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The Constitutional Case Against Intracircuit Nonacquiescence

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INTRODUCTION

A cornerstone of the United States Constitution is its separation of powers among the legislative, executive, and judicial branches of the national government.[1] The Framers of the Constitution reasoned that separated powers would guard against tyranny by blocking the undue concentration of authority in any single governmental department.[2] In crafting the Constitution, however, the Framers could not anticipate every dispute their scheme of separated powers might engender.[3] One modern separation-of-powers conflict not specifically anticipated by the constitutional text involves so-called "intracircuit nonacquiescence."[4]

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1. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 120 (1976) (per curiam) (recognizing "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another").

2. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 951 (1983).

3. *See infra* note 71.

4. Although the Framers did not record a discussion of the intracircuit-nonacquiescence issue, there is no dearth of commentary by modern-day analysts. A recent and provocative exchange of views appears in: Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) [hereinafter Estreicher & Revesz I]; Diller & Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher & Revesz*, 99 YALE L.J. 801 (1990); and Estreicher & Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990) [hereinafter Estreicher & Revesz II]. Other significant articles are: Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399 (1989) (discussing intracircuit nonacquiescence in terms of statutory reform); Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986) (discussing issues raised by intracircuit nonacquiescence but not proposing proper legal analysis), and Schwartz, *Nonacquiescence*, Crowell v. Benson, *and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989) (critiqued *infra* notes 97-151 and accompanying text). Other treatments of intracircuit nonacquiescence include: Fallon, *Social Security and Legal Precedent*, CASE & COM., Mar.-Apr. 1984, at 3; Heaney, *Why*

Intracircuit nonacquiescence occurs when executive-branch

the High Rate of Reversals in Social Security Disability Cases?, 7 HAMLINE L. REV. 1, 8-11 (1984); Kuhl, *The Social Security Administration's Nonacquiescence Policy*, 1984 DET. C.L. REV. 913; Weis, *Agency Non-acquiescence — Respectful Lawlessness or Legitimate Disagreement*, 48 U. PITT. L. REV. 845 (1987); Williams, *The Social Security Administration's Policy of Non-acquiescence*, 12 N. KY. L. REV. 253 (1985); Note, *Social Security Administration in Crisis: Non-acquiescence and Social Insecurity*, 52 BROOKLYN L. REV. 89, 93-133 (1986) [hereinafter BROOKLYN Note]; Note, *"Respectful Disagreement": Nonacquiescence by Federal Administrative Agencies in United States Courts of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463 (1985) [hereinafter COLUM. J. Note]; Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985) [hereinafter COLUM. REV. Note]; Comment, *Social Security Continuing Disability Reviews and the Practice of Nonacquiescence*, 16 CUMB. L. REV. 111, 116-20 (1985) [hereinafter CUMB. Comment]; Note, *Administrative Nonacquiescence in Judicial Decisions*, 53 GEO. WASH. L. REV. 147 (1985) [hereinafter GEO. WASH. Note]; Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847, 854-61 (1986) [hereinafter HARV. Note]; Note, *The Social Security Administration's Policy of Nonacquiescence*, 62 IND. L.J. 1101 (1986) [hereinafter IND. Note]; Note, *Federal Agency Nonacquiescence: Defining and Enforcing Constitutional Limits on Bad Faith Agency Adjudication*, 38 ME. L. REV. 185 (1986) [hereinafter ME. Note]; Note, *Executive Nonacquiescence: Problems of Statutory Interpretation and Separation of Powers*, 60 S. CAL. L. REV. 1143 (1987) [hereinafter S. CAL. Note]; Note, *Government Nonacquiescence Case in Point: Social Security Litigation*, 2 TOURO L. REV. 197 (1986) [hereinafter TOURO Note]; Note, *Agency Nonacquiescence: Implementation, Justification and Acceptability*, 42 WASH. & LEE L. REV. 1233 (1985) [hereinafter WASH. & LEE Note]; Note, *Nonacquiescence: Health and Human Services' Refusal To Follow Federal Court Precedent*, 63 WASH. U.L.Q. 737 (1985) [hereinafter WASH. Note]; Note, *Denying the Precedential Effect of Federal Circuit Court Decisions: Nonacquiescence by Administrative Agencies*, 32 WAYNE L. REV. 151 (1985) [hereinafter WAYNE Note]; *see also Judicial Review of Agency Action: HHS Policy of Nonacquiescence, Oversight Hearings Before the Subcomm. on Administrative Law & Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) [hereinafter *Oversight Hearings*]; *Social Security Disability Insurance Program: Hearing Before the Senate Finance Comm.*, 98th Cong., 2d Sess. 57, 105-07 (1984) [hereinafter *Social Security Hearing*] (statement of Martha McSteen, Acting Commissioner, SSA); *id.* at 113-25 (statement of Carolyn Kuhl, Assistant Attorney General); FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 59-60 (1990) [hereinafter COMMITTEE REPORT]; 1 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 324-27 (1990) [hereinafter COMMITTEE WORKING PAPERS]; Administrative Conference of the United States, Transcript of Proceedings of the Twenty-Seventh Plenary Session 39-94 (Sept. 16, 1988) [hereinafter Conference Transcript] (on file with author).

The special problems of nonacquiescence by the National Labor Relations Board in administering the National Labor Relations Act, *see infra* text accompanying notes 24-25, are considered in Dotson & Williamson, *NLRB v. The Courts: The Need For an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739 (1987); Ferguson & Bordoni, *The NLRB vs. The Courts: The Board's Refusal to Acquiesce in the Law of the Federal Circuit Courts of Appeals*, 35 N.Y.U. ANN. NAT'L CONF. LAB. LAW 195 (1983); Kafker, *Nonacquies-*

decision makers refuse to follow a circuit court's precedents even when acting subject to that circuit's, and no other circuit's, power of judicial review.[5] The Social Security Administration (SSA), for example, long has insisted that it may direct agency adjudicators to apply SSA national standards, rather than local circuit court interpretations of governing statutes, absent a contrary court order in a particular claimant's case.[6] Judges have chafed at this practice, decrying agency disregard of a supervisory circuit court's precedent as defiance of the judicial power "to say what the law is."[7] Executive officials, on the other

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cence by the NLRB: Combat Versus Collaboration, 3 LAB. LAW. 137 (1987); Mattson, *The United States Circuit Courts and the NLRB: 'Stare Decisis' Only Applies if the Agency Wins*, 53 OKLA. B.J. 2561 (1982); Modjeska, *The NLRB Litigation Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399 (1988); Silver & McAvory, *The National Labor Relations Act at the Crossroads*, 56 FORDHAM L. REV. 181 (1987); White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C.L. REV. 639 (1991); and Zimmerman & Dunn, *Relations Between the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation*, 8 EMP. REL. L.J. 4 (1982-1983).

This Article seeks to avoid plowing old ground covered in the existing literature. For this reason, the Article provides only essential background information, *see infra* Parts I-II, critiques existing work, *see infra* Part III, and propounds a fresh approach to the intracircuit-nonacquiescence problem, *see infra* Parts IV-VII.

5. A more elaborate definitional exegesis appears *infra* Part I.

6. The SSA's practices are detailed in many of the authorities cited *supra* note 4. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 692-99. Notably, the SSA in recent years has moved away from the strictest forms of intracircuit nonacquiescence. *See infra* notes 502-03 and accompanying text. Even in doing so, however, the agency has rejected the position that "any acquiescence policy . . . is legally compelled." Proposed Rule for Application of Circuit Court Law, 53 Fed. Reg. 46,630 (1988); *see* IND. Note, *supra* note 4, at 1109 (noting that SSA change of policy entailed no concession that prior policy was unlawful).

7. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). An illustrative case — using this *Marbury*-based reasoning and also collecting other decisions invoking this rationale — is Aldrich v. Heckler, 1985 Unempl. Ins. Rep. (CCH) ¶ 16,369, 2499-306, 2499-317 (D. Vt. June 25, 1985) (earlier opinion at 555 F. Supp. 1080 (D. Vt. 1982)). Other leading SSA-nonacquiescence cases include: Lopez v. Heckler, 572 F. Supp. 26 (C.D. Cal.), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 463 U.S. 1328 (Rehnquist, Circuit Justice), *motion to vacate stay denied*, 464 U.S. 879 (1983), *and district court aff'd in part and rev'd in part*, 725 F.2d 1489 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (mem.), *on remand*, 106 F.R.D. 268 (C.D.Cal. 1984), *stay denied*, 793 F.2d 1464 (9th Cir. 1985); Stieberger v. Heckler, 615 F. Supp. 1315, 1352, 1361-65 (S.D.N.Y. 1985), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986) (later opinion at Stieberger v. Sullivan, 738 F. Supp. 716 (S.D.N.Y. 1990) (addressing merits)); Hyatt v. Heckler, 579 F. Supp. 985, 989-90 (W.D.N.C. 1984), *vacated*, 757 F.2d 1455 (4th Cir. 1985), *vacated and remanded*

hand, have defended the practice.[8] They say that the judicial power focuses on issuing judgments in discrete cases, rather than declaring principles that invariably bind a "co-equal branch."[9] They argue further that nationwide adherence to agency rules, even if contrary to some circuit court precedent, (1) creates a salutary uniformity in agency administration of national programs; (2) produces optimum "percolation" of legal issues by facilitating circuit court reconsideration of controversial rulings; and (3) comports with Congress's design that agencies operate as expert administrators of the statutes they are charged to enforce.[10] This clash between executive and judicial

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sub nom. Hyatt v. Bowen, 476 U.S. 1167, *district court aff'd in part on remand*, 807 F.2d 376 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987) (other opinions at 586 F. Supp. 1154 (W.D.N.C. 1984) (awarding attorney fees); 618 F. Supp. 227 (W.D.N.C. 1985) (modifying fee award); Hyatt v. Bowen, 118 F.R.D. 572 (W.D.N.C. 1987) (remedial order); Hyatt v. Sullivan, 711 F. Supp. 837 (W.D.N.C. 1989) (awarding additional fees); 711 F. Supp. 837 (W.D.N.C. 1989) (additional order regarding pain evaluations), *aff'd in part and rev'd in part sub nom.* Hyatt v. Sullivan, 899 F.2d 329 (4th Cir. 1990)); Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984), *remanded sub nom.* Brest v. Secretary of Health & Human Servs., 754 F.2d 372 (6th Cir.), *on remand*, 615 F. Supp. 686 (N.D. Ohio 1985) (later opinions at 615 F. Supp 684 (N.D. Ohio 1985) (summary judgment for plaintiffs); 615 F. Supp 686 (N.D. Ohio 1985) (awarding attorney fees); Holden v. Bowen, 668 F. Supp. 1042 (N.D. Ohio 1986) (awarding attorney fees)); Polaski v. Heckler, 585 F. Supp. 1004, 1013 (D. Minn.), *modified*, 739 F.2d 1320 (8th Cir.), *and vacated in part*, 751 F.2d 943 (8th Cir. 1984), *vacated and remanded*, 476 U.S. 1167, *district court reinstated on remand*, 804 F.2d 456 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987). For other illustrative decisions critical of the SSA's intracircuit-nonacquiescence policy, see Capitano v. Secretary of Health & Human Servs., 732 F.2d 1066, 1070 n.9 (2d Cir. 1984), and Buckner v. Heckler, 580 F. Supp. 1536, 1542 (W.D. Mo. 1984); *see also* Ruppert v. Bowen, 871 F.2d 1172, 1177 (2d Cir. 1989). For commentaries collecting relevant intracircuit-nonacquiescence cases, see Diller & Morawetz, *supra* note 4, at 801 n.2; Estreicher & Revesz I, *supra* note 4, at 681 n.7, 699-702 (discussing in particular *Lopez* and *Stieberger* cases); ME. Note, *supra* note 4, at 195 n.53; TOURO Note, *supra* note 4, at 199 n.13.

8. *See, e.g.*, Kuhl, *supra* note 4; Letter From Rex E. Lee to Sen. Robert Dole (May 7, 1984), *reprinted in* 130 CONG. REC. 25,977 (1984) [hereinafter Lee Letter] (statement of Sen. Dole).

9. *See* Estreicher & Revesz I, *supra* note 4, at 723; Kuhl, *supra* note 4, at 916; Schwartz, *supra* note 4, at 1851-56. *See generally* Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985-86 (1987) (asserting the co-equal nature of the federal government's three branches).

10. *See, e.g.*, S & H Riggers & Erectors v. Occupational Safety & Health Review Comm'n, 659 F.2d 1273, 1278 (5th Cir. Unit B Oct. 1981) (Occupational Safety and Health Agency nonacquiescence defended as implementing " 'duty of formulating uniform and orderly national policy' " (quoting Occupational Safety and Health Review Commission opinion at 15)); *see also* Schwartz, *supra* note 4, at 1818-19 (same); White, *supra* note 4, at 665-66 (acquiescence would not be "consistent with Congress's creation of the NLRB" as an "expert agency" to formulate labor policy). *See generally infra* notes 411-13 and ac-

decisionmakers has spawned one of the most important modern issues in constitutional and administrative law — and an issue that the Supreme Court has yet to visit.[11]

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companying text (discussing a "uniformity" rational for intracircuit nonacquiescence).

