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Preface

Lopez v. Heckler remains undecided, but the decisional uncertainty only tangentially impacts on this note, which principally concerns the inability of large numbers of social security disability claimants to secure judicial review of their claim that governmental nonacquiesence [in prior circuit court holdings] denies them their constitutional rights.

The bulk of this note was written in early 1983. Subsequent decisions in Lopez only make minor additions to the discussion in the body of the note. The rationale for the decisions listed in the next paragraph, therefore, will not be discussed.

On February 22, 1984, the Ninth Circuit Court of Appeals affirmed much of the district court's preliminary injunction. The Supreme Court had stayed implementation of the injunction pending adjudication. Implementation was again held in abeyance when the Supreme Court granted certiorari to review it. On September 19, 1984, Congress enacted guidelines essentially upholding the plaintiffs' eligibility for social security benefits. On October 16, 1984, the Supreme Court partially affirmed and partially reversed the preliminary injunction. The government requested a rehearing and in December, 1984, the Supreme Court vacated the injunction and directed the district court to apply the new law. As a result, the plaintiffs have received none of the injunctive relief initially demanded even though many had their benefits restored under the new statutory guidelines.

The Lopez plaintiffs must begin again. At first glance, all the combatants' legal thrusts and parries appear moot. Such a characterization is inaccurate. Nothing has been decided about the constitutionality of nonacquiescence or the availability of injunctive relief for its victims. The statute does not prevent the government from employing nonacquiescence in the future. The Supreme Court has avoided nonacquiescence and has substantially narrowed the availability of injunctive relief through the application of complex jurisdictional prerequisites, discussed in detail below. In fact, the progress of Lopez to date casts doubt on the ability of similarly situated future plaintiffs to gain effective review of their
claims. The intricate dance performed by the plaintiffs, the government agency, and the courts in Lopez may serve as a blueprint for subsequent cases regardless of the final outcome of Lopez v. Heckler.

I. INTRODUCTION

The United States Supreme Court’s refusal to grant an emergency application to vacate a stay of a preliminary injunction ordered by Justice Rehnquist in Lopez v. Heckler\(^1\) created a legal tangle of massive proportions.\(^2\) Unfortunately, thousands of social security disability payment recipients whose terminations sparked this struggle,\(^3\) many with scarce physical and emotional resources and some with even less time,\(^4\) are enmeshed in this procedural tangle with little hope of a speedy remedy.

In Lopez, twenty named individual and fourteen organizational plaintiffs asked for injunctive relief\(^5\) on behalf of a nationwide class consisting of all those persons who had or might have their disability benefits terminated on grounds that they were no longer disabled or that their conditions had improved under Title II of the Social Security Act.\(^6\) Plaintiffs contended that the continued use of the procedures

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1. 713 F.2d 1432 (9th Cir. 1983). Justice Rehnquist subsequently granted this stay acting in his capacity as Circuit Justice for the Ninth Circuit Court of Appeals. 104 S. Ct. 10 (Rehnquist, Circuit Justice 1983).
3. Lopez, 713 F.2d at 1434.
4. Id. at 1437.
6. See 42 U.S.C. §§ 401-31 (1976 & Supp. 1981). Subsections 405(g) and 405(h) state in pertinent part:
   (g) Judicial review. Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides.
   (h) Finality of administrative determinations. The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or em-
that generated termination was unconstitutional.\textsuperscript{7} For the same reason, eighteen named plaintiffs also sought reversal of termination of their Title XVI Supplemental Income Disability Benefits.\textsuperscript{8} The district court certified only a circuit wide class.\textsuperscript{9} The defendant, Margaret Heckler, Secretary of Health and Human Services, estimated that the class already contained 72,000 people.\textsuperscript{10} Those who might be effected in the future would further swell the number.\textsuperscript{11}

The subsequent legal battle focused on the implementation of the preliminary injunction that the plaintiff had sought and won.\textsuperscript{12} The employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover on any claim arising under this title.

\textsuperscript{7} Lopez, 572 F. Supp. at 27. In Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982), see infra notes 22, 25-30, 36-42 and accompanying text, and Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981), see infra notes 23, 31-42 and accompanying text, the Ninth Circuit Court of Appeals ruled that the Secretary was required to introduce new evidence before a person previously declared permanently disabled could have his benefits terminated. \textit{Patti}, 669 F.2d at 586-87; \textit{Finnegan}, 641 F.2d at 1345. The claimants in Lopez, argued that they were denied due process when the Secretary terminated them in the face of these rulings without submitting new evidence. 713 F.2d at 1434.

\textsuperscript{8} Lopez, 572 F. Supp. at 27 n.1. The court found: "Title XVI of the Social Security Act created Supplemental Security Income Disability Benefits for persons who are both poor and disabled. . . . SSI benefits are paid to eligible poor persons whose income and resources fall below a specified level." \textit{Id}. See 42 U.S.C. §§ 1381-83 (1976 & Supp. V 1981). The key subsections of section 1381 covering procedural requirements read in pertinent part:

\textsuperscript{9} Lopez, 572 F. Supp. at 30.

\textsuperscript{10} \textit{Id}.

\textsuperscript{11} \textit{Id}.

\textsuperscript{12} \textit{Id}. The text of that portion of the court order granting class wide relief follows:

4. The plaintiffs' motion for a preliminary injunction is granted as follows:

The defendants, their agents and employees are enjoined and restrained within the Ninth Circuit:

\textsuperscript{a} From failing to follow, implement or accord precedential effect to Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981) and Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982).

\textsuperscript{b} From implementing the nonacquiescence policy contained in Social Security Rulings Nos. 82-10c, 82-49c and 81-6 . . .

\textsuperscript{c} In order to accomplish appropriate restoration of disability benefits pending resolution of this action, the court orders the defendants to implement the following procedure:

\textsuperscript{i} Within sixty (60) days following the date of this order, the defendants will notify (a) each class member who had been receiving Supplemental Security Income Disability benefits under 42 U.S.C. § 1382c(a)(3)(E), and who was termi-
Secretary objected to the requirement of the injunction that she continue paying interim benefits to terminated claimants whose individual claims were before the courts. The Secretary appealed to the Court of Appeals for the Ninth Circuit to have the enforcement of that part of the injunction stayed while the merits of the entire injunction were appealed. 13 The Ninth Circuit refused to stay, 14 Circuit Justice Rehnquist, however, stayed the injunction 15 and the Supreme Court then denied the plaintiff’s request to vacate his stay. 16 The case was remanded to the appellate court so it could determine if the district court’s preliminary injunction should be affirmed. 17 Because the injunction’s enforcement was stayed, the termination of all former recipients stood.

Lopez arose from unusual circumstances. In March of 1981 the Social Security Administration changed and accelerated the review procedures by which a recipient’s continuing eligibility for disability benefits was determined. 18 As a result, the number of terminations balanced from such benefits after August 25, 1980, and (b) all other persons who have been terminated from either Title II social security disability insurance or Title XVI Supplemental Security Income Disability after August 30, 1981, for the purported reason that his or her disability had ceased, whether or not such person has appealed, that:

Such person may apply for reinstatement of benefits if he or she believes that his or her medical condition has not improved following the granting of disability benefits.

(ii) Upon receiving such application, the defendants forthwith reinstate and pay benefits in the monthly amounts such person would have been receiving had his or her benefits not been interrupted.

(iii) Following such reinstatement, if the defendants or their agents or employees conduct a disability investigation or other screening of such person they will apply the standards set forth in Patti v. Schweiker and Finnegan v. Matthews and, if they conclude that such person’s medical condition has improved and he or she is no longer disabled, they will identify the evidence relied upon to reach that conclusion.

(iv) Following such review, persons who are notified of an initial determination that their benefits shall cease shall be given an opportunity to contest the determination and pending such review, they shall continue to receive aid as provided in current laws and regulations.

Id. at 32.

