior of Federal Bureau Chiefs* 185, 193-96 (1981).