11. *See* Maranville, *supra* note 4, at 488-90 (issue "has not been definitively resolved"); Schwartz, *supra* note 4, at 1819 ("[t]he lawfulness of nonacquiescence by federal administrative agencies is one of the significant unresolved problems of modern administrative law"); BROOKLYN Note, *supra* note 4, at 109-10 (constitutionality of intracircuit nonacquiescence "has yet to be authoritatively determined"); COLUM. REV. Note, *supra* note 4, at 582 n.5 ("no dispositive body of legal doctrine has developed" to resolve the nonacquiescence issue). In dissenting from the continuance of the stay order in *Lopez v. Heckler*, Justice Brennan (joined by Justice Marshall) observed: "[I]t is clear to me that it is the Secretary who has not paid due respect to a coordinate branch of Government by expressly refusing to implement the binding decisions of the Ninth Circuit." Lopez v. Heckler, 464 U.S. 879, 887 (1983) (Brennan, J., dissenting). The other Justices, however, did not comment on the constitutionality of intracircuit nonacquiescence because the proceedings before the Court in *Lopez* focused on the proper makeup of the plaintiff class, rather than on the constitutional issue. *See, e.g.*, Kubitschek, *supra* note 4, at 407 (noting that Court in *Lopez* "did not address the issue"). Notably, the visibility and importance of the intracircuit nonacquiescence issue may be on the rise in light of: (1) the likelihood of renewed congressional interest in the subject, *see, e.g.*, H.R. 4797, 101st Cong., 2d Sess. 2 (1990) (proposed legislation requiring, in general, intracircuit acquiescence by SSA); COMMITTEE REPORT, *supra* note 4, at 60 (recommending legislation barring SSA intracircuit nonacquiescence and examination of intracircuit nonacquiescence by other agencies); (2) the unresolved struggle of the Administrative Conference of the United States to come to grips with the issue, *see* Schwartz, *supra* note 4, at 1823, 1832-33 & n.53; Conference Transcript, *supra* note 4, at 77 (remarks of Harris Weinstein) (predicting Conference's revisiting of intracircuit-nonacquiescence issue); *see also* Letter from Gary J. Edles, General Counsel of the Administrative Conference of the United States, to Dan T. Coenen (Aug. 2, 1990) (on file with author) (noting that "[i]t may turn out that the Conference has not yet seen the last of this issue," which "remains alive in the courts"); and (3) recent proposals for decreasing the number of open-ended venue statutes, which would greatly increase opportunities for intracircuit nonacquiescence, *see* Draft Recommendation on Federal Agency Nonacquiescence, 53 Fed. Reg. 24,331, 24,332-33 (1988) (Administrative Conference of the United States Judicial Review Committee draft); Estreicher & Revesz I, *supra* note 4, at 764-70; COLUM. REV. Note, *supra* note 4, at 608; *see also* COLUM. J. Note, *supra* note 4, at 497-99 (discussing judicial and statutory alternatives for restricting venue options). At the least, the intracircuit-nonacquiescence problem has not gone, and will not go, away. *See, e.g.*, Stieberger v. Sullivan, 738 F. Supp. 716, 732, 754 (S.D.N.Y. 1990) (finding continuing "de facto non-acquiescence" and that "SSA's practice of not issuing [Acquiescence Rulings] . . . has resulted in non-acquiescence" even under SSA's most recent policies); Wilkerson v. Sullivan, 727 F. Supp. 925, 935 (E.D. Pa. 1989) (finding continuing SSA intracircuit non-acquiescence), *aff'd in part, rev'd in part, and vacated in part sub nom. In re* Petition of Sullivan, 904 F.2d 826 (3d Cir. 1990); Nash v. Bowen, 869 F.2d 675, 677 (2d Cir.) (citing "secretary's *de facto* policy of nonacquiescence in the law of the circuit"), *cert. denied*, 110 S. Ct. 59 (1989); COMMITTEE REPORT, *supra*

A lively exchange of views in the legal literature has increased the visibility of the intracircuit-nonacquiescence issue.[12] In 1989, Samuel Estreicher and Richard Revesz set forth a substantial defense of intracircuit nonacquiescence.[13] In the wake of that article, two other scholarly pieces — one by Matthew Diller and Nancy Morawetz[14] and the other by Joshua Schwartz[15] — sought to make the case against the practice. This Article draws on insights made by all these analysts, but also ventures well beyond their work. In particular it finds fault, especially on the ground of incompleteness, in the constitutional challenges to intracircuit nonacquiescence mounted in both the Schwartz and the Diller and Morawetz pieces.[16] It

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note 4, at 60 (noting that "Commissioner of Internal Revenue still asserts a 'right of non-acquiescence' "); Estreicher & Revesz I, *supra* note 4, at 713 (explaining how "the IRS . . . like SSA operates under a scheme that is essentially venue-certain" and noting that the "IRS has . . . engaged in intracircuit nonacquiescence"); *id.* at 717-18 (noting that "several agencies reported that they engage in intracircuit nonacquiescence" and discussing in particular the Federal Labor Relations Authority, Federal Trade Commission, and the Merit Systems Protection Board); Kubitschek, *supra* note 4, at 446-48 (noting examples of nonacquiescence and concluding that SSA is continuing to engage in intracircuit nonacquiescence notwithstanding new policies designed to ameliorate legal difficulties); Maranville, *supra* note 4, at 481, 485-86 (noting that "informal nonacquiescence appears to be widespread" and "some agencies seem disinclined to acknowledge the extent of their nonacquiescence activity"); S. CAL. Note, *supra* note 4, at 1146 n.13 (detailing nonacquiescence by agencies other than SSA); WAYNE Note, *supra* note 4, at 162 (same). *See generally* Estreicher & Revesz I, *supra* note 4, at 681 (stating that history of nonacquiescence goes back 60 years); Maranville, *supra* note 4, at 486 (noting that nonacquiescence decisions "span a period of thirty years").

12. *See generally supra* note 4 (listing numerous scholarly treatments of intracircuit nonacquiescence).

13. Estreicher & Revesz I, *supra* note 4. I use the term "substantial defense" deliberately, knowing that others — including Professors Estreicher and Revesz themselves — might describe their treatment of intracircuit nonacquiescence quite differently. *See, e.g., id.* at 719 (characterizing approach as putting "fairly significant checks" on nonacquiescence). I do so because Professors Estreicher and Revesz emphasize the same considerations that the Justice Department relies on in its advocacy of the legitimacy of intracircuit nonacquiescence. *See generally infra* notes 416-17, 456-57, 490-91 and accompanying text (discussing executive branch's major rationales for nonacquiescence). They also argue explicitly that there should be "a qualified acceptance" of the practice. Estreicher & Revesz I, *supra* note 4, at 753. For these reasons and others, the Estreicher and Revesz treatment of intracircuit nonacquiescence seems to me to be fairly characterized as setting forth a "substantial defense." *See generally infra* notes 525-39 and accompanying text (describing and critiquing Estreicher and Revesz position in detail).

14. Diller & Morawetz, *supra* note 4.

15. Schwartz, *supra* note 4.

16. The Schwartz article, which offers an elaborate treatment of the intracircuit-nonacquiescence issue, is critiqued in detail *infra* notes 95-137 and

also subjects the justifications for intracircuit nonacquiescence advanced by Estreicher and Revesz to an evaluation not otherwise available in the literature.[17] More generally, this Article seeks to respond to the failure of all earlier commentaries to propose any structure, apart from wide-open balancing, for evaluating the nonacquiescence issue.[18] It does so by advocating use of, and subjecting intracircuit nonacquiescence to, the sort of "heightened scrutiny" analysis courts commonly employ in evaluating governmental practices that raise evident threats to important constitutional values.

This Article comprises seven parts. Part I defines intracircuit nonacquiescence, while Part II comments on secondary challenges to the practice based on the fifth amendment's due process clause. Part III then turns to the primary line of attack, rooted in the separation of powers, and criticizes existing analyses that apply this constitutional principle. On the heels of this critique, Part IV proposes a fresh approach by urging courts to evaluate intracircuit nonacquiescence pursuant to the "means/ends" methodology widely used in other constitutional settings. Building on this discussion, Part V advocates so-called "heightened scrutiny" of intracircuit nonacquiescence in light of the demonstrably grave intrusion that practice makes on important separation-of-powers values. Part VI then considers the many justifications offered for intracircuit nonacquiescence and finds each of them wanting under even the less-exacting "intermediate" brand of heightened scrutiny. Finally, Part VII explores whether particular forms of intracircuit nonacquiescence — such as nonacquiescence limited to preliminary agency decision makers or during the pendency of Supreme Court review — merit protection even if the practice is otherwise unconstitutional.

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accompanying text. The Diller and Morawetz article does not seek in similar fashion to set forth a full-dressed, freestanding theory of intracircuit nonacquiescence; rather it is a "Comment" that seeks to *respond* to the extensive defense of intracircuit nonacquiescence constructed by Professors Estreicher and Revesz. *See* Diller & Morawetz, *supra* note 4, at 803 ("This Comment critiques Estreicher and Revesz' underlying assumptions about our legal system and their proposed standard for permissible nonacquiescence."). Given this limited mission, finding "fault" with the piece based on "incompleteness" may be unfair. The key point is that the Diller and Morawetz article — unlike this one — simply does not undertake to construct a full-scale theory concerning the constitutionality of intracircuit nonacquiescence.

17. *See infra* notes 414-95 and accompanying text; *cf.* Schwartz, *supra* note 4, at 1823 (noting that arguments for intracircuit nonacquiescence "have not been fully answered by critics").

18. *See infra* note 216.

In the end, this Article concludes that intracircuit nonacquiescence in all its forms is constitutionally unacceptable. The development of that theme requires much refinement. At bottom, however, the reason for the unconstitutionality of the practice is straightforward. No sufficiently powerful interest justifies the serious affront to the judicial power posed by executive flouting of the considered pronouncements of a supervisory circuit court.[19]

I. DEFINING INTRACIRCUIT NONACQUIESCENCE

Because the term "intracircuit nonacquiescence" is not self-explanatory, any discussion of the subject must begin with definitions. Intracircuit nonacquiescence differs from two related agency practices, often referred to as "intercircuit nonacquiescence"[20] and "nonacquiescence in the face of venue choice."[21] Intercircuit nonacquiescence occurs when an agency declines to follow one circuit court's pronouncements in processing claims subject to review by a *different* court of appeals.[22] The Internal Revenue Service, for example, sometimes engages in intercircuit nonacquiescence by directing agency decision makers not to follow a particular court of appeals ruling when evaluating disputes arising in other circuits.[23] Nonacqui-

19. Notably, intracircuit nonacquiescence has been most actively practiced and most widely debated and litigated in the context of the Social Security program. *See* sources cited *supra* note 4. For that reason, this Article at times focuses on the SSA experience and the arguments for or against intracircuit nonacquiescence developed in connection with the SSA program. At the same time, this Article undertakes a treatment of intracircuit nonacquiescence designed to cover all agencies, including those agencies that resolve private disputes rather than dole out government benefits. To this end, this Article seeks to deal directly with any special considerations raised by intracircuit nonacquiescence by private-dispute-resolving agencies. *See, e.g., infra* notes 443, 471 and accompanying text; *cf.* Estreicher & Revesz II, *supra* note 4, at 843 (challenging Diller and Morawetz analysis of intracircuit nonacquiescence because it is "based simply upon an analysis of SSA"). Agencies are not fungible, however, and some agencies possibly may construct agency-specific defenses for intracircuit nonacquiescence that this Article does not anticipate in precise form. I believe, however, that the central analysis developed in this Article — like the quite different, but similarly generalized, analysis of Professors Estreicher and Revesz — is sufficiently comprehensive to cover all agencies. At the least, the analysis set forth in this Article suggests that courts should place the heaviest burden on any agency advancing the view that it is entitled to engage in intracircuit nonacquiescence even though other agencies may not.

20. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 687.

21. *See, e.g., id.* at 741.

22. *See, e.g., id.* at 687.

23. *See, e.g.*, Maranville, *supra* note 4, at 477 n.14; Williams, *supra* note 4, at 263; *see also* Carter, *The Commissioner's Nonacquiescence: A Case for a Na-*

escence in the face of venue choice occurs when an agency fails to follow a circuit court decision in a setting where judicial review lies *both* to the decision-issuing circuit court *and* to other, different courts of appeals.[24] The National Labor Relations Board (NLRB), for example, nonacquiesces in this manner because a broad venue statute often forces the agency to act without knowing which circuit court ultimately will review the NLRB's action in the case.[25] True intracircuit nonacquiescence — in contrast to these other forms of nonacquiescence — occurs when agency decision makers *do* know the *sole* circuit court in which their action is reviewable and nonetheless refuse to follow *that court's* precedents.[26]

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tional Court of Tax Appeals, 59 TEMP. L.Q. 879, 881-901 (1986) (discussing the history, rationale, and process of Internal Revenue Service nonacquiescence); Rodgers, *The Commissioner "Does Not Acquiesce,"* 59 NEB. L. REV. 1001, 1004-12 (1980) (same). The legality of intercircuit nonacquiescence is widely accepted. *See, e.g.*, Lopez v. Heckler, 725 F.2d 1489, 1497 n.5 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984) (mem.); Estreicher & Revesz I, *supra* note 4, at 735-41; Schwartz, *supra* note 4, at 1856; COLUM. REV. Note, *supra* note 4, at 583.

24. *See* Estreicher & Revesz I, *supra* note 4, at 687, 705-12, 716-17; Schwartz, *supra* note 4, at 1833-34, 1856-57.

25. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 709-10. For an extensive discussion of the NLRB practice, see White, *supra* note 4; *see also* Maranville, *supra* note 4, at 494 & n.73 (citing "broad venue provisions" governing NLRB); COLUM. REV. Note, *supra* note 4, at 587-88 (discussing NLRB nonacquiescence and collecting cases). Although most commentators conclude that nonacquiescence in the face of venue choice is permissible, *see, e.g.*, Estreicher & Revesz I, *supra* note 4, at 742, others have urged the NLRB to abandon the practice, *see* Dotson & Williamson, *supra* note 4, at 744-47; Ferguson & Bordoni, *supra* note 4, at 220-24; Silver & McAvory, *supra* note 4, at 204-05; Weis, *supra* note 4, at 846-48. Circuit court decisions critical of particular applications of the NLRB's policy are collected in Schwartz, *supra* note 4, at 1821 n.14. *See also* Estreicher & Revesz I, *supra* note 4, at 710-11 nn.164-65 (collecting materials on NLRB nonacquiescence).

26. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 687, 719 (defining intracircuit nonacquiescence as arising when "the agency, at the time of its administrative proceedings, knows, by virtue of the venue rules, which court of appeals will review its action, and yet proceeds contrary to a ruling of that court"). A modest gloss on this definition is necessary; intracircuit nonacquiescence is present also "[w]hen all of the circuits in which an action for judicial review might be brought have rejected the agency's position." Schwartz, *supra* note 4, at 1857 n.159; *accord, e.g.*, Estreicher & Revesz II, *supra* note 4, at 832 n.4, 843 n.64 (noting that "[i]ntracircuit nonacquiescence can also occur in the face of venue choice, where an agency's position has been rejected in all circuits that can review a particular decision," and noting further that "several agencies engage in such conduct"). In these situations, supervisory circuit court law is, after all, no less determinate than when the agency's action is reviewable by only a single circuit that has set forth a rule of law contrary to the agency's view.