13. Lopez, 713 F.2d at 1434.
14. Id. at 1435.
16. Lopez, 104 S.Ct. 221, 225 (1983). This decision of the entire Court should not be confused with the decision Circuit Justice Rehnquist made in the same case one month earlier. See supra note 16.
17. Id.
18. Lopez, 713 F.2d at 1433-34. Prior to 1982, those judged permanently disabled could not be terminated without the presentation of new evidence that their medical condition had substantially improved. The court of appeals adhered to this rule in Patti v.
looned from 98,000 in fiscal year 1981 to over 195,000 in fiscal year 1982.\textsuperscript{19} The \textit{Lopez} plaintiffs claimed the doubling of terminations was the fruit of new procedures that the Court of Appeals for the Ninth Circuit had already found illegal.\textsuperscript{20} The plaintiffs maintained that their terminations violated the holdings of \textit{Patti v. Schweiker}\textsuperscript{21} and \textit{Finnegan v. Matthews}\textsuperscript{22} that, "before Social Security Disability Benefits [could] be terminated on the ground that the recipient [was] no longer disabled, the Secretary must introduce evidence that the recipient's medical condition [had] improved."\textsuperscript{23}

In \textit{Patti} an administrative law judge reversed a 1978 determination that a recipient was no longer disabled.\textsuperscript{24} In 1979, however, the agency again terminated the plaintiff without introducing new facts.\textsuperscript{25} A district court judge upheld the second termination.\textsuperscript{26} The court of appeals reversed, finding that "a prior ruling of disability can give rise to a presumption that the disability still exists."\textsuperscript{27} While the presumption did not shift the burden of proof, the Secretary "was required to 'meet or rebut' [it] with evidence that the [plaintiff's] condition had improved in the interim."\textsuperscript{28} The court restored the plaintiff's benefits because the Secretary presented no such evidence.\textsuperscript{29} In \textit{Finnegan}, the plaintiff had entered the federal Supplemental Security Income program in 1974 when the California program was integrated with the national one.\textsuperscript{30} A grandfather clause in the federal takeover agreement raised the presumption that former recipients under the state program would automatically qualify for federal benefits.\textsuperscript{31} The circuit court reversed\textsuperscript{32} a district court affirmance of the secretary's termination of

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\textsuperscript{19} Lopez, 713 F.2d at 1434.
\textsuperscript{20} Id. See supra note 7 and accompanying text.
\textsuperscript{21} 669 F.2d 582 (9th Cir. 1982).
\textsuperscript{22} 641 F.2d 1340 (9th Cir. 1981).
\textsuperscript{23} Lopez, 713 F.2d at 1434 (citing \textit{Patti}, 669 F.2d at 587; \textit{Finnegan}, 641 F.2d at 1345).
\textsuperscript{24} 669 F.2d at 583.
\textsuperscript{25} Id. at 584.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 586.
\textsuperscript{28} Id. at 587.
\textsuperscript{29} Id.
\textsuperscript{30} 641 F.2d at 1342-43.
\textsuperscript{31} 641 F.2d at 1342.
\textsuperscript{32} Id.
\end{flushleft}
the plaintiff's benefits, holding that "benefits to a grandfatheree must not be terminated absent proof of a material improvement in his medical condition." The court reinstated Ms. Patti's and Mr. Finnegan's benefits but the Secretary refused to acquiesce in the appellate courts legal rule created by the holdings in Patti and Finnegan that recipients were presumed disabled and could not be terminated prior to the presentation of evidence that their conditions had improved. The Secretary stated that the holding applied only to the plaintiffs before the court in Patti and Finnegan. Regardless of these decisions the Secretary would continue to use accelerated screening procedures and new rules of evidence. In response to Patti, the Social Security Administration ruled that "even if current medical or other evidence does not show 'medical improvement' . . . a non grandfathered SSI [Supplemental Security Income] recipient is subject to cessation if such evidence shows that the recipient is able to engage in substantial gainful activity." After Finnegan, a similar ruling insured that those accepted into the federal program who had previously been in the state program would receive the same treatment. Both rulings reflected a previously articulated Social Security Administration policy that "[w]here the evidence obtained at the time of a continuing disability investigation (CDI) establishes that the individual is not currently disabled . . . a finding of cessation is appropriate. It will not be necessary to determine whether or how much the individual's condition has medically improved since the prior favorable determination." Thus, the Administration did not apply the standards mandated by Patti and Finnegan to other recipients during a CDI. This was the nonacquiescence policy that the plaintiffs in Lopez said denied them due process under the fifth amendment of the United States Constitution and violated the separation of powers mandated by Article Three of the United States Constitution. The district court's determination in that case, that nonacques-

33. Id. at 1347.
34. Id.
35. Id.; Patti, 669 F.2d at 587.
36. Patti v. Schweiker, SSR 82-49c (Oct. 1982); Finnegan v. Matthews, SSR 82-10c (Jan. 1982). In these rulings, the Secretary directed her administrative law judges not to acquiescence in the Ninth Circuit holdings. Id.
37. Id.
38. Id.
40. Finnegan v. Mathews, SSR 82-10c (Jan. 1982).
41. Continuance or Cessation of Disability or Blindness, SSR 81-6 (Cum. ed. 1981).
42. 713 F.2d at 1434.
cence was unlawful, provided the starting point for its grant of a preliminary injunction ordering the Secretary to conform her disability determinations to the standards set in *Patti* and *Finnegan*. 43

The claim for classwide injunctive relief was central to the plaintiff's effort to defeat the Secretary's policy of nonacquiescence. Since a class action places all recipients who have been terminated in a single suit, the injunctive relief sought would permit all class members to continue to collect benefits while their eligibility claim was reetermined. 44 The district court had to determine, however, whether its jurisdiction extended to the claims of the class and permitted a classwide injunctive remedy. 45

The Supreme Court's holding in *Weinberger v. Salzi* 46 is the modern point of departure for an evaluation of these issues, 47 which include "the jurisdiction of a federal district court to entertain such challenges [to social security administration policies, practices and eligibility decisions] and the related question of exhaustion of administrative remedies; . . . the propriety of class actions and . . . availability of injunctive . . . relief." 48 Analysis of these issues is important because *Salzi* can be read to impede judicial review of constitutional issues such as nonacquiescence. What follows is a preliminary analysis of the *Salzi* factors.

A. Jurisdiction

In *Salzi*, a widow challenged on equal protection grounds a Social Security Insurance Benefits statute that limited payments to the survivors of marriages that lasted more than nine months. 49 The Supreme Court reversed a three judge district court finding that federal question jurisdiction could be asserted because of the constitutional nature of

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43. Id.
44. See supra note 12.
46. 422 U.S. 749 (1975).
48. Id. The first two points could be modified further. The source of a court's jurisdiction as well as whether it has jurisdiction is important because various jurisdictional statutes carry significant limitations. For instance, 42 U.S.C. section 405(g), the jurisdictional subsection of Title II of the Social Security Act, generally only allows a federal district court to assert jurisdiction over claims in which plaintiffs have exhausted their administrative remedies. Social Security Act § 205(h), 42 U.S.C. § 405(h) (1970). In a similar fashion, the scope as well as the propriety of the class action is of crucial significance.
49. 422 U.S. at 755-56. The plaintiff, who had been married almost six months when her husband died, see 422 U.S. at 753, challenged the constitutionality of the nine month requirement. *Id.* at 755-56.
the claim. Justice Rehnquist, writing for the majority, stated that the Social Security Act's jurisdictional section barred the assumption of federal question jurisdiction. If the administrative exhaustion requirement of the act were satisfied, however, a federal district court could assert jurisdiction over the claims of individually named beneficiaries who met all the other requirements of the act. Under *Safi*, then, if individuals contested a Social Security Administration determination, they could not bring a claim to court before the agency's mechanisms for settling such disputes had been fully utilized.

Administrative exhaustion occurs whenever the Secretary makes a "final decision." Language in the *Safi* decision indicated that the

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50. *Id.* at 756-61. 28 U.S.C. section 1331 gives federal district courts jurisdiction over claims arising under federal law. 28 U.S.C. § 1331 (1976 & Supp. V 1981). The court reasoned that in this case, however, jurisdiction was controlled by 42 U.S.C. § 405(h) (1970), amended by 42 U.S.C. § 405(h) (Supp. II 1976). At the time of the *Safi* decision, the third sentence of this section of the statute read: "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 41 of title 28 to recover on any claim arising under this subchapter." Social Security Act, § 205(h), 42 U.S.C. § 405(h)(1970).