This form of nonacquiescence is well illustrated by the administration of the Social Security program.[27] Social Security disability claimants initiate the claim-seeking process by filing a request for benefits in a local Social Security office.[28] If benefits are denied both by frontline claims evaluators and by higher-level SSA officials responsible for reviewing denials, an appeal lies solely to the local district court and, from that court, to the regional court of appeals.[29] Thus, Social Security decision makers can determine readily which circuit court has review authority over any particular claimant's case.[30] Notwithstanding this fact, the SSA began in the 1960s to issue rulings that ordered agency decision makers not to follow specified circuit court interpretations of the Social Security Act even when adjudicating claims within the decision-issuing circuit.[31] In addition, SSA policy makers generally informed agency decision makers that they should apply SSA rules even if incompatible with local circuit court law.[32] These directives created a profound practical problem for SSA claimants: they lost the benefit of favorable circuit court precedent unless they endured a prolonged agency review process and then secured a judicial order requiring the agency to follow local circuit court law.[33]

Questions of definitional nicety lurk in any discussion of in-

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27. *See* sources cited *supra* note 4.

28. *E.g.*, Estreicher & Revesz I, *supra* note 4, at 692.

29. *E.g.*, *id.* at 692-93.

30. *E.g.*, *id.* at 693-94. The SSA venue statute is 42 U.S.C. § 405(g) (1988). For an extensive discussion of SSA procedures and practices during the 1980s, see COMMITTEE WORKING PAPERS, *supra* note 4, at 286-327.

31. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 694 & n.64; Maranville, *supra* note 4, at 477 n.15 (collecting SSA nonacquiescence rulings). In 1982, for example, SSA directed its decision makers — including its decision makers in the western states — not to follow the Ninth Circuit's decisions in Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982), and Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981). *See* SSR 82-49c, 20 C.F.R. § 416.994 (1982); SSR 82-10c, 20 C.F.R. § 416.994(e) (1982). Those Ninth Circuit decisions required a showing of some medical improvement before the Secretary could terminate payments to an SSA recipient previously found to be disabled. *See Patti*, 669 F.2d at 587; *Finnegan*, 641 F.2d at 1347. As a result of SSA's nonacquiescence in these decisions, the SSA terminated payments to numerous recipients in the Ninth Circuit without any showing of medical improvement as required by Ninth Circuit case law. This particular manifestation of intracircuit nonacquiescence culminated in the *Lopez* litigation, *see supra* note 7, which is summarized in Estreicher & Revesz I, *supra* note 4, at 699-701. *See also* Schwartz, *supra* note 4, at 1817 n.3 (detailing history of medical-improvement nonacquiescence).

32. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 699; Kuhl, *supra* note 4, at 913.

33. *See infra* note 66.

tracircuit nonacquiescence.[34] The SSA's practices, however, il-

34. For example, one definitional question concerns how certain a particular court's review authority must be before an agency may be said to be engaging in *intra*circuit nonacquiescence. Even with respect to a Social Security disability claim, the SSA may not be *absolutely* certain as to the reviewing court because an applicant may relocate his or her home during the claims process. *See* 42 U.S.C. § 405(g) (1988) (specifying that venue in SSA judicial-review action lies in the district where "the plaintiff resides"). Nonetheless, the probability that the local circuit will review the local decision maker's action is so high that all agree that a failure to follow that circuit court's precedents constitutes intracircuit nonacquiescence. *See* cases cited *supra* note 4 (cases critical of SSA practice). The probability of review by an identified circuit court may be similarly high in particular cases handled by agencies that normally act with venue uncertainty, as when the NLRB takes action after a remand from a particular circuit court. *See, e.g.*, Ithaca College v. NLRB, 623 F.2d 224, 227 (2nd Cir.), *cert. denied*, 449 U.S. 975 (1980); *see also* Estreicher & Revesz I, *supra* note 4, at 712 n.172 (noting that where cases are on remand from a particular court of appeals, it is "virtually certain they [will] return to that court"). *But see* White, *supra* note 4, at 647 n.37 (noting that, even in these cases, venue uncertainty exists). Professor Estreicher has already suggested a test as good as any for deciding whether the agency is subject to the limits on intracircuit nonacquiescence in such cases: whether there is a "fair certainty" that a particular circuit court will hear the case. Estreicher, *The Second Circuit and the NLRB 1980-1981: A Case Study in Judicial Review of Agency Action*, 48 BROOKLYN L. REV. 1063, 1078 (1982). Accordingly, if such a "fair certainty" exists, a failure to follow that circuit's precedent is properly defined as intracircuit nonacquiescence.

A second definitional question concerns whether the term "nonacquiescence" properly describes an agency's denigration of circuit court precedent when it appears as a litigant in court. *See* White, *supra* note 4, at 661 (arguing lawfulness of "nonacquiescence" by NLRB "as litigant" even though "venue uncertainty vanishes once a [Board] order is before a particular circuit court"). Professor Maranville asserts, for example, that "[n]onacquiescence involves internal agency activity," but not "the agency's external behavior in litigation." Maranville, *supra* note 4, at 475. Following her lead, this Article focuses on internal action by an agency, including but not limited to agency adjudication. *See infra* note 128. The separate but related question of whether an agency may without exception "respectfully disagree" with a circuit court's precedents, even when filing papers in the courts of that circuit, is discussed *infra* note 499.

Finally, an agency may "nonacquiesce" in different types of legal rulings. For example, an agency may nonacquiesce in constitutional rulings or in interpretations of federal statutes that have no special connection to the particular agency (as when the Immigration and Naturalization Service takes action on a Freedom of Information Act request). In the most common case, however, an agency declines to honor a court's interpretation of the statute subject to the agency's own specialized administration — as when the National Labor Relations Board nonacquiesces in a judicial interpretation of the National Labor Relation Act. This Article focuses on the latter brand of nonacquiescence, which is the most defensible because it draws support from agency claims of specialized expertise. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 720 & n.214. Because this Article concludes in the end that intracircuit nonacquiescence, even in such "enabling statute" rulings is unconstitutional, *see infra* Part VI. C., it follows a fortiori that an agency may not engage in intracircuit

lustrate well the central constitutional problem: May agency decisionmakers determining a citizen's rights constitutionally disregard a circuit court's interpretations of governing statutes even though those decisionmakers know their actions are reviewable by that, and no other, circuit court? The remainder of this Article addresses that question.

II. THE EQUAL PROTECTION AND DUE PROCESS ARGUMENTS

Courts and commentators generally have concluded that the most potent constitutional challenge to intracircuit nonacquiescence rests on the separation of powers.[35] This Article follows that lead by focusing on the separation-of-powers line of attack. Others have argued, however, that intracircuit nonacquiescence violates the precepts of equal protection[36] and due process[37] embodied in the fifth amendment.[38] These additional

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nonacquiescence in supervisory-circuit precedents interpreting the Constitution or statutes other than the one subject to the agency's specialized administration.

35. *See infra* note 70 and accompanying text.

36. *See* Kubitschek, *supra* note 4, at 432 n.187, 433-34 (citing equal protection cases and suggesting that SSA nonacquiescence violates equal protection requirement); COLUM. REV. Note, *supra* note 4, at 603; HARV. Note, *supra* note 4, at 857-58; S. CAL. Note, *supra* note 4, at 1170-71, 1173. For judicial discussions lending the equal protection argument a sympathetic ear, see Stieberger v. Heckler, 615 F. Supp. 1315, 1367, 1374 (S.D.N.Y. 1985), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Lopez v. Heckler, 572 F. Supp. 26, 30 (C.D. Cal. 1983), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 463 U.S. 1328 (Rehnquist, Circuit Justice), *motion to vacate stay denied*, 464 U.S. 879 (1983), *and district court aff'd in part and rev'd in part*, 725 F.2d 1489 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984) (mem.).

37. *See* BROOKLYN Note, *supra* note 4, at 122-23; IND. Note, *supra* note 4, at 1116-19; ME. Note, *supra* note 4, at 252; S. CAL. Note, *supra* note 4, at 1171; *see also* Diller & Morawetz, *supra* note 4, at 826 (noting that nonacquiescence raises "serious due process questions"). At least one district court has endorsed the due process argument in assessing SSA nonacquiescence. *See* Hyatt v. Heckler, 579 F. Supp. 985, 1002 (W.D.N.C. 1984), *vacated*, 757 F.2d 1455 (4th Cir. 1985), *vacated and remanded sub nom.* Hyatt v. Bowen, 476 U.S. 1167, *district court aff'd in part on remand*, 807 F.2d 376 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); *see also* Polaski v. Heckler, 585 F. Supp. 1004, 1011 (D. Minn. 1984) (preliminarily deciding that intracircuit nonacquiescence violates due process and separation of powers), *modified*, 739 F.2d 1320 (8th Cir.), *and vacated in part*, 751 F.2d 943 (8th Cir. 1984), *vacated and remanded*, 476 U.S. 1167, *district court reinstated on remand*, 804 F.2d 456 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987); Stieberger v. Sullivan, 738 F. Supp. 716, 730 (S.D.N.Y. 1990) (strongly indicating that intracircuit nonacquiescence violates equal protection and due process).

38. Commentators have argued also that intracircuit nonacquiescence vio-

constitutional theories deserve at least an introduction.

A. EQUAL PROTECTION

The equality-based challenge to intracircuit nonacquiescence arises because the practice produces unequal treatment of the rich and the poor.[39] Nonacquiescing agencies do not themselves discriminate; they subject rich and poor alike to the agency's legal rules. Unequal treatment results, however, because only those claimants with sufficient resources can secure judicial review and the application of favorable circuit court law it necessarily brings.[40] This discrimination against the

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lates the sub-constitutional principle of stare decisis. *See* Schwartz, *supra* note 4, at 1827 n.31 (collecting authorities). The stare decisis argument has much to commend it, especially when the agency acts in a "judge-like" adjudicative capacity. The rationales supporting that argument, however, are the *same* structural reasons set forth below in propounding the separation-of-powers argument. *See infra* Part III; *cf.* Schwartz, *supra* note 4, at 1828 (suggesting that stare decisis argument rests on "unexamined assumptions about the relationship between administrative agencies and article III courts"). Accordingly, that argument is not independently addressed in this Article. Professors Estreicher and Revesz take a different subconstitutional tack, arguing that the "arbitrary and capricious" standard of the Adminstrative Procedure Act (APA) gives rise to a complex, multi-pronged set of factors defining when intracircuit nonacquiescence is permissible. *See* Estreicher & Revesz I, *supra* note 4, at 759-64. This Article does not explore whether the APA supports the sort of elaborate test proposed by Professors Estreicher and Revesz. If Professors Estreicher and Revesz are correct, however, in asserting that "review of agency action under the APA is far more substantively demanding than [constitutional] rationality review," Estreicher & Revesz I, *supra* note 4, at 721 n.216, they provide good reason for concluding that the limitations on intracircuit nonacquiescence espoused in this Article are proper as a matter of statutory, as well as constitutional, law. Professors Estreicher and Revesz, after all, argue that the APA invites balancing in assessing the legality of agency action and that, for example, the government's justifications for nonacquiescence must give way when "nonacquiescence is carried too far and becomes a tool for defiance of judicial review." *See* Estreicher & Revesz I, *supra* note 4, at 759-61. Given these premises, the critique of the Estreicher and Revesz position developed below, *see infra* notes 526-39 and accompanying text, and the powerful reasons for foreclosing intracircuit nonacquiescence altogether, *see infra* Part V, the balance struck in this Article would seem no less legitimate than the balance struck by Professors Estreicher and Revesz if one is called on to engage in balancing under the APA.

39. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 690 n.39 (describing discrimination favoring "parties with greater litigation resources" as the "central cost of nonacquiescence"); Schwartz, *supra* note 4, at 1818 (noting that nonacquiescence imposes substantial burdens on claimant).

40. Estreicher & Revesz I, *supra* note 4, at 683-84 (expressing concern about "undesirable distributional consequences that arise when only parties with sufficient resources to pursue an appeal to the courts can benefit from a favorable rule of law"). Of course, the risk of discrimination against the poor may be reduced outside the SSA context. *See, e.g.*, Kafker, *supra* note 4, at

weakest members of society fairly merits description as "prejudicial and unfair."[41] There exist, however, two basic difficulties in transmuting that fact into a viable equal protection claim. First, the impoverished do not make up a constitutionally suspect class.[42] Second, even if they did, the practice of intracircuit nonacquiescence "was not established *for the purpose* of discriminating"[43] against the poor.[44] These realities leave little doubt that a straightforward equal protection challenge to intracircuit nonacquiescence will produce only minimal scrutiny[45] and a resulting refusal to invalidate the practice.[46] Critics thus

142-43 (noting that parties before the NLRB "tend to be relatively affluent and sophisticated and thus more likely to appeal"); Maranville, *supra* note 4, at 534 (noting that, unlike in SSA context, "[m]any, though certainly not all, of the affected unions and employees [in NLRB cases] will have substantial resources for obtaining judicial relief"). That fact, however, will provide cold comfort to those persons who *do* lack the wherewithal to finance a judicial appeal. *See, e.g.*, Commissioner, INS v. Jean, 110 S. Ct. 2316, 2322 n.14 (1990) (noting that " 'small businesses . . . do not have the resources to fully litigate' " (quoting H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10 (1980))). Notably, intracircuit nonacquiescence also adversely and discriminatorily affects those who, even if not impecunious, "have a stake in the controversy that is too small to justify the expense of resorting to the courts." Estreicher & Revesz I, *supra* note 4, at 749 n.325.

41. *Lopez*, 572 F. Supp. at 30 (condemning "dual system of law," especially "with respect to the types of individuals here concerned, whose resources, health and prospective longevity are, by definition, relatively limited"); *accord, e.g.*, Neuborne, *The Role of The Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 375, 378 (1988) (maintaining that "a theory of law that the law depends on how much money you have and not on a uniform self-executing duty to comply, is fundamentally inconsistent with our values").

42. *See* Harris v. McRae, 448 U.S. 297, 323 (1980); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973); Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam); *accord* IND. Note, *supra* note 4, at 1117.

43. Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979) (emphasis added).

44. Rather, as already noted, the nonacquiescence doctrine was established for such purposes as ensuring uniformity and facilitating circuit court reconsideration of controversial rulings. *See supra* text accompanying note 10. It also might be suggested that SSA intracircuit nonacquiescence unconstitutionally discriminates against the disabled. The disabled, however, also are not a suspect class, *see* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442-46 (1985), and the SSA's policy is aimed at *all* claimants rather than only those claimants who actually are disabled. A claim of discrimination against the disabled thus adds no power to the equal protection challenge.

45. *See generally infra* notes 223-24 and accompanying text (explaining that courts usually give substantial deference to the government in "minimal scrutiny" equal protection cases).

46. *See* IND. Note, *supra* note 4, at 1117 (noting that intracircuit nonacquiescence is rationally related to legitimate end of achieving uniformity). *See generally infra* note 413 and accompanying text (identifying government interests advanced by intracircuit nonacquiescence).

must seek some other equality-based argument for attacking intracircuit nonacquiescence.

The most promising approach may lie in arguing that intracircuit nonacquiescence violates the principle of cases like *Boddie v. Connecticut*[47] because it impinges on a "protected right" of meaningful access on the part of indigents to the application of controlling legal principles.[48] Recent Supreme Court decisions, however, have restricted the room to argue for recognition of such a right.[49] Moreover, one logical way of equalizing the treatment between rich and poor victims of intracircuit nonacquiescence would be to give the poor free access to the same corrective judicial review proceedings that more prosperous claimants can afford.[50] In *Ortwein v. Schwab*,[51] however, the Court rejected a claimed right of government-paid access to judicial review of agency-conducted benefits proceedings.[52] The Court's reasoning — which seems equally applicable in this context — was that access to the agency's proceedings was "not conditioned on payment of any fee" and that a claim for governmental benefits involves "no fundamental interest."[53] *Ortwein* suggests that lawyers who mount a

47. 401 U.S. 371, 374 (1971) (recognizing indigent right of free access to legal system to obtain divorce); *see also* Little v. Streater, 452 U.S. 1, 16 (1981) (holding that state's refusal to pay for indigent defendant's blood grouping in paternity suit violated due process).

48. *See Boddie*, 401 U.S. at 379-80.

49. *See, e.g.*, Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 83-84 (1988); Little v. Streater, 452 U.S. 1, 16 n.12 (1981); United States v. Kras, 409 U.S. 434, 446 (1973); *see also* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (expressing reluctance "to discover new fundamental rights"). *See generally* Estreicher & Revesz I, *supra* note 4, at 734-35 (concluding that United States Supreme Court cases indicate that de facto discrimination against the indigent does not render nonacquiescence per se invalid).

50. Notably, this fact helps explain why an equal protection analysis is properly viewed as less central to evaluating the constitutionality of intracircuit nonacquiescence than the separation-of-powers analysis. Although government funding of appeals would eliminate the disparate effects of intracircuit nonacquiescence on the rich and the poor, such funding would not answer the objections that courts are the primary expositors of law, and that their pronouncements bind the executive branch.

51. 410 U.S. 656 (1973) (per curiam).

52. *Id.* at 660.

53. *Id.* at 659-60 (citations omitted). Diller and Morawetz seek to distinguish *Ortwein* on the ground that in that case "the Court noted that there was no reason to doubt that the administrative proceedings had been conducted fairly." Diller & Morawetz, *supra* note 4, at 825-26 (citing *Ortwein*, 410 U.S. at 659 n.4). The passage from *Ortwein* they rely on, however, indicates only that the record contained no support for the conclusion that the agency hearings violated "the minimal requirements of due process" established in Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970). The question whether intracircuit nonacqui-

Boddie-based attack on intracircuit nonacquiescence will be fighting an uphill battle.

B. DUE PROCESS

An alternative fifth-amendment challenge to intracircuit nonacquiescence is available not only to the poor, but to all agency claimants. That challenge posits that, regardless of the separation of powers, an agency's refusal to follow a supervisory circuit court's precedent offends procedural due process because it raises an unacceptable "risk of an erroneous deprivation."[54] This risk arises, the argument goes, because intracircuit nonacquiescence necessarily deprives agency claimants of the benefit of controlling law.[55] Critics of this argument urge that it "entails circular reasoning,"[56] because circuit court pronouncements cannot constitute "controlling law" unless separation-of-powers considerations require agency adherence to circuit court precedent.[57] This response, however, overstates the case against the procedural-due-process challenge.

The separation-of-powers principle mandates maintenance of checked and balanced governmental structures.[58] Due process, in contrast, mandates "fundamental fairness" in the government's treatment of individuals.[59] Two such differing concepts might well warrant differing conclusions with respect to whether an agency must honor a supervisory circuit court's pronouncement. For example, one might defend intracircuit nonacquiescence against separation-of-powers attack by reasoning that an agency's ability to disregard circuit court rulings fol-

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escence violates the procedural due process rights (of rich and poor alike) under precedents like *Goldberg* is considered *infra* notes 54-66 and accompanying text.

54. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

55. *Id.* Moreover, at least in SSA cases, the claim of a due process violation gathers strength from "the private interest that will be affected by the official action." *Id.* This is so because the unavailability of disability benefits threatens to deprive claimants "of basic necessities such as food, shelter, and necessary medical care." Diller & Morawetz, *supra* note 4, at 816 (collecting numerous citations to case law).

56. Schwartz, *supra* note 4, at 1828 n.37.

57. *Id.*; *accord* Maranville, *supra* note 4, at 518-19; *see* Estreicher & Revesz I, *supra* note 4, at 732-33 & n.266.

58. *See, e.g.*, Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 259 (1989) (describing separation of powers as reflecting "structural and political ideals" rather than "a system of private rights").

59. *E.g.*, Little v. Streater, 452 U.S. 1, 16 (1981) (citing "the requirement of 'fundamental fairness' expressed by the Due Process Clause").

lows from the lack of any structural mandate that agency action be subjected to circuit court review at all.[60] Such reasoning, however, does not answer the argument that it is fundamentally unfair for an agency to deny claimants the benefit of a reviewing circuit's precedents when Congress in fact has provided for circuit court review.[61]

Whether disregard of a supervisory circuit court's pronouncements violates the due process norm of fundamental fairness calls for the exercise of value-laden judgment in a setting where few Supreme Court precedents provide guidance. The courts have indicated, however, that due process requires adjudicators to heed at least *some* external legal standards,[62] including in the agency setting.[63] Moreover, on its face, an agency decisionmaker's adherence to self-serving agency rules already invalidated by the reviewing circuit court raises a tension with the norms of "meaningful"[64] and "impartial"[65] decisionmaking that lie at the core of the due process guarantee.[66]

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60. *See infra* notes 173, 177 and accompanying text.

61. *Cf.* Douglas v. California, 372 U.S. 353, 355-57 (1963) (due process requires provision of counsel on criminal appeal even though state has no duty to afford appeals).

62. *See* Hicks v. Oklahoma, 447 U.S. 343, 347 (1980) (state court's failure to honor state law requiring discretionary jury sentencing violated due process); Shuttlesworth v. Birmingham, 382 U.S. 87, 93-95 (1965) (when state court interprets state criminal statute narrowly to avoid overbreadth, due process requires state to ensure that defendant be convicted under statute as construed, rather than as written); Roy v. City of Augusta, 712 F.2d 1517, 1523-24 (1st Cir. 1983) (federal due process arguably violated when local agency "flouted the mandate of the state court"); *see also* Chilicky v. Schweiker, 796 F.2d 1131, 1138 (9th Cir. 1986) (suggesting, inter alia, that a "[k]nowing use of unpublished criteria and rules contrary to the Social Security Act" and "[i]ntentional disregard of dispositive favorable evidence" might violate due process), *rev'd on other grounds*, 487 U.S. 412 (1988).

63. *See* Bell v. Burson, 402 U.S. 535, 541-42 (1971) ("The hearing required by the Due Process Clause must be 'meaningful' . . . and 'appropriate to the nature of the case.' . . . It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard." (citations omitted)); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (benefits decision "must rest solely on the legal rules and evidence adduced at the hearing").

64. *E.g.*, Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

65. *E.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

66. *See* Diller & Morawetz, *supra* note 4, at 826 (questioning compatibility with due process of an "administrative process [that] becomes a series of obstacles yielding decisions that are predictably subject to reversal"). Moreover, intracircuit nonacquiescence — especially in SSA cases — runs hard up against the basic due process proposition that "justice delayed [is] justice denied." Arnett v. Kennedy, 416 U.S. 134, 221 (1974) (Marshall, J., dissenting); *see, e.g.*, *Armstrong*, 380 U.S. at 552; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532,

The key point is that extrapolations from such due process values — which this Article leaves for elaboration by others — may justify invalidation of intracircuit nonacquiescence even if that practice survives separation-of-powers attack.[67]

At the same time, it cannot be denied that the due process and separation-of-powers critiques of intracircuit nonacquiescence share much common ground. For example, those governmental interests said to shelter nonacquiescence from a separation-of-powers challenge will inform likewise the issue whether adherence to supervisory circuit court precedent is part of the process that is due under the fifth amendment.[68] More fundamentally, any elaboration of the requirements of "fundamental fairness" must draw on the same rule-of-law norms that underpin the separation-of-powers attack.[69] This Article now turns to that central line of constitutional analysis.

III. THE SEPARATION-OF-POWERS PROBLEM AND A REJECTION OF OTHER APPROACHES

Courts and scholars widely agree that the key constitutional question concerning intracircuit nonacquiescence is whether the practice transgresses the so-called "separation of

543 (1985); Barry v. Barchi, 443 U.S. 55, 66 (1979); Fusari v. Steinberg, 419 U.S. 379, 38 (1975). This is so because a "potentially devastating consequence of nonacquiescence is that those parties before the agency that can and do appeal to court must wait until they have exhausted administrative and judicial proceedings before they can receive the benefit of the circuit's law." Diller & Morawetz, *supra* note 4, at 815; *see also* Maranville, *supra* note 4, at 495 (nonacquiescence can delay favorable decision for years); Williams, *supra* note 4, at 261 (noting "lengthy period of time" involved in administrative proceedings); BROOKLYN Note, *supra* note 4, at 122 n.180 (noting that exhaustion of SSA disability claimant's administrative remedies "takes close to two years on the average").

67. Moreover, the availability of a freestanding due process theory could have significant practical consequences. Most important, although congressional authorization of intracircuit nonacquiescence might neutralize any separation-of-powers attack, *see generally infra* notes 208-11 and accompanying text, Congress has no similar ability to alter judicial definition of the procedural safeguards that the due process clause imposes, *see, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540-41 (1985). The finding of a due process violation might also support a private damages remedy not otherwise available based on a violation of the separation of powers. *See* Davis v. Passmann, 442 U.S. 228, 243-44 (1979) (authorizing suit under due process clause of fifth amendment).

68. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (laying weight in determining what process is due on "the Government's interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

69. *See infra* Part V.

powers principle."[70] That principle, however, is notoriously cryptic.[71] No Supreme Court decision instructs courts to employ a history-based analysis,[72] a presumptive rule of invalidity,[73] or a multi-factor test[74] when they turn to unresolved separation-of-powers issues. In particular, the Court has considered only a handful of cases pitting the executive branch against the judiciary,[75] and those cases do not purport to declare any overarching analytical framework.[76] A basic problem in assessing the constitutionality of intracircuit nonacquiescence thus lies in deciding how even to *structure* the legal analysis.

Both proponents and opponents of intracircuit nonacquiescence have responded to this difficulty by seeking to distill dispositive principles from supposedly controlling Supreme Court decisions. At least two courts have intimated that the Supreme

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70. Morrison v. Olson, 487 U.S. 654, 697 (1988); *see, e.g.*, Estreicher & Revesz I, *supra* note 4, at 722 (separation-of-powers claim is "by far the most central"); Schwartz, *supra* note 4 (briefly discussing due process and equal protection claims, while analyzing extensively whether intracircuit nonacquiescence comports with Constitution's allocation of powers); Weis, *supra* note 4, at 849 (noting that the dispute between the courts and administrative agencies is "an institutional one" that "has its roots . . . in the separation of powers doctrine"). The leading decisions holding intracircuit nonacquiescence unconstitutional also opt for a separation-of-powers rationale. *See, e.g.*, Schwartz, *supra* note 4, at 1824 n.23 (collecting numerous separation-of-powers-based decisions); *cf. supra* note 36-37 (setting forth equal protection and due process cases).

71. *See, e.g.*, Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 603-04 (1984); WAYNE Note, *supra* note 4, at 184 (emphasizing indeterminacy of separation of powers principle); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (noting the "poverty of really useful and unambiguous authority applicable to concrete problems of executive power," and arguing that "what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be defined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh").

72. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989).

73. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (applying "virtually *per se* rule of invalidity"); Reeves, Inc. v. Stake, 447 U.S. 429, 440-41 (1980) (setting forth "general rule" but exploring whether exception is justified on facts presented).

74. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 444-45 (1979); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279-89 (1977).

75. Such decisions include United States v. Nixon, 418 U.S. 683, 707-13 (1974), and Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175-80 (1803).

76. *But cf. infra* notes 239-49 and accompanying text (explaining that the Supreme Court has used a heightened scrutiny analysis in many separation-of-powers decisions).

Court's decision in *Cooper v. Aaron*[77] deals a death blow to intracircuit nonacquiescence.[78] Professor Schwartz's recent critique of intracircuit nonacquiescence relies in similar fashion on *Crowell v. Benson*.[79] Proponents of nonacquiescence, on the other hand, argue that the practice has been validated by the Supreme Court's decision in *United States v. Mendoza*.[80] Likewise, Professors Estreicher and Revesz argue that the constitutionality of much, if not all, intracircuit nonacquiescence is established by Congress's authorization of the practice and decisions, like *Sheldon v. Sill*,[81] that broadly validate congressional control over the jurisdiction of the lower federal courts.[82] The matter, however, is not so easy. Each of these four case-based approaches — two attacking intracircuit nonacquiescence and two defending it — fails to solve the constitutional difficulty.

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77. 358 U.S. 1 (1958).

78. *See* Stieberger v. Heckler, 615 F. Supp. 1315, 1356-58 (S.D.N.Y. 1985), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Lopez v. Heckler, 725 F.2d 1489, 1497 n.5 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984) (mem.). Making in effect the same argument, other courts and commentators have cited Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See* cases and sources cited *supra* note 7. Clearly, *Cooper* is the more apposite of these two authorities because it speaks directly to the extra-judgment effect of judicial pronouncements of law. *See infra* text accompanying notes 271-83. For a collection of the authorities relying on *Cooper* or *Marbury* or both, see Estreicher & Revesz I, *supra* note 4, at 722 n.221, and Schwartz, *supra* note 4, at 1824 n.26 & 1830 n.46.

79. 285 U.S. 22 (1932); *see* Schwartz, *supra* note 4.