52. *Safi*, 422 U.S. at 756-57.

53. Social Security Act, § 205(h), 42 U.S.C. § 405(g) (1970 & Supp. V 1981). This subsection reads in part: "Any individual, after any final decision of the Secretary made after a hearing to which he is a party . . . may obtain a review of such decision by a civil action commenced within sixty days." *Id.*

54. *Id.* In order to exhaust administrative remedies a claimant who has been terminated normally takes the following steps:

Title 20 — Employees' Benefits Chapter III — Social Security Administration

(1) Initial determination. This is a determination we make about your entitlement or your continuing entitlement to benefits or about any other matter, as discussed in § 404.902, that gives you a right to further review.

(2) Reconsideration. If you are dissatisfied with an initial determination, you may ask us to reconsider it. Generally, you must request a reconsideration before you may request a hearing.

(3) Hearing. If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) Appeals Council review. If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) Federal court review. When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) Expedited appeals process. At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) Nature of the administrative review process. In making a determination or
Secretary, not the protesting claimant, determined when a final decision had been made. Thus, unless the Secretary waived the exhaustion requirement, claimants were apparently required to pursue all administrative remedies before taking the case to district court. The Court, however, soon delineated circumstances when the requirement would not be literally applied. In *Mathews v. Eldridge*, the Court subdivided the exhaustion requirement into waivable and non-waivable parts. In deciding if it had jurisdiction over a claim, a court could not waive the requirement that a claimant present a request for benefits. The final decision requirement could be waived if the claimant mounted a constitutional challenge to the procedures used by the agency and if additional administrative decisions would not provide an adequate remedy. Thus, if the constitutionality of the process itself were challenged a plaintiff could take a claim to federal court after benefits had been requested but before the Secretary had rendered a final decision. The court would still have to ascertain whether a claimant was placing the constitutionality of the process in question or merely making a claim for benefits.

The Court's clarification of these jurisdictional guidelines in *Eldridge* is essential to the *Lopez* action because not all named plaintiffs, let alone all the class members, had exhausted their administrative remedies. Furthermore, if the plaintiffs in *Lopez* were forced to exhaust their administrative remedies, they could never challenge the Administration’s policy of nonacquiescence. The district court would determine the eligibility for social security benefits, relying presumably on *Patti* and *Finnegan*. Having fully exhausted the Secretary's proceedings and having received a decision reversing the result of those procedures, however, their attack on the procedures themselves would

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55. *Saalf*, 422 U.S. at 763-64.
57. *Id.* at 328.
58. *Id.*
59. *Id.* at 330-32.
60. *Id.*
61. *Lopez*, 713 F.2d at 1439.
be moot.62

Justice Rehnquist, however, found that the teaching of Salfi and Eldridge required staying the district court's injunction in Lopez because it "cover[ed] individuals who . . . never questioned the initial determination that they [had] ceased to be disabled."63 The Lopez plaintiffs, however, took action equivalent to that taken by the plaintiffs in Eldridge and in the latter case the Supreme Court found that the action satisfied the nonwaivable claim for benefits requirement.64

In Mathews v. Diaz65 the Supreme Court arguably created an additional ground for waiving the final decision requirement.66 Unlike Eldridge, Diaz challenged the constitutionality of the statute on which the Secretary based a decision, not the procedure she employed to implement the law.67 The majority in Diaz appeared to excuse exhaustion when exhaustion was futile: If futile, "[the] element may be deemed waived even over the Secretary's objection."68 A court would rule on the constitutionality of a statute regardless of the Secretary's waiver of exhaustion. If the Diaz rule were not also applied when a constitutional challenge to the manner in which the Secretary implemented a constitutional statute was mounted, a plaintiff would be forced to pursue futile administrative actions. Thus the Secretary's nonacquiescence guaranteed that no matter how many times a recipient attacked the procedure, it would still be employed to deny benefits to all future claimants until they, too, mounted a similar challenge.69 The futility of further administrative appeals pertaining to those procedures under those circumstances is readily apparent. When plaintiffs exhaust their administrative remedies and pursue the claim in federal district court, the court will never rule on those procedures because by that time the claim rather than the procedures themselves will be before the court. Justice Rehnquist did not even consider Diaz when he granted the stay

62. In City of Los Angeles v. Lyons, 452 U.S. 1308 (1983), the Court refused to rule on the constitutionality of the Los Angeles Police Department's standard procedure of subduing individuals with choke holds because the plaintiff no longer had standing to object to those procedures once he had exhausted his administrative remedies. Id. at 1309.

63. Heckler v. Lopez, 104 S. Ct. at 14. The Court in Eldridge found that "Eldridge's constitutional challenge [was] entirely collateral to his substantive claim of entitlement. Moreover, there is a crucial distinction between the nature of the constitutional claim asserted here and that raised in Salfi." Eldridge, 424 U.S. at 330-31.

64. Salfi Revisited, supra note 48 at 738 & n.94.


66. Diaz, 426 U.S. at 76.

67. Id. at 70-71.

68. Id. at 75-77.

69. See Lopez, 713 F.2d at 1439.
in *Lopez*.

**B. Class Action**

*Salfi* was a class action. The Supreme Court stated that because the complaint did not allege that all class members had filed a claim with the Secretary, the class did not "satisfy the requirements for jurisdiction under 42 U.S.C. § 405(g)." The unequivocal language created the impression that class relief was impossible under 405(g). The Court in *Califano v. Yamasaki* shifted direction and allowed a class action if all class members had satisfied the nonwaivable jurisdictional requirement.

**C. Injunctive Relief**

*Yamasaki* also provided Social Security class action claimants with the possibility of the injunctive relief that the *Salfi* court apparently withheld. In *Salfi*, Justice Rehnquist noted that section 405(g) "contains no suggestion that a reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicant before the court." Justice Blackmun, however, speaking for the majority in *Yamasaki*, found injunctive relief available unless "the clearest command to the contrary from Congress" existed. After *Yamasaki*, congressional silence could no longer be used to deny injunctive relief. Language in *Yamasaki* particularly applies to the circumstances in *Lopez*: "In class actions, an injunction may be necessary to protect the interest of absent class members and to prevent repetitive litigation." One purpose of the *Lopez* class action was to protect

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71. 422 U.S. at 755.
72. *Id.* at 764. The U.S. Code section cited by the Court requires, in part, that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action." Social Security Act, § 205(h), 42 U.S.C. § 405(g) (1976 & Supp. V 1981).
73. *Salfi Revisited*, supra note 48, at 729.
74. 442 U.S. 682 (1979). In this case, a district court had certified a nationwide class of recipients. *Id.* at 688. Those recipients claimed that the Secretary violated the due process clause of the fifth amendment to the United States Constitution, U.S. CONST. amend. XIV, § 2, by not holding predetermination hearings before he attempted to recoup alleged overpayments to them. *Id.*
75. *Id.* at 701.
76. 442 U.S. at 763 n.3.
77. 442 U.S. at 705.
78. *Id.*
disabled class members unlikely to assert their own claims; another was to avoid repeated litigation concerning the legality of termination procedures that had already been decided in \textit{Patti} and \textit{Finnegan}. Justice Rehnquist also ignored \textit{Yamasaki} when he stayed the implementation of the injunction in \textit{Lopez}.

II. THE L\textit{OPEZ} INJUNCTION AND ITS AFTERMATH

A. The District Court Decision

The district court found that the plaintiffs easily satisfied the factual requirements for granting a preliminary injunction as articulated by the court of appeals in \textit{Beltran v. Meyers}: \footnote{677 F.2d 1317 (9th Cir. 1982).} “[T]he moving party must demonstrate ‘either a combination of probable success on the merits’ and the possibility of irreparable injury, or that serious questions are raised and the balance of hardship tips sharply in the moving party’s favor.” \footnote{572 F. Supp. at 29 (quoting Beltran v. Meyers, 677 F. 2d 1317, 1320 (9th Cir. 1982)).} The trial court in \textit{Lopez} found that the plaintiffs were likely to succeed on the merits because the Secretary’s nonacquiescence violated the judiciary’s power “to say what the law is . . . [and to] apply the rule to particular cases.” \footnote{Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).} The district court disapproved of the Secretary’s stance: “[F]or the Secretary to make a general assertion that a decision of the Court of Appeals is not to be followed because she disagrees with it is to operate outside the law.” \footnote{Id. at 29.}

The plaintiff’s injury in \textit{Lopez} might have been irreparable.