80. 464 U.S. 154 (1984); *see* sources cited *infra* note 148. For a discussion of *Mendoza*, see *supra* Part III. C.

81. 49 U.S. (8 How.) 440 (1850).

82. *Id.* at 448-49. *Sheldon*, together with many other Supreme Court decisions, recognizes broad congressional authority to withhold jurisdiction over any class of the cases and controversies set forth in article III from lower federal courts. *Id.*; *accord, e.g.*, Allen v. McCurry, 449 U.S. 90, 103 (1980); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845))). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-5 (2d ed. 1988) (discussing Congress's constitutional power to create and control the federal judiciary). Although Professors Estreicher and Revesz do not explicitly cite these cases, they rest their "implied authorization" defense of intracircuit nonacquiescence on "the wide-ranging power that Congress enjoys over the jurisdiction of the lower federal courts." Estreicher & Revesz I, *supra* note 4, at 730.

A. *COOPER V. AARON*

Some suggest that *Cooper v. Aaron*[83] establishes by itself that intracircuit nonacquiescence is unconstitutional.[84] In *Cooper*, the Court declared it the duty of southern political leaders to honor the ruling in *Brown v. Board of Education*[85] even if not subject to a specific judicial desegregation decree.[86] Critics of intracircuit nonacquiescence argue that agency officers have no less of a duty to "acquiesce" in the rulings of the federal judiciary than did the state officials upbraided in *Cooper*.[87]

Others have offered reasons why *Cooper* does not control challenges to intracircuit nonacquiescence.[88] The main reason, however, is that the government's defense of intracircuit nonacquiescence rests on considerations unique to the operation of federal agencies: the value of uniformity in administration of national agency programs, the special need for percolation of issues concerning agency programs through the lower federal courts, and the claimed rightness of vindicating judgments made by congressionally anointed agency experts.[89] None of these considerations was present in *Cooper*, which involved nonadherence to a judicial pronouncement by state officials, rather than federal agency specialists.[90]

To say this much is not to say that *Cooper* teaches little about the intracircuit-nonacquiescence issue; in fact, it teaches much.[91] It is to say, however, that *Cooper* standing alone cannot condemn a national agency policy defended on grounds unrelated to the local practices considered and excoriated in *Cooper*.[92] The distinctive features of federal agencies — which

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83. 358 U.S. 1 (1958)

84. *See supra* note 78 and accompanying text.

85. 347 U.S. 483 (1954).

86. *Cooper*, 358 U.S. at 18-20.

87. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 722 & n.221 (articulating argument and collecting argument's advocates).

88. *See, e.g., id.* at 723-28; WASH. Note, *supra* note 4, at 748.

89. *See supra* note 10 and accompanying text.

90. *Cf.* Estreicher & Revesz I, *supra* note 4, at 728 ("The relevant question . . . is how an agency with national jurisdiction over a particular problem must react to the ruling of a court of limited geographical jurisdiction, which can render neither final nor nationally uniform rules of decision.").

91. The effect of *Cooper* on the intracircuit-nonacquiescence debate is considered *infra* notes 277-89 and accompanying text.

92. *But cf. infra* note 284 (suggesting presence of some parallels between defense of local officials' autonomy asserted in *Cooper* and agency officials' grounds for claiming power to engage in intracircuit nonacquiescence).

are considered in detail below[93] — may or may not justify intracircuit nonacquiescence.[94] Courts, however, should not use crude citations to *Cooper* simply to sweep those considerations under the constitutional rug.

B. *CROWELL V. BENSON*

Professor Schwartz has orchestrated a challenge to intracircuit nonacquiescence that is grand in scale compared to the minimalist incantation of *Cooper v. Aaron*.[95] His imaginative article devotes eighty-nine pages to urging that intracircuit nonacquiescence in agency adjudication offends the constitutional postulates underlying *Crowell v. Benson*.[96]

Crowell arose out of a workers compensation award made by a federal agency, pursuant to a federal statute, based on facts found by an agency officer.[97] The employer challenged this award, claiming that Congress's empowerment of agency officials to make such compensation decisions offended article III's assignment of the judicial power to judges tenured for life and protected against salary reductions.[98] The Court in *Crowell* rejected this attack.[99] It first noted that the case did not involve a "public rights" dispute, such as a contested claim for governmental "pensions and payments;" thus, the already settled public rights doctrine did not work to insulate Congress's assignment of this adjudicatory work to agencies from article III attack.[100] Even so, the Court concluded that the statutory scheme was constitutional. It reasoned that the delegation of fact-finding duties to the workers compensation agency was constitutional in light of the courts' age-old use of masters and other non-life-tenured assistants as fact finders in ordinary liti-

93. *See infra* notes 412-95 and accompanying text.

94. For a further treatment of the specialist-agency distinction and other possible differences between *Cooper* and cases of nonacquiescence, see *infra* notes 284-98 and accompanying text.

95. Schwartz, *supra* note 4.

96. 285 U.S. 22 (1932).

97. *Id.* at 36-37. *Crowell* is described in detail in Schwartz, *supra* note 4, at 1837-42.

98. *Crowell*, 285 U.S. at 37.

99. *Id.* at 54.

100. *See id.* at 50-51 (discussing Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855)). The Court concluded that the case involved instead a "private right," because it pitted one private litigant (the worker asserting the claim for monetary compensation) against another private litigant (the employer resisting the claim). *Id.* at 51.

gation.[101] The Court also detected no problem in letting the agency make legal rulings concerning entitlement to benefits because Congress had provided for judicial review of those rulings by article III courts.[102] Under these circumstances, the Court concluded, Congress's assignment of adjudicatory authority to the agency did not undermine "the essential attributes of the judicial power."[103]

Building on *Crowell*, Professor Schwartz argues that intracircuit nonacquiescence in the context of agency adjudication violates the separation of powers. In his view, the critical question in evaluating intracircuit nonacquiescence is whether the practice offends the constitutional theory justifying congressional delegations of adjudicatory powers to non-article III tribunals.[104] He claims that the "seminal case" on this subject is *Crowell*,[105] which established a "judicial review theory" of agency adjudication,[106] and that under this theory agency adjudication is constitutionally permissible only so long as an article III court retains " 'complete authority to insure the proper application of the law.' "[107] Professor Schwartz concedes that the availability of direct review of agency action by an article III court "ordinarily" satisfies this constitutional requirement,[108] but claims that the availability of such review alone does not suffice when an agency engages in intracircuit nonacquiescence.[109] This is so, he says, because nonadherence to a reviewing circuit court's precedents poses "both a practical and symbolic challenge to the authority of the article III courts"[110] inconsistent with the "subordinate position" of adjudicatory agencies envisioned by *Crowell*.[111] Professor Schwartz adds that intracircuit nonacquiescence violates *Crowell*'s judicial review theory even in "public rights" cases, notwithstanding the validation of unreviewed agency handling of public-rights disputes in *Crowell* itself.[112] He reaches this conclusion by claiming that later decisions have rejected the public-rights/private-

101. *Id.* at 51-54.
102. *Id.* at 54.
103. *Id.* at 51.
104. *See* Schwartz, *supra* note 4, at 1819-20, 1834.
105. *Id.* at 1836.
106. *Id.* at 1820, 1842.
107. *Id.* at 1844 (quoting *Crowell*, 285 U.S. at 54).
108. *Id.* at 1842, 1850.
109. *Id.* at 1849-51, 1855-56.
110. *Id.* at 1851.
111. *Id.* at 1848.
112. *See supra* note 100 and accompanying text.

rights dichotomy.[113]

Professor Schwartz's article abounds with valuable insights, many of which are echoed in this Article. His single-minded reliance on *Crowell*, however, exposes his analysis to a host of serious challenges not applicable to a more wide-ranging separation-of-powers analysis.

First, *Crowell* indicated that article III lets Congress permit agency adjudication so long as *Congress* vests *courts* with certain *powers of review*. This simply is a far cry from saying that an *agency* must force *its own decision makers* to apply certain *rules of decision*. Professor Schwartz's leap between these distant points is particularly problematic because he makes it without considering at all the distinctive governmental interests said to justify intracircuit nonacquiescence.[114] This omission offends both standard practice in constitutional analysis and relevant separation-of-powers precedents.[115] Nor is this omission true to *Crowell* itself, because the Court's constitutional analysis in that case relied to no small extent on the practical justifications that supported agency handling of workers-compensation claims.[116]

Second, even if cases like *Crowell* — concerning congressional authority to create non-article III tribunals — control the intracircuit-nonacquiescence issue, *Crowell* itself is no longer the most relevant authority in this field. Professor Schwartz's fixation on *Crowell* leads him all but to ignore the recent trilogy of Supreme Court cases that have addressed the same problem: *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[117] *Thomas v. Union Carbide Agricultural Products Co.*,[118] and *Commodity Futures Trading Commission v. Schor*.[119] The approach of these cases is, moreover, irreconcila-

113. Schwartz, *supra* note 4, at 1881-1903.

114. *See id.* at 1855-56.

115. *Infra* notes 123, 221-49 and accompanying text.

116. Crowell v. Benson, 285 U.S. 22, 46 (1932) (relying on fact that program procedures were intended to provide "a prompt, continuous, expert, and inexpensive method" for dealing with large numbers of disputes); *id.* at 54 (lauding "method shown by experience to be essential in order to apply [congressional] standards to the thousands of cases involved").

117. 458 U.S. 50 (1982).

118. 473 U.S. 568 (1985).

119. 478 U.S. 833 (1986). Professor Schwartz does assert in a footnote that the shifting majorities in these cases "based their analysis on *Crowell*." Schwartz, *supra* note 4, at 1843 n.105. Although this statement is true in the loose sense that the Court in each case cites to *Crowell*, one struggles in vain to find explicit or implicit reliance on any meaningful "judicial review theory." Indeed Professor Bator, the primary exponent of the judicial review theory, is

ble with the strict "judicial review theory" Professor Schwartz extracts from *Crowell*.[120] In *Northern Pipeline*, for example, the Court rejected adjudication by non-article III bankruptcy judges even though their legal rulings were fully reviewable by article III courts.[121] In *Thomas*, on the other hand, the Court upheld a congressionally imposed program of nonconsensual adjudication by non-article III decisionmakers, which barred altogether judicial review of many rulings on legal issues.[122] Indeed, Professor Schwartz himself acknowledges that these recent cases opt not for the model of *Crowell*, but instead for an "elaborate balancing test."[123] The balancing approach underly-

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"uneasy" with the Court's "reformulation" of its approach in these recent cases precisely because "it leaves the Court with a large *ad hoc* discretion . . . akin to a substantive due process test." Bator, *supra* note 58, at 257.

120. The point here is not that these recent decisions are "better" than *Crowell* or that Professor Schwartz may not argue that the recent cases provide a less satisfactory explanation for the constitutionality of administrative adjudication than *Crowell*. Rather, the point is that vindication of Professor Schwartz's position would require an overruling — or at least a major revisionist rereading — of three United States Supreme Court decisions that represent that Court's most recent treatment of this area of law. *See supra* note 119; *infra* notes 121-24 and accompanying text.

121. *See Northern Pipeline*, 458 U.S. at 55, 84-87 (plurality opinion); *id.* at 100 (White, J., dissenting).

122. Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 593-94 (1985). *Thomas* concerned a statute that mandated binding arbitration of disputes over proper compensation between filers and users of valuable pesticide-related information required to be recorded under federal law. The statute, however, permitted judicial review of the arbitrator's determination "only for 'fraud, misrepresentation, or other misconduct,'" *id.* at 573-74, thus placing *most* legal determinations within the unreviewable authority of the non-article III tribunal, *see id.* at 571 (noting "only limited judicial review" available under the statute). In upholding this scheme, the Court reasoned that: "Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Id.* at 583; *cf.* Maranville, *supra* note 4, at 524 ("Congress apparently has the authority to make administrative agencies the exclusive decisionmakers, even on issues of law, by precluding judicial review of agency decisions."); Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 304 n.68 (1990) (reading Bator as concluding that "some determinations by the executive or other non-article III tribunals need not be judicially reviewed"). *But cf.* WAYNE Note, *supra* note 4, at 185 n.198 (discussing need for judicial review).

123. Schwartz, *supra* note 4, at 1888-89. This conclusion is particularly well-supported by the Court's discussion of the matter in *Schor*:

> In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. *Thomas*, 473 U.S. at 587. Although such rules might lend a greater degree of coherence to this area of the law, they might also

ing the Court's modern cases simply is not the same as — and indeed seems a significant departure from — the "judicial review theory" Professor Schwartz finds dispositive of the intracircuit-nonacquiescence issue.[124]

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unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. *Id.*, at 590. Among the factors upon which we have focused are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Schor, 478 U.S. at 851.

124. *See supra* notes 106-08 and accompanying text; *see, e.g.*, Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 509 (1987) ("*Schor* repudiates . . . the analytic structure underpinning *Crowell v. Benson*."). Moreover, these new cases — and other important considerations as well — undermine an alternative argument, hinted at by Professor Schwartz, for finding intracircuit nonacquiescence incompatible with *Crowell*. Professor Schwartz notes that "[o]ne route" to the rejection of intracircuit nonacquiescence is to argue that it violates *Crowell*'s portrayal of agency adjudicators' function as providing "assistance" to article III courts. Schwartz, *supra* note 4, at 1845-48 (citing Crowell v. Benson, 285 U.S. 22, 51 (1932)). The invocation of this " 'judicial assistant' model," *id.* at 1846, to attack intracircuit nonacquiescence, however, is plainly unavailing. *See* Estreicher & Revesz II, *supra* note 4, at 842 n.62 (criticizing Professor Schwartz's position); *see also* Schwartz, *supra* note 4, at 1847 n.124 (collecting authorities critical of model). *Crowell* itself spoke of "assistance" only briefly in justifying agency factfinding by analogy to juries and masters, and not in upholding those agency forays into law-finding that give rise to the nonacquiescence problem. *Crowell*, 285 U.S. at 51. Professor Bator, even while lauding *Crowell* as "the greatest and deepest of the cases discussing our problem," Bator, *supra* note 58, at 261, has dismissed the "judicial assistant" extrapolation as "ludicrously inapt," "misconceived," and "neither a promising analytical tool nor a powerful way to describe the existing terrain," *id.* at 252-53. The Court's new cases make it even more apparent that "judicial assistantship" is not the touchstone of legitimate agency involvement in the adjudicatory process, *see Strauss*, *supra* note 123, at 509; indeed, they countenance agency participation in adjudication that is not conceivably describable as assistance to article III courts, *see Thomas*, 473 U.S. at 568 (discussed *supra* note 122 and accompanying text); *see also Schor*, 478 U.S. at 856 (upholding empowerment of agency to adjudicate even state-law counterclaims not because agency decisionmakers served as judicial assistants, but because "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*"). Beset by these problems, Professor Schwartz ultimately rejects this argument himself, conceding that his challenge to intracircuit nonacquiescence cannot and does not "depend[ ] on the passive image of agency action suggested by" the "judicial assistant" model. Schwartz, *supra* note 4, at 1849; *see also id.* at 1871 n.210 (rejecting argument that agency nonacquiescence

Third, *Crowell*'s "judicial review theory," even as conceived by Professor Schwartz, focuses on the availability of review by, and acquiescence in the rulings of, an article III court.[125] It thus would seem that subjecting administrative adjudication to possible Supreme Court review — together with forced acquiescence in Supreme Court rulings — should satisfy *Crowell*.[126] If that is so, however, the even greater protection afforded by forced acquiescence in Supreme Court precedent, together with the availability of review by *both* the Supreme Court *and* at least one other lower article III court, should meet *Crowell*'s requirements without any additional mandate of intracircuit acquiescence. Professor Schwartz claims that agency acquiescence in Supreme Court rulings alone is not sufficient to satisfy article III,[127] but (in my view at least) he never adequately explains why.[128]

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should result in an automatic award of attorney fees under Equal Access to Justice Act, 5 U.S.C. § 504 (a)(1) (1988); 28 U.S.C. § 2412 (d)(1)(A) (1988), although such a "per se rule might be plausible if restrictions or nonacquiescence were predicated on *Crowell*'s characterization of administrative agencies as judicial assistants").

125. *Supra* notes 108-09 and accompanying text.

126. *See also* Estreicher & Revesz I, *supra* note 4, at 730 (reasoning that under recent Supreme Court cases, "Congress can pursue uniformity at the administrative level to the extent of abolishing circuit court review of agency action altogether").

127. Schwartz, *supra* note 4, at 1854-55.

128. *Accord* Estreicher & Revesz II, *supra* note 4, at 842 n.62 ("Professor Schwartz has difficulty explaining why this residual Article III check is not satisfied by the availability of Supreme Court review."). Professor Schwartz's invocation of the judicial review theory raises a number of related analytical problems. The theory, for example, would seem logically to require invalidation of intracircuit nonacquiescence even if clearly authorized by Congress. This is so because to the extent *Crowell* creates constitutional limits, it puts limits on *congressional* power to structure the agency/court relationship. *See supra* text accompanying note 104. Yet a recurring theme in the Supreme Court's jurisprudence is that the presence or absence of congressional authorization of executive action may carry substantial weight in assessing that action's compatibility with separation-of-powers constraints. *See infra* notes 188, 210-11 and accompanying text.

In a similar vein, Professor Schwartz finds that intracircuit nonacquiescence violates *Crowell*'s judicial review theory because "[f]rom a practical point of view" intracircuit nonacquiescence frustrates "proper application of the law." Schwartz, *supra* note 4, at 1851. But why is what a single circuit court says about a national statute, sometimes in the face of disagreement by other circuits, properly characterized as "the law"? *See generally* Estreicher & Revesz I, *supra* note 4, at 725-27 (analyzing the effect of circuit court decision on the national state of the law). And why does nonacquiescence frustrate a national statute's "proper application" if it maximizes uniformity in a setting where different experts — namely, local circuit court judges, other judges, and agency experts — differ as to the statute's proper interpretation? As these

Fourth, Professor Schwartz's report of the death of the public rights doctrine[129] is greatly exaggerated.[130] Under present law, as even Professor Schwartz recognizes, the "public rights" character of the dispute remains a "factor" favoring some greater measure of agency autonomy in the adjudicatory process.[131] Given this doctrinal reality, however, a reasonable conclusion is that agency adjudications of *public rights* cases

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questions suggest, Professor Schwartz reads *Crowell* as requiring a special agency responsiveness to that *particular* "Article III court *with reviewing authority*." Schwartz, *supra* note 4, at 1851-52 (emphasis added); *see id.* at 1852-53 (article III requires adherence to "precedents that bind the very court in which judicial review of agency action will occur"); *id.* at 1853 (critical that particular court has "reviewing jurisdiction"); *id.* at 1856 ("relationship between the nonacquiescing agency and the court whose precedents are rejected assumes critical importance"). But the need for such special responsiveness is hardly self-evident — especially given the systemic justifications offered for intracircuit nonacquiescence and Professor Schwartz's own acknowledgement of "the primacy of the *system* of Article III courts in adjudicating questions of law." Schwartz, *supra* note 4, at 1868; *see infra* note 413 and accompanying text.

Professor Schwartz's focus on a judicial review theory also seems to create a "perverse" result. Estreicher & Revesz II, *supra* note 4, at 842 n.62. This is so because, under that theory, the constitutional prohibition on nonacquiescence applies only to "agencies that utilize formal adjudication as a mode of decisionmaking," and not at all "to agencies functioning through informal processes, lacking trial-type safeguards." *Id.*; *see* Schwartz, *supra* note 4, at 1858 n.163 ("[A]dministrative agencies engaged in adjudication have special obligations to abide by judicial precedents that executive branch officials do not bear in other contexts."). Of course, an important segment of agency work includes "informal investigation, enforcement activities, and claims processing," Maranville, *supra* note 4, at 493, all of which activity Professor Schwartz's theory apparently fails to cover. *But see id.* at 508 (noting that "[u]nless controlling case doctrine were applied to the prosecutorial or claim-deciding staff, the doctrine would require adherence to controlling decisions in only a fraction of the cases coming before the agency"). In addition, Professor Schwartz's analysis necessarily fails to deal with intracircuit nonacquiescence in agency rule making, *see* Schwartz, *supra* note 4, at 1830-31 n.49, and the ability of agencies, when acting as litigators, to disregard controlling circuit court precedent, White, *supra* note 4, at 668 & n.181; *cf. infra* note 499 (discussing this issue). Professor Schwartz's failure to address nonacquiescence in any context except formal agency adjudication highlights the need to seek some other, broader constitutional analysis.

129. *See* Schwartz, *supra* note 4, at 1881-1903. As noted above, the "public rights" doctrine, as outlined in *Crowell*, exempted certain forms of agency action — including the award or failure to award government benefits — from any form of judicial review. *See supra* notes 100, 113.

130. It is also ironic, because Professor Schwartz's interment of the public rights doctrine rests on the same recent Supreme Court decisions, *see supra* notes 117-19 and accompanying text, that he all but ignores in advocating the "judicial review theory" on which his basic case rests. *See* Schwartz, *supra* note 4, at 1886-90.

131. Schwartz, *supra* note 4, at 1890; *see also* Granfinanciera, S.A. v.

that *are fully subject to judicial review* do not violate article III when agency adjudicators acquiesce in Supreme Court, but not circuit court, precedent. Otherwise, it is hard to see how the public-rights "factor" has any meaningful content at all in the context of applying Professor Schwartz's judicial review theory.[132]

Finally, Professor Schwartz's argument rests in the end on favorable constructions of the most shadowy of judicial phrases. What *are* "the essential attributes of the judicial power"?[133] What *does it mean* to preserve "complete authority to insure the proper application of the law"?[134] Professor Schwartz seeks, as an analyst should, to extract meaning from these Delphic utterances. Their patent obliqueness suggests, however, that his framework ultimately must collapse into the sort of wide-open balancing it might be supposed to replace.[135] Indeed, there exists unique evidence of the indeterminacy of *Crowell* with respect to the intracircuit-nonacquiescence debate. This is so because Professor Schwartz's argument hinges on the "judicial review theory" of agency adjudication that he borrows from Professor Bator.[136] Yet Professor Bator himself was unpersuaded that intracircuit nonacquiescence violates the constitutional separation of powers.[137]

The central point of this critique is not that Professor

Nordberg, 109 S. Ct. 2782, 2795-97 (1989) (emphasizing public right/private right distinction).

132. Moreover, to the extent that the Court has blurred the private-rights/public-rights dichotomy in recent cases, it has done so to *shelter* seemingly private-rights adjudication from article III attack. *See* Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 585-86, 589 (1985) (upholding agency-adjudication program in part because "the right created by FIFRA is not a purely 'private' right, but bears many of the characteristics of a 'public' right"). This fact suggests not that *Crowell*'s "judicial review theory" is alive and well for purposes of both "public rights" and "private rights" adjudication, but instead that the Court has moved toward exempting certain forms of agency private-rights adjudication, no less than agency public-rights adjudication, from any strict requirement of judicial review.

133. Crowell v. Benson, 285 U.S. 22, 51 (1932).

134. *Id.* at 54.

135. Indeed Professor Schwartz's own discussion reveals as much. *See* Schwartz, *supra* note 4, at 1851 (concluding that "proper question is . . . whether nonacquiescence undermines the ability of the courts 'to insure the proper application of the law' "); *id.* at 1851-55 (developing "practical" and "symbolic" reasons why intracircuit nonacquiescence violates article III).

136. Schwartz, *supra* note 4, at 1842, 1849.

137. *See* Bator, *Address by the Deputy Solicitor General and Counsellor to the Solicitor General of the United States*, 61st A.L.I. PROC. 493, 497 (1984) (asserting that intracircuit nonacquiescence does not raise "serious concerns . . . about . . . judicial supremacy").

Schwartz is wrong; indeed, if the Court moves back toward *Crowell*, and then gives that case an ample interpretation, his argument may carry the day. Rather, the point is that Professor Schwartz's line of argument is neither the best one nor the most complete one available. A more broad-gauged constitutional approach — using modern "means/end" analysis and drawing on a wider range of separation-of-powers jurisprudence — establishes with greater persuasive force the constitutional infirmity of intracircuit nonacquiescence.

C. *UNITED STATES V. MENDOZA*

Just as detractors of intracircuit nonacquiescence have invoked *Cooper* and *Crowell*,[138] defenders of nonacquiescence urge that the Supreme Court validated the practice in *United States v. Mendoza*.[139]

In *Mendoza*, a Filipino filed an action in the United States District Court for the Central District of California, challenging the denial of his petition for naturalization by the Immigration and Naturalization Service.[140] The plaintiff claimed that the government had deprived him of due process of law by not affording Filipinos the same opportunities to become naturalized as it afforded other noncitizen Armed Forces veterans in the wake of World War II.[141] The district court ruled in favor of the plaintiff, and the court of appeals affirmed.[142] Neither of those courts, however, reached the merits of the plaintiff's constitutional challenge.[143] Instead, they relied on the doctrine of nonmutual collateral estoppel and the fact that the United States District Court for the Northern District of California had ruled against the government on the same issue in an earlier case.[144] The Supreme Court granted certiorari to explore the question whether "the United States may . . . be collaterally estopped on an issue such as this, adjudicated against it in an earlier lawsuit brought by a different party."[145] Emphasizing "that 'the Government is not in a position identical to that of a private litigant,' "[146] the Court barred application of nonmutual

138. *See supra* notes 84-137 and accompanying text.
139. 464 U.S. 154 (1984); *see* sources cited *infra* note 148.
140. *Id.* at 155.
141. *Id.* at 156-57.
142. *Id.* at 157-58.
143. *Id.* at 155.
144. *Id.*
145. *Id.*
146. *Id.* at 159 (quoting INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam)).

collateral estoppel against the United States.[147] Latching onto this ruling, the Department of Justice has urged that a rule barring intracircuit nonacquiescence "is nothing more than a rule of mandatory nonmutual collateral estoppel against the government" prohibited by *Mendoza*.[148]

Leading commentators agree that *Mendoza* does not shelter intracircuit nonacquiescence from constitutional attack.[149] Some observers, however, have stressed the wrong reasons for distinguishing *Mendoza*,[150] while others have suggested that *Mendoza* has more bearing on the intracircuit-nonacquiescence issue than it rightly deserves.[151] In reality, for at least three separate reasons, *Mendoza* is all but irrelevant to the nonacquiescence debate.[152]

First, *Mendoza* simply was not a case involving a constitutional challenge. Thus no one argued in *Mendoza* — and no one reasonably could argue — that the Constitution requires routine application of the common law principle of nonmutual collateral estoppel in ordinary governmental litigation.[153] It follows that, whatever else the Court decided in *Mendoza*, it did not decide the distinctive separation-of-powers issue presented by intracircuit nonacquiescence.

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147. *Id.* at 162.

148. Brief for Appellants at 41, Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986) (No. 85-6310), *quoted in* Estreicher & Revesz I, *supra* note 4, at 684 n.21; *see* Kuhl, *supra* note 4, at 914 (Deputy Assistant Attorney General, Justice Department) (arguing that legislative restrictions on nonacquiescence "would create many of the same problems identified" in *Mendoza*); Schwartz, *supra* note 4, at 1876-77 & nn.231-32 (noting government reliance on *Mendoza* and collecting additional authorities); HARV. Note, *supra* note 4, at 854-55 (noting government reliance on *Mendoza*); TOURO Note, *supra* note 4, at 203-04 (noting SSA's reliance on *Mendoza*); *see also* White, *supra* note 4, at 669-70 (arguing *Mendoza*'s "reasoning suggests that commanding acquiescence is improper"); CUMB. Comment, *supra* note 4, at 125 (relying on *Mendoza* in defending intracircuit nonacquiescence).

149. *See* Estreicher & Revesz I, *supra* note 4, at 684-86; Schwartz, *supra* note 4, at 1875-81; *see also id.* at 1877 n.233 (collecting authority rejecting government's *Mendoza*-based arguments).

150. *See* Schwartz, *supra* note 4, at 1877-80 & n.234 (noting, for example, inapposite arguments that *Mendoza* supports a distinction between constitutional and statutory rulings or permits a "hardship" exception).

151. *See* Estreicher & Revesz I, *supra* note 4, at 685-86.

152. Professor Schwartz's treatment of *Mendoza* (although, in my view, incomplete because it does not develop all of the points made here) ably collects existing judicial and scholarly commentary on *Mendoza*. *See* Schwartz, *supra* note 4, at 1875-81.

153. For a general discussion of collateral estoppel, and nonmutual collateral estoppel in particular, see F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 11.16-.31 (3d ed. 1985).