If such a claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced in \textit{Patti} and \textit{Finnegan}. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stands. \footnote{Id. at 30.}

For these reasons the balance of hardship tipped “sharply” in the plaintiffs’ favor: \footnote{Id. at 29.} “The record shows that some who have unexpectedly lost benefits have already suffered deprivation . . . or even death from the very disabilities that the Secretary deemed them not to
have." No judge disputed this finding of the district court although some failed to reach the question. Further, the judge found that the failure of the Secretary to follow established judicial precedent presented a serious legal question of denial of due process. Thus, the plaintiffs had satisfied the Beltran alternatives.

The court found that the case met the Federal Rules of Civil Procedure class action guidelines. It limited the class to the circuit, however, based on its belief that the courts of other circuits would be better equipped to determine the legality of the Secretary's nonacquiescence within their circuits. The court did not address possible preclusion by Salfi of classwide relief and did not confront the barriers that Salfi may have raised to injunctive remedies.

The district court treated jurisdiction cursorily: "[T]he Court noted that formal exhaustion was not required . . . once the Secretary 'has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine.'" The judge, however, neglected the distinction between the procedural constitutional claim made against the manner in which the Secretary implemented a constitutional statute in Lopez and the substantive constitutional attack on the law made in Salfi and Diaz. He further noted that the court of appeals in Ringer v. Schweiker applied the Salfi exception when the Secretary's ruling "makes the result of that process 'both preordained and immuta-

88. Id. at 30.

89. Id.

90. Lopez, 572 F. Supp. at 30-31. The court stated:

This court now finds that this group fulfills the requirements for class certification under Federal Rule of Civil Procedure 23(a) . . . . The common constitutional challenge to the policy of nonacquiescence is a legal claim shared by all class members. The class representatives' claims are typical of those of the class since they stem from the same course of conduct, again the nonacquiescence, and pose the same constitutional challenge thereto. The representatives are adequate because they have no interests antagonistic to the class members and seek the identical relief sought for the class. Moreover, counsel for these representatives are able and experienced in protecting the interests of the poor.

The proposed Ninth Circuit class also fulfills the requirement of Federal Rule of Civil Procedure 23(b)(2).

Id.

91. Id. at 31.

92. Id. at 29 (quoting Salfi v. Weinberger, 422 U.S. 749, 765 (1975)).

93. 697 F.2d 1291 (9th Cir. 1982), rev'd, 104 S.Ct. 2013 (1984). This reversal, a possibility noted by Justice Rehnquist when he first granted the temporary stay, Lopez, 104 S.Ct. at 14 (Rehnquist, Circuit Justice 1983), destroys this argument, see infra note 169. The distinction between Ringer and Eldridge, however, remains critical. See infra note 110 and accompanying text.
ble.' 94 The district court failed to recognize, however, that the circuit court's analysis in Ringer flowed from the Court's consideration in Eldridge of the constitutionality of a procedure, not from the examination of the constitutionality of the statute in Salfi. The trial court concluded that any further recourse to administrative procedures attacking nonacquiescence would prove futile95 because the Secretary had admitted that the administrative law judges had been directed to ignore the Patti and Finnegan guidelines.

B. The Court of Appeals Denial of the Secretary's Application for a Stay

The district court focused primarily on nonacquiescence. The Supreme Court, however, had not directly confronted nonacquiescence in the twentieth century.96 While a number of appellate courts had soundly condemned nonacquiescence,97 the Supreme Court's silence might have bespoken a reluctance to decide the issue. Perhaps sensing this possibility the court of appeals affirmed the implementation of the injunction but focused on the murky jurisdiction, class action, and remedy guidelines provided by Salfi, Eldridge, Diaz, and Yamasaki that the district court had ignored in assessing the plaintiffs' likelihood of success. Because the Secretary merely asked for a stay of the part of the injunction which required her to pay interim benefits, the only issue before the court was whether those benefits would be paid to former recipients terminated under guidelines that had been ruled illegal.98 Judge Reinhardt, speaking for a unanimous three judge panel, refused to stay that part of the injunction.99 The appeals court applied the same standard the district court had used in granting the preliminary injunction to determine if a stay should be granted.100 The court also stated that under the circumstances it could reverse a lower court order only if it were clearly erroneous or if the judge had abused

95. Id.
96. Outside of tax cases, this author has not encountered a single Supreme Court reference to the doctrine of nonacquiescence.
97. See, e.g., Jones & Laughlin Steel Corp. v. Marhsall, 636 F.2d 32, 33 (3d Cir. 1980); ITT World Communications v. FCC, 635 F.2d 32, 43 (2d Cir. 1980); Ithaca College v. NLRB, 623 F.2d 224, 228-29 (2d Cir. 1980), cert denied, 449 U.S. 975 (1980).
98. Lopez, 713 F.2d at 1435.
99. Id. at 1440.
100. Id. at 1435. The court applied "two interrelated legal tests." On the one hand, movants must establish "a probability of success on the merits and the possibility of irreparable injury" while, on the other hand, they raise "serious legal questions" and demonstrate "that the balance of hardships tips sharply in its favor." Id.
his discretion.\footnote{Id. at 1436 (citing Los Angeles Memorial Coliseum Comm. v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980)).} The appellate court retraced each step of the balancing process articulated by the district court.\footnote{Id. at 1432-36.} It paid greater attention to the burden the government bore in paying interim benefits but concluded that the balance still overwhelmingly favored the plaintiffs.\footnote{Id. at 1436-38. In discussing the government's burden the court found that "the physical and emotional suffering shown by plaintiffs in the record before us is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government."Id. at 1437. The kind of harm caused by the terminations, including possible death, would be irreparable and not susceptible to retroactive relief. Id. The court found that the public interest also commanded the injunction: "The government must be concerned not just with the public fisc but with the public weal. . . . Our society as a whole suffers when we neglect the poor, the hungry, the disabled or when we deprive them of their rights and privileges." Id.}

The court determined that the defendant's nonacquiescence posture had little likelihood of success.\footnote{Id. at 1438.} Nonacquiescence was unconstitutional: even if it were not, any agency decision not grounded upon the \textit{Patti} and \textit{Finnegan} guidelines would be "rejected summarily whenever challenged in this circuit."\footnote{Id. at 1438 & n.8. The court may not be saying that all nonacquiescence is unconstitutional but rather that this nonacquiescence is. Unfortunately, the court provides no clue as to why some nonacquiescence actions might be acceptable.} The court saw "little chance that the Secretary will convince this Court to the contrary."\footnote{Id. at 1438.} With regard to the issue, therefore, the plaintiff had demonstrated a likelihood of success and had raised serious legal questions.\footnote{Id. at 1438.}

In her request for a stay, the Secretary contended that the district court did not have jurisdiction over the claims of all certified class members.\footnote{Id. at 1438.} Her attack could not be disposed of easily. The Secretary claimed that neither the nonwaivable presentation of a claim requirement nor the waivable exhaustion of administrative remedies requirement had been satisfied by all class members.\footnote{Id. at 1438.} The appellate court...
found that the nonwaivable requirement had been satisfied because: (1) recipients had been receiving benefits when they were terminated; and (2) the Secretary had had an opportunity to reinstate them. The court found support for its analysis in a decision from another circuit. The court's reliance on another circuit is curious in light of the more direct support provided by *Eldridge v. Mathews*. In *Eldridge*, the claimants fulfilled the prerequisite by taking action similar to that of the *Lopez* plaintiffs. *Lopez* and *Eldridge* were, thus, analogous challenges to the constitutionality of an administrative procedure. Despite the failure of the court of appeals to rely on it, *Eldridge* plainly authorized its conclusion in *Lopez* that the nonwaivable element of jurisdiction had been satisfied.

The court found several grounds on which to premise its finding that the waivable requirements had also been met. First, the refinement of *Salfi* by *Eldridge* supported the district court's conclusions: “It would have been futile to require plaintiffs to pursue administrative remedies in the face of the Secretary's announced policy of nonacquiescence.” The court excused exhaustion of administrative remedies under the circumstances. Second, the plaintiffs made a constitutional attack on the Secretary's nonacquiescence. The Secretary had made up her mind and was unlikely to consider substantial changes “at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context.” The court, therefore, excused exhaustion of administrative remedies. Finally, even if the claim had been statutory rather than constitutional the court excused exhaustion because the Secretary had taken a final position with regard to procedures for redetermining eligibility.

The Secretary argued that many class members had not met the

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110. *Id.*
111. *Id.* (citing Ellison v. Califano, 546 F.2d 1162, 1164 (5th Cir. 1977)). In *Ellison* a benefits claimant asserted the unconstitutionality of an administrative rule that caused a couple who had separated to be treated as married for six months after the separation. The appellate court found that under these circumstances exhaustion of administrative remedies was not required. *Ellison*, 546 F.2d at 1164.
113. *Id.* at 329. See infra note 181 for explanation of the procedure.
114. See supra notes 19-24, 58-64 and accompanying text.
115. *Lopez*, 713 F.2d at 1439.
116. *Id.*
117. *Id.*
118. *Id.* at 1440.
119. *Id.* at 1439 (quoting *Eldridge*, 424 U.S. at 330).
120. *Id.* at 1439-40.
121. *Id.*
statutory requirement of appealing the agency's termination finding within sixty days. Ordinarily, failure to make a timely appeal would render the initial judgment res judicata as to future proceedings. Judge Reinhardt cited language in Salfi and Eldridge that the court would deem a res judicata claim waived if not reopened by the agency. Even though the barren record in Lopez suggested a waiver, Judge Reinhardt rejected the Secretary's reliance on administrative res judicata. He based his rejection on a Supreme Court dictum to the effect that "the administrative res judicata bar is ordinarily not applied when an agency's decision is challenged on constitutional grounds." A close reading of Califano v. Sanders, the quoted decision, however, reveals that the court referred to the agency decision to waive the statute of limitations not the decision to terminate the plaintiff. No claim was made in Lopez that the Secretary unconstitutionally applied administrative res judicata. An administrative bar of an untimely claim would normally not be reversible even if, as in Lopez, the underlying claim for benefits was based on the Constitution. The circuit court's application of Sanders to the Lopez claim, therefore, was inappropriate.

The appellate court then took pains to distinguish a recent court of appeals holding. In Smith v. Schweiker the Second Circuit reversed a district court's finding that it had jurisdiction in a termination class action case. The plaintiffs in Smith, as well as those in Lopez, argued that procedures such as those mandated by Patti and Finnegan had not been followed. The Ninth Circuit Court of Appeals in Lopez distinguished Smith because no constitutional question had been raised and none of the named plaintiffs had exhausted their administrative remedies. The Lopez court found, therefore, that, while the Secretary "may have raised 'serious legal questions', she had failed to make a showing of probability of success on the merits."
C. Justice Rehnquist Grants a Stay in His Capacity as Circuit Justice for the Ninth Circuit

Within days, Circuit Justice Rehnquist temporarily stayed the implementation of part of the injunction so the court could consider the appeal. He found that the Secretary’s request required staying “the portion . . . which requires her to pay benefits to all applicants until she establishes their lack of disability through hearings complying with Patti and Finnegan.” He found three guidelines by which to make the decision: (1) whether four justices would vote to grant certiorari; (2) whether the “stay equities” would tip in the plaintiff’s or defendant’s favor; and (3) what the final outcome of the claim would likely be. He noted that petitioners ordinarily ask for a stay only so they can be given time to ask the Court for certiorari. Justice Rehnquist found, however, that the unusual circumstances that gave rise to the Lopez petition enabled him to stay a district court injunction so that an appeal could be made to a circuit court.

Circuit Justice Rehnquist first attacked the scope of the districts court’s order. He acknowledged that four Justices would be unlikely to grant certiorari on the propriety of the Patti and Finnegan guidelines and that no conflict over these criteria existed among the circuits. The propriety of the guideline, an issue of statutory interpretation, was not the issue. The issue was whether the Ninth Circuit Court of Appeals rule of law once declared must be applied in subsequent cases. The plaintiffs presented a claim which the district and circuit courts denominated constitutional. Justice Rehnquist, on the other hand, expressed himself troubled by the injunction’s “mandatory nature, its treatment of . . . exhaustion of administrative

I concur completely in Judge Reinhardt’s opinion. I write separately only to emphasize my concern over the Secretary’s avowed policy of nonacquiescence with Ninth Circuit law as enunciated in Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982), and Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981). The Secretary’s ill-advised policy of refusing to obey the decisional law of this circuit is akin to the repudiated pre-Civil War doctrine of nullification whereby rebellious states refused to . . . recognize certain federal laws within their boundaries. . . . The government expects its citizens to abide by the law — no less is expected of those charged with the duty to faithfully administer the law.

Id. at 1441.

134. Lopez, 104 S. Ct. 10 (Rehnquist, Circuit Justice 1983).
135. Id. at 12.
136. Id.
137. Id.
138. Id. at 13-16.
139. Id. at 13-14.
140. Id. at 12.
remedies . . . and its direction to the Secretary to pay benefits on an interim basis to parties who have neither been found by the Secretary nor by a court of competent jurisdiction to be disabled." He found that such an injunction "significantly interferes with the distribution between administrative and judicial responsibility for enforcement of the Social Security Act." He argued that the seriousness of the legal questions meant that he did not have to consider the stay equities.

Circuit Justice Rehnquist used two guidelines in his analysis: first, the teaching of Salji required the exhaustion of administrative remedies; and, secondly, FPC v. Transcontinental Pipeline Corp. required that the scope of judicial review of such administrative determinations be narrow. Notwithstanding his concession that the propriety of the administrative guidelines was not the issue, he appears to be saying that courts should not interfere with the administrative process. He found that a court would need strong grounds for "determining that additional evidence is requisite for adequate review . . . [and that it could not] proceed by dictating to the agency the methods, procedures and the time dimension of the needed inquiry." The reasoning would especially hold true when the only action any class member has to take to force the government to pay would be to assert "his subjective belief [that] his medical condition has not improved since the earlier determination." The analysis makes sense if the issue is the propriety of the termination guidelines. If the issue is nonacquiescence, however, the analysis is irrelevant. Justice Rehnquist's analysis bore on whether the termination guidelines were proper not on whether a circuit court's finding that they were not should have been followed.

Justice Rehnquist next scrutinized the issue of exhaustion of administrative remedies. He found that some class members had not met the nonwaivable requirement of presenting a claim for benefits and that other class members had failed to meet the waivable requirement of exhausting their administrative remedies. He held that, under Salji, only the Secretary could determine if further pursuit of adminis-

141. Id.
142. Id.
143. Id.
146. Id. (quoting FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333, (1976)).
147. Id. at 14.
148. Id.
trative remedies would be futile and in doing so, he ignored the subsequent softening of the language in *Eldridge*. He admitted that the appellate court's decision in *Ringer* excused exhaustion if the Secretary had taken a "final position," but he pointed out that certiorari had been granted in *Ringer* to review that holding. Because of these conclusions, only the constitutional nature of the claim remained to justify the waiver of the waivable requirement.

Justice Rehnquist acknowledged that *Eldridge* excused exhaustion when a constitutional claim was made, but stated that the *Lopez* claim did not necessarily meet this requirement merely by being labeled "constitutional." He found that the Secretary's failure to provide predetermination hearings in *Eldridge* raised a constitutional question while the claim in *Lopez* only concerned an insufficient evidentiary showing and was, therefore, not constitutional in nature. He could draw this distinction only because he ignored the nonacquiescence claim of the plaintiffs.