Second, the facts of *Mendoza* render it readily distinguishable from cases concerning intracircuit nonacquiescence.[154] *Mendoza* involved the effect of a ruling of a district court, rather than a circuit court — a fact of significance because even staunch critics of intracircuit nonacquiescence do not advocate forced acquiescence in district court decisions.[155] Even more important, *Mendoza* involved an earlier judicial decision's impact on tribunals (the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit Court) that were in no sense *subordinate* to the deciding court (the United States District Court for the Northern District of California).[156] Intracircuit-nonacquiescence cases, on the other hand, concern how rulings of a circuit court affect decisionmakers who are subordinate in the indisputable sense that their actions are subject to review and reversal by *only that very circuit court*.[157] *Mendoza* also addressed only the prerogatives of the government as a "party"[158] seeking to "litigate issues"[159] in "lawsuits."[160] Thus, *Mendoza* did not purport to address the duties of executive officers when they act as agency adjudicators or, indeed, as anything other than litigants appearing in court.[161]

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154. *See, e.g.*, Sun Towers, Inc. v. Heckler, 725 F.2d 315, 323 n.8 (5th Cir. 1984) (noting opportunity for distinguishing other cases from *Mendoza*), *cert. denied*, 469 U.S. 823 (1984).

155. *See, e.g.*, Schwartz, *supra* note 4, at 1859-60.

156. One commentator's assertion that both the earlier case and *Mendoza* itself arose in the same district court, S. CAL. Note, *supra* note 4, at 1175 n.92, is simply wrong, *see* United States v. Mendoza, 464 U.S. 154, 157 (1984) (indicating that earlier decision arose out of Northern District of California); Mendoza v. United States, 672 F.2d 1320, 1320 (1984) (syllabus) (indicating that *Mendoza* arose in the Central District of California), *rev'd*, *Mendoza*, 464 U.S. 154.

157. *See supra* note 26 and accompanying text.

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

159. *Id.* at 162.

160. *Id.* at 160, 163. The Supreme Court's discussion simply leaves no doubt that it was focusing on issue preclusion in "government litigation." *Id.* at 161-62; *see id.* at 164 (referring to "application of an estoppel when the Government is litigating"); *id.* at 161-64 (referring to issue preclusion in "litigation," "action[s]," "cases" and "private civil litigation").

161. *See* Estreicher & Revesz I, *supra* note 4, at 685 ("the fact that the government may not be precluded in court from relitigating issues that it lost in prior cases does not imply that it may disregard rulings of the courts of appeals in the conduct of its internal proceedings"); Schwartz, *supra* note 4, at 1879-80 (arguing that "*nonacquiescence* by administrative agencies exercising adjudicatory authority presents problems significantly different from those considered in *Mendoza*"); ME. Note, *supra* note 4, at 199 (citing post-*Mendoza* decisions suggesting litigator/non-litigator distinction). *Mendoza* also is distin-

Finally, the *Mendoza* decision rested on considerations of policy not applicable in cases concerning intracircuit nonacquiescence.[162] At the core of *Mendoza* lay a concern about "freezing the first final decision rendered on a particular legal issue,"[163] for all time,[164] in all courts,[165] in all parts of the country.[166] Faced with such a prospect, the Supreme Court insisted on "allowing litigation in *multiple* forums,"[167] emphasizing in particular "the benefit it receives from permitting *several courts of appeals* to explore a difficult question before this Court grants certiorari."[168] A ban on intracircuit nonacquiescence does not frustrate this agenda. Rather, the agency — even if required to comply with local circuit court precedent — may pursue its own policies in other circuits, defend those policies in those circuits when challenged, seek Supreme Court review when it so desires, and thus avoid the nationwide "freezing . . . of the law"[169] that the Court in *Mendoza* eschewed.[170]

Indeed *Mendoza* differs from an intracircuit-nonacquiescence case on the most fundamental level, because *Mendoza* at bottom did not involve any tension at all between executive and judicial authority. To be sure, *Mendoza* protected executive prerogatives to relitigate issues of law. The Court afforded this

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guishable because the rule it establishes does not raise the problems of inequitable treatment presented by intracircuit nonacquiescence. *See supra* notes 39-41 and accompanying text.

162. *See* Lopez v. Heckler, 725 F.2d 1489, 1497 n.5 (9th Cir.) (finding policies underlying *Mendoza* inapplicable to nonacquiescence), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984) (mem.); Stieberger v. Heckler, 615 F. Supp. 1315, 1358-61 (S.D.N.Y. 1985) (same), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Schwartz, *supra* note 4, at 1881 (concluding that prohibition on intracircuit nonacquiescence will not produce "the result the *Mendoza* Court sought to avoid"); IND. Note, *supra* note 4, at 1120-21 (intracircuit nonacquiescence does not threaten policies underlying *Mendoza*).

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

164. *See id.* at 161-62.

165. *See id.* at 163.

166. *See id.* at 160.

167. *Id.* at 163 (emphasis added).

168. *Id.* at 160 (emphasis added); *see* Maranville, *supra* note 4, at 510-11 (noting that Court in *Mendoza* relied "primarily" on desirability of multi-circuit exploration of issues prior to Supreme Court review).

169. *Mendoza*, 464 U.S. at 164.

170. *See* BROOKLYN Note, *supra* note 4, at 120-21; TOURO Note, *supra* note 4, at 206-07; *see also Mendoza*, 464 U.S. 154, 164 (1984) ("[A]pplication of an estoppel when the Government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the Government is still free to litigate that issue in the future with some other party.").

protection, however, to safeguard *judicial* autonomy to fashion rules of law free of otherwise sweeping issue-preclusion restraints.[171] Such a decision — designed to safeguard, rather than to contract, federal court authority — hardly disposes of the argument that executive disregard of the preexisting precedents of a supervisory circuit court trenches too much on the judicial power.[172]

D. CONGRESSIONAL AUTHORIZATION

Professors Estreicher and Revesz do not argue that *Mendoza* establishes the constitutionality of intracircuit nonacquiescence. Instead they seek to parry the separation-of-powers challenge by constructing the following syllogism:

Major Premise:	If Congress passed a statute authorizing intracircuit nonacquiescence, that practice (at least for the most part) would be constitutional.[173]
Minor Premise:	The "current administrative landscape" suggests an "implicit authorization of nonacquiescence" sufficient to say that "the hypothetical statute permitting nonacquiescence [has] in fact been enacted."[174]
Conclusion:	Intracircuit nonacquiescence is (at least for the most part) constitutional.[175]

As its formulators recognize, the major premise of this argument is controversial.[176] In particular, it rests substantially on the view that Congress's greater power to eliminate lower

171. Indeed, the *Mendoza* Court repeatedly decried the effect that applying collateral estoppel would have on "this Court." *Mendoza*, 464 U.S. at 160. The Court also reasoned that its decision was responsive to "the crowded dockets of the courts," *id.* at 161, that it might advance "economy interests" of the courts, *id.* at 163, and (most importantly) that it "better allow[ed] *thorough development of legal doctrine*" by the courts, *id.* (emphasis added); *see also* Schwartz, *supra* note 4, at 1876 (noting that *Mendoza* rule was designed to protect "scarce federal appellate judicial resources" and to "better serve the development of carefully considered legal doctrine").

172. *See supra* note 7 and accompanying text.

173. Estreicher & Revesz I, *supra* note 4, at 730.

174. *Id.* at 729-30.

175. *Id.* at 731.

176. *Id.* at 730-31.

court jurisdiction to review agency action includes the lesser power to provide for such review without requiring intracircuit acquiescence.[177] But the greater jurisdiction-stripping power assumed by this argument may not exist at all,[178] and even if it does exist, a "greater" constitutional power often does not include what might be characterized as a "lesser" one.[179] In this setting, moreover, there exists a strong argument for rejecting any greater-includes-the-lesser reasoning, because active flouting of local circuit court pronouncements may well create a greater "affront to judicial authority"[180] than eliminating altogether lower court interaction with an executive agency.[181]

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177. *Id.* at 730 (relying on "the wide-ranging power that Congress enjoys over the jurisdiction of the lower federal courts").

178. *See* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 229-30 (1985) (arguing that text of article III requires vesting federal judicial power to hear federal question, admiralty, and public ambassador cases in federal courts as a whole); Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 513 (1974) (arguing that practical limits on access to Supreme Court may preclude congressional elimination of lower federal court jurisdiction); *see also* Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 93 (1975) (arguing that congressional power over lower federal court jurisdiction is limited by the fifth amendment's due process clause in cases where doors to the state courts are closed); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42-89 (1981) (arguing that congressional power to mold federal jurisdiction is limited in various ways). *See generally* Schwartz, *supra* note 4, at 1820, 1835-43 (under *Crowell*, Congress may assign adjudicatory tasks to an administrative agency "only to the extent that judicial review can assure effective supervision, by the article III courts, of the administrative agencies' determinations of questions of law").

179. *See* Estreicher & Revesz I, *supra* note 4, at 731; *see also, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267-68 (1981) ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."); Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements . . . .").

180. Estreicher & Revesz I, *supra* note 4, at 732.

181. *See* Maranville, *supra* note 4, at 497-99; *see also infra* notes 357-80 and accompanying text; *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) (distinguishing removal of jurisdiction and "legislative interference with courts in the exercising of continuing jurisdiction"). Professors Estreicher and Revesz anticipate this challenge with the undeveloped assertion that, "without regard to" the greater-includes-the-lesser argument, Congress possesses "fairly broad authority to define the respective roles of agency and reviewing court." Estreicher & Revesz I, *supra* note 4, at 731. Plainly, however, *some* limit on that authority exists, *see, e.g.*, *id.* at 721, 725 (conceding the need for agencies to "acquiesce" in Supreme Court decisions and lower-court injunctions), and — for

The more profound deficiency in the Estreicher/Revesz syllogism, however, lies in its minor premise. In support of their claim of "implicit" congressional "authorization" of intracircuit nonacquiescence, Professors Estreicher and Revesz offer one lonely paragraph of discussion.[182] That discussion, moreover, asserts that Congress's "authorization" of intracircuit nonacquiescence is established by nothing more than "the congressional choice in favor of administrative government"[183] and the congressional goal in establishing agency programs of advancing "uniformity in the administration of federal law."[184] Congress's endorsement of administrative government, however, did not authorize administrators to do whatever they pleased, and its call for uniformity did not supply a license to achieve uniformity at any price.[185] Finding an "implicit authorization" of so focused and controversial a practice as intracircuit nonacquiescence in such cloudy formulations as "favor[ing] administrative government" and "promot[ing] uniformity" is simply too long a leap.[186]

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reasons developed in detail below — an authorization of defiance of local circuit court precedent seems a plausible candidate for being viewed as transgressing the constitutional boundary. *See supra* Parts IV-VI.

182. Estreicher & Revesz I, *supra* note 4, at 729-30.

183. *Id.* at 729.

184. *Id.*

185. For example, Professors Estreicher and Revesz concede that agencies must adhere to judicial orders in individual cases, even when such action produces nonuniform results, *id.* at 723, and acknowledge more broadly that intracircuit nonacquiescence is not "rational" unless certain requirements that they identify are satisfied, *id.* at 758; *see supra* note 525 and accompanying text. *See also supra* note 9, *infra* note 275 and accompanying text (noting position of defenders of nonacquiescence that the executive must nonetheless obey judgments in individual cases). Moreover, inferring a congressional intent to authorize intracircuit nonacquiescence from a declared preference for uniformity is especially problematic because such nonacquiescence in fact produces substantial disuniformity of treatment between those who appeal and those who do not. Diller & Morawetz, *supra* note 4, at 818. *See generally supra* notes 39-41 and accompanying text (discussing equal protection challenge to intracircuit nonacquiescence).

186. In fact, if Professors Estreicher and Revesz are right in arguing that an answer to the "implicit authorization" issue flows from such vaguely framed congressional objectives, the better view is that Congress implicitly has *condemned* intracircuit nonacquiescence. Congress, after all, provided that courts would review the actions of agencies — not vice versa. *See* McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1124 n.17 (1977) (" 'almost every regulatory statute enacted by Congress has contained provisions authorizing Federal courts to review the legality of administrative action' " (quoting H.R. REP. NO. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6125)). *See generally* COLUM. REV. Note, *supra* note 4, at 598-99 (discussing scope of judicial review over ad-

The outlandishness of a claim that Congress has "implicitly authoriz[ed]" intracircuit nonacquiescence becomes even more evident when one consults the actual legislative record. While framing the Social Security Disability Benefits Reform Act of 1984 (1984 Act),[187] Congress took its one and only hard look at intracircuit nonacquiescence.[188] Following extensive investigation, the Democrat-controlled House of Representatives passed a bill proscribing intracircuit nonacquiescence as part of a comprehensive package aimed at broadly reforming the SSA disability program.[189] The Republican-controlled Senate produced a similarly wide-ranging bill, which dealt with nonacquiescence by imposing significant procedural limitations on SSA's ability to engage in the practice.[190] In this legislative posture, the congressional conference committee that forged the 1984 Act took

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ministrative agency action). On its face, this chosen structure reveals a legislative design to subordinate agencies to courts in a meaningful way. *See* Thomas v. Heckler, 598 F. Supp. 492, 496 (M.D. Ala. 1984) (by providing for judicial review, Social Security Act "recognizes the primacy of the courts in determining the law"); Diller & Morawetz, *supra* note 4, at 819 (noting that judicial review "is the principal means" used by Congress "to hold agencies accountable to statutory limitations on agency power"). Furthermore, if Congress intended to subordinate agencies to courts, the better inference surely is that Congress would not and did not tolerate agency disregard of the pronouncements of reviewing courts. *See* Kubitschek, *supra* note 4, at 423 & n.139; *see also* Maranville, *supra* note 4, at 527 (noting that "Congress's provision for judicial review of agency decisions suggests that Congress intended the courts to have the final word on some issues in individual cases"); COLUM. REV. Note, *supra* note 4, at 600 (noting that legislation authorizing courts to review agency action and to interpret scope of agency power indicates that Congress did not "empower[ ] agencies to disregard judicially declared limits on their power"). Proponents of nonacquiescence might respond to this argument by claiming that Congress surely has made no such decision. That, however, is precisely the point. If the claim that Congress has implicitly rejected intracircuit nonacquiescence in providing for judicial supervision of agency action is an overreach, the claim that Congress has implicitly authorized the practice in simply providing for agencies and expressing an interest in uniform program administration is no less an overreach.