Justice Rehnquist found the mandatory nature of the circuit court's injunction objectionable. Arguably, that class members either still were or previously had been receiving benefits showed that they sought a prohibitory (which would maintain the status quo), rather than mandatory (which would command new action) injunction. He found that because of the injunction's mandating nature, the court's power to grant relief did not extend to plaintiffs. He noted that the Supreme Court granted certiorari in *Heckler v. Day* to review a lower court order that the Solicitor General pay interim benefits to all class claimants while the Secretary made an initial determination of their eligibility. Justice Rehnquist argued that *Lopez* presented an analogous situation but neglected to mention that the claimants in *Day*, unlike those in *Lopez* had not previously been collecting benefits.

Justice Rehnquist accepted the lower court's finding that the eq-

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149. *Id.*
150. 424 U.S. at 328.
153. *Id.* at 14.
154. *Id.* at 15.
155. *Id.* at 12.
156. *Id.* at 15.
159. *Id.* at 15.
160. *Id.* *But see Day*, 685 F.2d at 21.
uities favored the plaintiffs. He stated that the manner in which the district court sought to remedy the situation caused him to stay the injunction. In other words, relief for individuals who had been terminated would be appropriate if they had presented a claim and exhausted their administrative remedies but class wide injunction relief would be too intrusive an action for a district court to take unless all class members met strict jurisdictional requirements. These considerations apparently overwhelmed the merits of the nonacquiescence claim. They left, however, hundreds of thousands of eligible individuals, whose nonacquiescence claim would never be reviewed, without benefits.

D. The Supreme Court Affirms the Stay

Despite this glaring problem, five Justices denied, without comment, the plaintiffs' application to vacate Justice Rehnquist's stay. Justice Stevens was joined by Justice Blackmun in his partial dissent. Justice Stevens noted that some class members had received a final determination and had sought judicial review within sixty days. The stay, he urged, should not have applied to them. He maintained that these members had satisfied both the waivable and the nonwaivable prerequisites because, after termination, they each had returned a questionnaire in which they had claimed continued disability. This action, in addition to the fact that "their benefits had been

161. Lopez 104 S. Ct. at 15.
162. Id.
163. Id.
164. Id.
166. Id. at 221-25, (Stevens, J., dissenting).
167. Id. at 222 (Stevens, J., dissenting).
168. Id. at 223 (Stevens, J., dissenting).
169. Id.; see Appellees-Respondents' Memorandum in Support of Emergency Application to Vacate Stay at 10 n.11, Lopez v. Heckler, 104 S.Ct. 10 (Rechquist, Circuit Justice 1983). The steps a claimant takes are as follows:

The procedure starts with the recipient's completion of a questionnaire which asks, among other things, whether the recipient or the treating physician believes the recipient can work. Following the state agency's review process, a tentative determination letter is sent with an invitation to submit additional evidence if available prior to the final determination. The notice terminating disability benefits, if any, follows final review of the case, including any additional evidence. The only recent change is the requirement of a face-to-face interview with the recipient at the local Social Security district office at which time the Social Security worker assists the recipient complete a questionnaire.

Id.
terminated on the basis of a regulation that [was] assumed for the pur­
poses of this proceeding to be invalid,”170 satisfied the non-waivable
requirement.171 Plaintiffs had met the waivable precondition because
the Secretary had taken a final position and, therefore, further admin­
istrative appeals would have been futile.172 Under these circumstances,
Justice Stevens reasoned, the Court in Diaz had found that “this ele­
ment may be deemed waived even over the Secretary’s objections.”173
Justice Stevens felt it made no difference whether the claim were con­
stitutional or not.

Justices Brennan and Marshall also dissented.174 They stated that
the equities so strongly favored the plaintiffs that regardless of ques­
tionable legal issues the stay should have been vacated.175 Justice
Brennan noted that if the full Court were considering the injunction
rather than the stay, he might have agreed with most of Justice Ste­
vens's analysis, but he did not believe it was presently necessary “to
provide further support for the conclusion reached by the Court of
Appeals,”176 particularly because the appellate court’s opinion
“clearly explained why the beneficiaries . . . satisfied the jurisdic­tional
requirements of 42 U.S.C. §§ 405(g) and . . . (h).”177 Brennan was
the only Justice to mention nonacquiescence: “[I]t is the Secretary
who has not paid due respect to a coordinate branch of government
[by] expressly refusing to implement the binding decision of the Ninth
Circuit.”178

III. Analysis

The issues presented in Lopez have produced multifaceted and
often contradictory judicial responses.179 All judges who have consid­
ered the nonacquiescence claim, however, appear to agree that it has
merit.180 Justice Rehnquist’s decision to review the injunction in­
dependent of the merits of the nonacquiescence claim181 is one critical

170. Lopez, 104 S. Ct. at 223 (Stevens, J., dissenting).
171. Id. at 224 (Stevens, J., dissenting).
172. Id. (Stevens, J., dissenting).
173. Id. (Stevens, J., dissenting) (citing Diaz, 426 U.S. at 75-77).
174. Lopez, 104 S.Ct. at 225 (Brennan, J., dissenting).
175. Id. (Brennan, J., dissenting).
176. Id. at 226 (Brennan, J., dissenting).
177. Id. (Brennan, J., dissenting).
178. Id. at 226-27 (Brennan, J., dissenting).
179. Lopez, 713 F.2d at 1440. But see 104 S.Ct. at 221.
180. Lopez, 713 F.2d. at 1436; Lopez, 104 S.Ct. at 14 (Circuit Justice Rehnquist ac­
cepted for the purposes of this motion that the claim had merit). Lopez, 104 S.Ct at 223,
(Stevens, J., dissenting); Lopez, 104 S.Ct. at 226 (Brennan, J., dissenting).
181. 104 S.Ct. at 12.
element that sets Justice Rehnquist and the four Justices\footnote{See \textit{supra} note 177.} who, in \textit{Lopez}, supported his stay apart from the remaining Justices and judges who have issued rulings in this case. The refusal to consider the merits of the nonacquiescence claim is neither legally nor logically sound. \textit{Schmidt v. Lessard}\footnote{414 U.S. 473 (1974).} provides the sole source of authority for not balancing the equities among the litigants. Under a balancing theory the choice lies between the excess cost the government would incur when individuals who should not be collecting benefits receive them and the harm termination might visit on those who are cut off unjustly because of the government’s nonacquiescence.\footnote{\textit{Lopez}, 713 F.2d at 1436.} In \textit{Schmidt}, a court granted injunctive relief to a class of individuals over eighteen years old involuntarily committed to mental institutions in Wisconsin.\footnote{414 U.S. at 473-74.} The injunction did not specify the form of relief mandated.\footnote{\textit{Id.} at 476.} The defendant could not determine how to comply; therefore, the injunction violated the specificity requirement of the Federal Rules of Civil Procedure.\footnote{Id. Fed. R. Civ. P. 65. Rule 65 in relevant part provides: “Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail; and not by reference to the complaint or other document, the act or acts sought to be restrained.” \textit{Id.}} The \textit{Lopez} injunction is specific.\footnote{See \textit{supra} note 12.} The problem presented by \textit{Schmidt}, therefore, is not applicable in these circumstances. Perhaps Justice Rehnquist meant that \textit{Schmidt} stands for the broader proposition that injunctions could generally be scrutinized without reaching the merits of the claim. This theory draws no support from the short \textit{Schmidt} opinion which focused only on the importance of specificity in an injunction.\footnote{Id. at 473-77.} The opinion gives no hint of any broader pretentions. Moreover, when the mandate of an injunction is arguably unclear, one questions the sufficiency of the clarity of its contents not why it was issued.\footnote{Id. at 477. The precise language of the Court is; “[W]e can hardly begin to assess the correctness of the judgment entered by the district court here without knowing its precise bounds.” \textit{Id.}} If the mandate is clear, however, then the scrutiny should focus on the legal merits of that mandate.

Justice Rehnquist also considered it significant that the injunction required the Secretary to initiate monetary payments.\footnote{\textit{Lopez}, 104 S.Ct. at 13.} His distinc-
tion between prohibitory and mandatory injunctions\(^1\) implies that he might accept an order that required the Secretary to keep paying rather than to start paying benefits. He cited *Heckler v. Day*\(^2\) for the proposition that the Court frowns on an injunction that requires the payment of interim benefits in similar circumstances.\(^3\) The plaintiffs in *Lopez*, however, had been receiving benefits prior to their terminations\(^4\) while the plaintiffs in *Day* had never received benefits.\(^5\) The circumstances of the two cases are, therefore, significantly different. Thus, the distinction between a prohibitory and a mandatory injunction breaks down.

For the purposes of the motion to stay, Justice Rehnquist accepted that all members of the class had once been judged disabled by a government agency and subsequently illegally terminated without the production of new evidence.\(^6\) He faulted the district court’s injunction, however, because it allowed only the recipients’ “subjective belief” to entitle them to injunctive remedy.\(^7\) Justice Rehnquist apparently considered only the period after termination and, thus, ignored the totality of the circumstances. Most fundamentally, he disregarded the fact that the Secretary’s basis for termination was an evidentiary standard previously held illegal by the court of appeals.

Justices Stevens and Brennan and the lower court judges share the virtue of permitting the plaintiff’s nonacquiescence claim to be addressed.\(^8\) Despite their difference all appear to have been affected by the equitable strength of the plaintiff’s position. Perhaps this accounts for their willingness to inquire into the merits of the nonacquiescence claim. But in order to reach the merits these judges had to dispose of the *Salfi* problems raised by Justice Rehnquist. Recall that Justice Rehnquist’s analysis grappled primarily with three questions: (1) whether the plaintiffs presented claims for benefits (2) whether the nature of their claims was such that the exhaustion of administrative remedies could be excused and (3) whether the sixty day statute of

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1. Id. A mandatory injunction is one that orders the start of some activity. A prohibitory injunction is one that commands the maintenance of the status quo. *Id.*
4. 713 F.2d at 1434.
5. 685 F.2d. at 21.
7. *Id.* at 14.
limitation requirement applied to members of the class.\textsuperscript{200} The remainder of this note will sketch a different approach to these questions, one that is sensitive to the separation of powers concerns of \textit{Salfit} without allowing these concerns to frustrate judicial review of the important issue of agency non-acquiescence.

\section*{A. Claim for Benefits: The Nonwaivable Element}

\textit{Ellison v. Califano}\textsuperscript{201} arguably provides support for the appellate court's finding that the nonwaivable claim for benefits requirement had been met.\textsuperscript{202} In \textit{Ellison}, the court said: "In the context of this case, a claim for benefits was presented to the Secretary \textit{automatically} when the SSI recipient reported a separation from an eligible spouse."\textsuperscript{203} The Supreme Court has never approved an "automatic" claim theory.\textsuperscript{204} Because \textit{Ellison} represented a challenge to the constitutionality of a statute and \textit{Lopez} a challenge to the constitutionality of a procedure, the latter arguably does not arise in the context to which the \textit{Ellison} court limited its holding. The Ninth Circuit Court of Appeals could have found stronger support for its position from \textit{Eldridge}. Both \textit{Eldridge} and \textit{Lopez} challenged the constitutionality of the Secretary's procedures.\textsuperscript{205} The \textit{Eldridge} Court found that the plaintiff's response to a questionnaire sent out to recipients by the Secretary satisfied the nonwaivable request for benefits requirement.\textsuperscript{206} The plaintiffs in \textit{Lopez} filled out an almost equivalent questionnaire.\textsuperscript{207} Thus, \textit{Eldridge} rather than \textit{Ellison} provided the appellate court with stronger grounds for finding that the plaintiffs had satisfied the nonwaivable request for benefits prerequisite.

Justice Stevens, in partial dissent to \textit{Lopez}, relied on \textit{Eldridge}, not \textit{Ellison}.\textsuperscript{208} Justice Powell, the author of the \textit{Eldridge} opinion, supported Justice Rehnquist's stay.\textsuperscript{209} This may reflect a change of position on Justice Powell's part or he may have merely been deferring to

\begin{thebibliography}{99}
\bibitem{200} 713 F.2d 1432 (9th Cir.), \textit{stay granted}, 104 S.Ct. 10 (Rehnquist, Circuit Justice), \textit{stay affirmed}, 104 S.Ct. 221 (1983). Justice Rehnquist does not reach the statute of limitation issue in granting the stay, 104 S.Ct. at 10-15. Justice Stevens does not explicitly say a class action is appropriate but it is implied in his decision. \textit{See id. at} 221-25 (Stevens, J., dissenting).
\bibitem{201} 546 F.2d 1162 (5th Cir. 1977).
\bibitem{202} \textit{See supra} notes 125-28 and accompanying text.
\bibitem{203} 546 F.2d at 1164 (emphasis in the original).
\bibitem{204} \textit{Lopez}, 104 S.Ct. at 14 (Rehnquist, Circuit Justice 1983).
\bibitem{205} \textit{See supra} notes 58-64 and accompanying text.
\bibitem{206} 424 U.S. at 332.
\bibitem{207} \textit{See supra} note 173 and accompanying text.
\bibitem{208} 104 S.Ct. at 223 (Stevens, J., dissenting).
\bibitem{209} \textit{Id. at} 221.
\end{thebibliography}
the Circuit Justice's opinion in granting the *Lopez* stay. In either case, the theory of *Lopez* is that a recipient has to do more than fill out a questionnaire stating that he/she is still entitled to benefits.

This result is not only inconsistent with the Supreme Court's previous holding in *Eldridge*, it is wholly impractical. The district court noted that many *Lopez* litigants would have trouble protecting their rights because of their disabilities.\(^{210}\) It is reasonable to assume that many would do no more than fill out the questionnaire. Apparently, under the majority view, they would be unsuccessful if they later fought the termination of their benefits. Nonacquiescence, therefore, coupled with the Supreme Court's ruling in *Lopez*, might severely limit the number of eligible individuals who eventually would have their benefits reinstated. If the use of nonacquiescence effectively reduces the total number of recipients, a desire to cut costs could result in its repeated use.

The manner in which benefit termination occurs may also lower the percentage of recipients who meet the request for benefits constraint. If the department informs individuals that new evidence compels the cessation of their benefits, they are likely to contest evidence they think is false. The same individuals, told that a *procedural* change in the way evidence is considered will result in a benefit termination, may fail to act. A procedural change is external to the claimant. The individual may feel powerless to act because the change has nothing to do with the person's condition. When procedural changes bring about termination, therefore, demanding more than a response to the questionnaire will further limit the scope of the certified class. Deserving individuals may lose their benefits.

**B. Exhaustion of Administrative Remedies: the Waivable Element**

The class would be further constricted if the standard required exhaustion of administrative remedies as to all class members. The majority who supported Justice Rehnquist's stay may not still agree\(^ {211} \) with the language of *Salfi*\(^ {212} \) that the Secretary had the sole discretion to determine when further appeals would be futile.\(^ {213} \) This interpretation may possibly revitalize this power of the Secretary. As noted in the introduction to this note, the Court appeared to retreat from the


\(^{211}\) *See* *Lopez*, 104 S.Ct. at 221.

\(^{212}\) *Salfi*, 422 U.S. at 749 (1975).

\(^{213}\) *Id.* at 766.
conclusion in *Eldridge*:

"A claimant's interest to have a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." The judiciary need not defer if further administrative action could not possibly settle the claim. The *Lopez* plaintiffs' challenge to the Secretary's nonacquiescence could not possibly have been settled through further administrative appeals because the Secretary had directed her administrative law judges not to acquiesce in the *Patti* and *Finnegan* holdings. The language of *Eldridge* rather than the language of *Salfi* should govern the *Lopez* claim.

Justice Stevens might have been seeking a middle ground. He approved an award of interim benefits, but on a statutory rather than a constitutional basis. In other words, if the Secretary's procedural instructions render further appeals futile, then even if the Secretary's action raises no constitutional issue, she has taken a final position. Once the Secretary has taken a final position, the Supreme Court's *Diaz* decision excuses further administrative appeals. Professor Goldstein has argued that the court held that "[a]s to the waivable element, the Court held that a final decision had been made within the meaning of Section 405(g) despite the secretary's protestation to the contrary since he had conceded the absence of factual issues and that the applications had or would be denied because of the challenged statutory provisions."

Unlike *Lopez*, however, *Diaz* concerned a constitutional challenge to a statute not to the implementation of new regulations for carrying out an unchallenged statute. Professor Goldstein acknowledges, however, that "it can be argued that the final decision requirement should be approached differently when legal issues arise out of the regulations . . . [M]uch more deference should be accorded the Secretary when the legality of regulations is at issue." The distinction between an attack on the Secretary's procedures and a substantive constitutional challenge to a statute argues against the application of the *Diaz* decision to a constitutional challenge, but in other circumstances, the *Diaz* decision might apply.

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215. Id. at 330.
216. 669 F.2d 582 (9th Cir. 1982).
217. 641 F.2d 1340 (9th Cir. 1981).
218. 104 S.Ct. at 221 (Stevens, J., dissenting).
219. Id. at 223.
221. Id. at 70.
223. See supra notes 69-75.
holding to *Lopez*. Again, the holding of *Eldridge* excusing further futile administrative action appears more appropriate, because *Eldridge* and *Lopez* are both attacks on the constitutionality of procedures adopted by the Secretary.

Perhaps Justice Stevens relied on *Diaz* rather than *Eldridge* to support his dissent to the *Lopez* stay. If he could convince Justice Powell that his stance corresponds more consistently with one of Powell’s earlier decisions, Justice Stevens might garner the fifth vote he needs to support his position. Because Justice Powell was the author of the *Eldridge* decision, however, he may be more likely to apply *Eldridge* rather than *Diaz* to an analogous situation.

Even if the basis for the *Lopez* claim were merely statutory, the Court should still reach the merits of the Secretary’s policy of nonacquiescence. If the court decides in the claimant’s favor, it would read the Social Security Act to require the Secretary to follow its interpretation of particular provisions of that act. Both *Eldridge* and Justice Stevens’ interpretation of *Diaz*, thus, authorize the Court to address the legality of the policy of the Secretary that gave rise to the nonacquiescence claim, whether as a statutory claim or a constitutional matter. By utilizing statutory rather than constitutional analysis, Justice Stevens hurdles *Salfi* and addresses nonacquiescence.

In *Lopez*, the district and appellate courts concluded that plaintiffs raised a constitutional claim. According to Justice Stevens, they might have succeeded with merely a statutory challenge: apparently, however, they presented a constitutional claim. They did not necessarily say, “We are entitled to benefits,” but rather, “We are entitled to have our benefits reviewed according to rules of law mandated by the Ninth Circuit Court of Appeals.” The plaintiffs charged that the Secretary unconstitutionally refused to acquiesce in this rule of law and that she therefore denied them due process and violated separation of powers by terminating their benefits. The district court determined only that the *Lopez* claimants were entitled to benefits until their cases could be screened under the *Patti* and *Finnegan* criteria: if the agency “conclude[s] that such person’s medical condition has im-

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225. Justice Powell is the author of the *Eldridge* decision. The actions of the plaintiffs in *Lopez* are virtually equivalent to the actions of the plaintiffs in *Eldridge*. See supra note 185 and accompanying text.
228. 713 F.2d at 1432 (1983).
proved and he or she is no longer disabled, [it] will identify the evidence relied upon to reach the conclusion."231 Even if sufficient evidence were presented, therefore, class members might still be terminated. Perhaps the Supreme Court remains reluctant to screen evidence presented at administrative hearings. A difference exists, however, between scrutinizing the rules of evidence and reviewing the evidence itself. If the Secretary can employ illegal evidentiary rules, she accrues broad powers to immunize her activities from judicial review. Such rules can be applied to many statutes. The Lopez stay suggests that the Supreme Court is willing to examine only the outcome produced by such rules in particular individual cases, thus effectively leaving the rules of evidence themselves free from judicial scrutiny. The Court serves neither the spirit nor the substance of the Constitution by this approach.

C. Statute of Limitations

If a claimant does not appeal the Secretary's final decision in sixty days to the district court, the ruling is res judicata in all subsequent claims.232 Yet the class the district court certified included individuals who had not made a timely appeal.233 The court of appeals concluded that the Supreme Court in Salfi234 and Eldridge235 had determined that the statute of limitations was "waivable by the parties and not having been timely raised below . . . need not be considered here."236 The court of appeals cited a second ground to deem the requirement waived: "In any event the administrative res judicata bar is ordinarily not applied when the agency's decision is challenged on constitutional grounds."237 Justice Rehnquist did not discuss this issue in his stay order, but Justice Stevens correctly rejected the argument.238 A court may review constitutional challenge to the agency's decision to apply the sixty day statute of limitations.239 A court may not review the application of the statute of limitations, however, just because the underlying claim against the Secretary is constitutional in nature.

In Califano v. Sanders, the Court implied that a constitutional

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231. Id. at 32.
232. Lopez, 713 F.2d at 1440.
233. Lopez, 572 F. Supp. at 31-32. See also Lopez, 104 S.Ct. at 222 (Stevens, J., dissenting).
234. 422 U.S. at 763-64.
235. 424 U.S. at 328 n.9.
236. Lopez, 713 F.2d at 1440.
237. Id.
challenge to the application of the sixty day statute of limitations would be justiciable. The plaintiffs might make a stronger claim if they were to maintain that claimants were not likely to know that they could appeal a change in administrative procedure. Claimants might assert that the Secretary had given them insufficient notice under the circumstances. While the fate of the argument before the Supreme Court is uncertain, it would more closely meet the reviewability requirements of Sanders.

IV. CONCLUSION

The heart of the problem for the Lopez litigants is the Court's refusal to acknowledge the constitutional issue of nonacquiescence. The Court's reluctance may reflect the complex political setting in which the doctrine is employed. The Supreme Court may also fear that courts would unnecessarily encumber agencies by dictating procedures. The Court's hesitancy is understandable, but as a result hundreds of thousands of Lopez v. Heckler claimants, none found ineligible under the applicable Social Security Act standards set out in Patti and Finnegan, remain without the support many of them need to survive. Furthermore, the Court's refusal to reach the issue encourages nonacquiescence, thus making an ultimate confrontation more likely.

Whether there can be judicial review of the Secretary's policy of

240. Id.
241. This, in effect, is making a constitutional argument of improper notice.
242. Outside the tax arena the doctrine of nonacquiescence was articulated by the National Labor Relations Board as early as 1953. Morand Bros. Beverage Co. v. NLRB, 204 F.2d 529 (7th Cir. 1953). The court rejected its validity, id. at 533, but the case was not appealed. The position of the NLRB was that only the Supreme Court could alter its rulings. Id. The Third Circuit Court of Appeals found the NLRB's repeated resort to this tactic illegal: "[O]ur judgments . . . are binding on all inferior courts and litigants in the . . . district, and also on administrative agencies. . . . For the board to predicate an order on its disagreements with this court's interpretation of a statue is for it to operate outside the law." Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979). The plaintiffs in the above two cases were companies appealing what they considered to be pro-union decisions. In Lopez, the agency arguably is using nonacquiescence as a sword to terminate the rights of those it is charged with protecting. In the NLRB setting, the agency used the doctrine to shield the rights of those in its charge. A determination of the constitutionality of nonacquiescence would have farreaching effects because it might affect the functioning of many administrative agencies, such as the Federal Trade Commission, Internal Revenue Service, Occupational Safety and Health Administration and the Environmental Protection Agency to name a few.

nonacquiescence is the fundamental issue presented by *Lopez*. If *Patti* and *Finnegan* had been followed, none of the *Lopez* plaintiffs would have lost benefits as a result of the application of illegal standards. The first circuit-wide determination that the agency had employed such standards would redound to the benefit of all claimants. When nonacquiescence is added, however, the result of the first claimant's case would have no effect on other claimants. The difference argues for broad class-wide relief, but instead the Court has applied jurisdictional barriers that limit class membership.\(^{243}\) The result "represent[s] a classic elevation of form over substance."\(^{244}\)

Robert Meeropol

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