187. Pub. L. No. 98-460, 98 Stat. 1794 (1984) (codified as amended in scattered sections of 42 U.S.C.).

188. Because earlier instances of intracircuit nonacquiescence were so sporadic and of such limited practical significance, neither the public nor the Congress had focused on the practice. For this reason, no reason whatsoever exists for concluding that, prior to 1984, this executive policy had gained a constitutional immunity because "Congress . . . consistently failed to object to this longstanding practice." Dames & Moore v. Regan, 453 U.S. 654, 682 n.10 (1981).

189. *See* H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 37 *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3095 (discussing House bill's provisions).

190. *See id.*

up the issue of intracircuit nonacquiescence.[191] Ultimately, as part of a complex compromise on legislation treating some sixteen major subjects, the conference committee proposed that Congress not enact any legislation concerning nonacquiescence.[192] The full Congress then acceded to that approach.[193]

In opting for inaction, however, Congress specifically *refused* to authorize intracircuit nonacquiescence.[194] Indeed the full conference committee went out of its way to emphasize that: "The conferees do not intend that the agreement to drop both provisions be interpreted as approval of 'non-acquiescence' by a federal agency to an interpretation of a United States Circuit Court of Appeals as a general practice."[195] This refusal to approve nonacquiescence was hardly surprising, because a widespread and deeply felt hostility toward the SSA policy existed in the Congress.[196] The conference committee report itself stated that "many of the conferees" had "strong concerns" about intracircuit nonacquiescence[197] and the entire committee flatly criticized the policy's "clearly . . . undesirable consequence" of generating repetitious appeals costly to both claimants and the government.[198] Representative Pickle, who was

191. *Id.*

192. *Id.*; *see also* BROOKLYN Note, *supra* note 4, at 124 & n.189 (detailing the 16 subjects).

193. *See* Pub. L. No. 98-460, 98 Stat. 1794 (1984) (codified as amended in scattered sections of 42 U.S.C.).

194. *See, e.g.*, Stieberger v. Heckler, 615 F. Supp. 1315, 1375 (S.D.N.Y. 1985), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Maranville, *supra* note 4, at 526 ("To the extent that one can infer any congressional intent as to nonacquiescence . . . it appears that Congress intends to avoid passing judgment on the issue."); WAYNE Note, *supra* note 4, at 170 (conference committee "made clear that deletion of both provisions did not constitute tacit acceptance of nonacquiescence by any agency"); Conference Transcript, *supra* note 4, at 90 (remarks of Mr. Sussman) (Congress "threw up their hands" and "wouldn't bite the bullet on this").

195. H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3095 (emphasis added).

196. For example, a number of conference committee members took the floor to express their strong personal opposition to SSA intracircuit nonacquiescence. *See, e.g.*, 130 CONG. REC. S11,460 (daily ed. Sept. 19, 1984) (statement of Sen. Sasser); *id.* at S11,469 (statement of Sen. Bingaman). *See generally* Schwartz, *supra* note 4, at 1850 n.139 (citing "unfavorable congressional attention" to SSA intracircuit nonacquiescence).

197. H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3095.

198. *Id.* at 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3096. The conference report also directly questioned "the constitutional basis of nonacquiescence," *id.* at 37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3095, and urged that, instead of nonacquiescing, the Secretary should "resolve policy conflicts promptly" either by appealing to the Supreme Court or by

principally responsible for the legislation in the House, went so far as to tell his colleagues that the conference report "send[s] a clear signal to the administration that the present policy of [nonacquiescence] is *not acceptable*."[199]

Even more to the point, the legislative materials show that Congress declined to act at all on intracircuit nonacquiescence precisely because it envisioned a *judicial* resolution of the constitutional questions raised by the practice *uninfluenced by any legislative pronouncements*. Even the report accompanying the less-restrictive Senate proposal emphasized that "nothing in the section shall be interpreted as sanctioning any decision of the Secretary not to acquiesce."[200] The conference committee expressed even more clearly its intention to hand the ball to the judiciary when it observed that: "The conferees also feel that in addition to the practical administrative problems which may be raised by non-acquiescence, the legal and Constitutional issues raised by non-acquiescence can only be settled by the Supreme Court."[201] As these statements indicate, Congress distinguished between "the practical administrative problems" raised by intracircuit nonacquiescence and "the legal and Constitutional issues" presented by the SSA's policy.[202] With respect to the practical problems, Congress decided to forego formal legislation, but to "jawbone" the agency in the conference report.[203] With respect to "legal and Constitutional issues," the Congress very deliberately decided not to speak at all, but instead to permit judicial resolution of those issues on a clean slate.[204]

In claiming that Congress nonetheless impliedly has authorized intracircuit nonacquiescence, Professors Estreicher and Revesz barely acknowledge — much less respond to — this

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seeking legislative action, *id.* *See generally* COLUM. Note, *supra* note 4, at 587 n.33 (noting that "the final conference report contained strong language criticizing the practice of nonacquiescence").

199. 130 CONG. REC. H9836 (daily ed. Sept. 19, 1984) (emphasis added).

200. H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3095. The Senate took this approach because it perceived that "if a constitutional issue is involved, it cannot be settled in this legislation." S. Rep. No. 466, 98th Cong., 2d Sess. 21 (1984).

201. H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3096; *accord* 130 CONG. REC. H9834 (daily ed. Sept. 19, 1984) (statement of Rep. Archer) ("We agreed to encourage SSA to litigate this issue before the Supreme Court.").

202. *See* H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3096.

203. *See id.*

204. *See supra* notes 200-02 and accompanying text.

history of the 1984 Act. They say only that: "The implications of the Conference Report for the legitimacy of continued intracircuit nonacquiescence by SSA are difficult to assess because the legislators held a range of views."[205] The "implications of the Conference Report" with respect to the implied-authorization issue, however, are not "difficult to assess" at all. Precisely because the legislators did hold "a range of views," the conference committee agreed that Congress would not speak one way or the other on whether intracircuit nonacquiescence was authorized or legally permissible. Against this backdrop, the contention that Congress in effect has enacted a "statute *permitting* nonacquiescence"[206] is unsupportable and, indeed, extraordinary.[207]

205. Estreicher & Revesz I, *supra* note 4, at 704 n.137.

206. *Id.* at 730 (emphasis added).

207. If proponents of intracircuit nonacquiescence wished to cut their losses, they might respond that the legislative history of the 1984 Act reveals at most Congress's choice regarding the Social Security Program, and thus reveals only that intracircuit nonacquiescence *by the SSA* has not been implicitly authorized by Congress. Such a claim, however, would be unpersuasive as well, because Congress in considering the 1984 Act took its one and only look squarely at the practice of intracircuit nonacquiescence in the very context in which that practice has been most visible and controversial. It makes no sense to say that Congress's *express* refusal to authorize intracircuit nonacquiescence in this setting counts for less than supposed emanations of an "implicit authorization" of nonacquiescence by other agencies flowing from nothing more than their creation and generalized calls for administrative uniformity. Indeed, Congress's refusal to authorize intracircuit nonacquiescence in the SSA context may suggest a fortiori an absence of such authorization in other contexts, because the central uniformity-based justification for intracircuit nonacquiescence, *see infra* notes 414-17 and accompanying text, is surely at its apex in connection with the SSA program, *see infra* note 414 and accompanying text. It also noteworthy in this regard that the conference committee did not limit its remarks regarding intracircuit nonacquiescence to the SSA, but instead noted its refusal to give "approval of 'non-acquiescence' *by a federal agency*." H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3095 (emphasis added).

Nor can agencies bootstrap their way into an "implicit authorization" by demanding deference under the *Chevron* rule, *see infra* notes 487-89 and accompanying text, to their own supposedly expert judgments about whether Congress has authorized intracircuit nonacquiescence. *See* Diller & Morawetz, *supra* note 4, at 818-19. Even Professors Estreicher and Revesz concede this much, apparently on the ground that any such judgment would travel well outside the agency's range of delegated authority and expertise. *See* Estreicher & Revesz II, *supra* note 4, at 841 ("We of course do not argue that intracircuit nonacquiescence is legitimate simply because an agency has chosen to nonacquiesce and the federal courts are bound by *Chevron* to defer to that choice."). *But cf.* White, *supra* note 4, at 666 (finding *Chevron* deference is properly applied to the NLRB's conclusion that multiple-venue judicial-review statute is incompatible with any duty to acquiesce). In any event, in light of the unam-

The conclusion that Congress has refused to authorize intracircuit nonacquiescence has significant analytical consequences. It obliterates the jurisdiction-control defense of the practice advanced by Professors Estreicher and Revesz by negating entirely their critical minor premise. Of no less importance, this conclusion undercuts three alternative arguments for the constitutionality of intracircuit nonacquiescence.[208] First, the absence of congressional authorization undermines any argument that Congress properly has sanctioned the practice as an "incidental" limitation on the right to SSA benefits, which Congress has created and properly may define pursuant to its spending and commerce powers.[209] Second, the absence of congressional authorization undoes any claim that intracircuit nonacquiescence enjoys "the strongest of presumptions" of constitutionality based on the sort of cooperative executive-legislative action envisioned by the Court in *Youngstown Sheet & Tube Co. v. Sawyer*.[210] Finally, the lack of congressional authorization neutralizes any argument that Congress has validated executive nonacquiescence pursuant to its "necessary and proper" authority "to effectuate not only its own enumerated powers, but all the powers of *every* branch of the federal government."[211]

The key point is that Congress has not authorized — im-

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biguous legislative history of the 1984 Act, any agency conclusion that an implicit congressional authorization of intracircuit nonacquiescence exists would transgress even the bounds of reasonableness imposed by *Chevron*.

208. *Cf.* Diller & Morawetz, *supra* note 4, at 821-22, 824 (suggesting that constitutional inquiry may differ depending on whether Congress has, or has not, authorized nonacquiescence).

209. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982) (plurality opinion).

210. 343 U.S. 579 (1952). In *Youngstown Sheet & Tube*, the Court addressed whether the executive power allowed the President to seize privately owned steel mills to ensure their operation in the face of a nationwide strike. Writing for the majority, Justice Black concluded that the President lacked this power, in part because no "statutory authorization for this seizure" existed, *id.* at 585, and because "Congress had refused to adopt that method of settling labor disputes," *id.* at 586. In a famous concurrence, Justice Jackson expanded on this theme, distinguishing among three types of cases. In one set of cases, "the President acts pursuant to an express or implied authorization of Congress," *id.* at 635, and, as a result, the authority of the president to act is "supported by the strongest of presumptions," *id.* at 637. Justice Jackson's approach in *Youngstown Sheet & Tube* has become an important part of modern separation-of-powers analysis. *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (citing Justice Jackson's approach as "analytically useful"); W. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 93 (1987) (Justice Jackson's opinion has "proved valuable to subsequent courts and lawyers").

211. Bator, *supra* note 58, at 168 (emphasis added).

plicitly or otherwise — intracircuit nonacquiescence by the executive branch. Thus, any constitutional analysis based on an "implied authorization" offers no more hope for solving the nonacquiescence puzzle than do citations to *Cooper*, *Crowell*, or *Mendoza*. Courts must construct some other methodology for assessing the constitutional question.

IV. IDENTIFYING AN ALTERNATIVE APPROACH

The Supreme Court has yet to address the constitutionality of intracircuit nonacquiescence.[212] Many lower courts have condemned the practice, but they have done so essentially by assertion.[213] Existing case law thus sheds little light on how to approach this constitutional question.

As with other constitutional issues, resolution of the intracircuit-nonacquiescence controversy requires, in the end, a choice between competing values.[214] It may be enough to leave the matter at that and to proceed without more to balancing the pros and cons of the practice.[215] Other commentators have done just that.[216] Such wide-open balancing, however, raises serious problems. It imposes institutional costs on courts by lending credence to the charge that the judiciary acts as little more than a "super-legislature" guided only by the shifting preferences of its individual members.[217] Unstructured balancing also

212. *See supra* note 11.

213. *See* Estreicher & Revesz I, *supra* note 4, at 718 (noting that court decisions have come "without detailed elaboration").

214. *See, e.g.*, L. TRIBE, *supra* note 82, at viii; *see also* Estreicher & Revesz I, *supra* note 4, at 751 (claiming that "striking a proper balance between the competing values [is] exceedingly difficult"); Maranville, *supra* note 4, at 528 (ruling on nonacquiescence requires "choice between conflicting values").

215. *Cf.* Morrison v. Olson, 487 U.S. 654, 677-97 (1988) (using what one dissent characterized as "the 'totality of the circumstances' mode of analysis" in holding constitutional provisions of Ethics in Government Act of 1978 that created special court to appoint independent counsel for investigation and restricted Attorney General's power to remove independent counsel).

216. *E.g.*, Estreicher & Revesz I, *supra* note 4, at 720 & n.215 (proposing a "balancing of competing factors" and suggesting that constitutional inquiry "presumably" would be "similar" to balancing-oriented "rationality review" under the APA); *id.* at 751 (suggesting applicability of "cost benefit calculus"); CUMB. Comment, *supra* note 4, at 125 (concluding that "necessity" for intracircuit nonacquiescence "often outweighs any negative impact it may have"); *see also* Diller & Morawetz, *supra* note 4, at 803, 812-17 (responding to cost-benefit analysis of Estreicher and Revesz and concluding that a "fair consideration of the costs and supposed benefits of nonacquiescence requires rejection of [their] proposed standard").

217. *See, e.g.*, Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 788 (1945) (Black, J., dissenting).

threatens sound decisionmaking in the particular case by raising the odds that judicial analysis will be undisciplined, idiosyncratic, or skewed by self-interest or partisanship.[218] These risks are particularly significant when the issue presented is whether an executive policy impinges too much on judicial prerogatives. After all, when courts are called on to judge their own case, they should be especially inclined to use a recognized and discretion-limiting analytical framework.

Such a framework is available. Indeed, for at least five decades, the Supreme Court has been hammering out as its principal constitutional methodology an approach well suited to evaluation of the intracircuit-nonacquiescence issue. That methodology mandates a structured "judicial scrutiny of means/ends relationships."[219] Under the modern-day version of this methodology, a court determines first what "level of scrutiny" it must apply to the challenged governmental policy.[220] The court then inquires whether the particular governmental interests offered in support of that policy are sufficiently potent and carefully enough advanced by it to meet the applicable standard of review.[221] This methodology surfaces most often in equal protection cases.[222] In those cases, the courts usually apply so-called "minimal" scrutiny[223] — requiring only that the governmental policy be "rationally related" to a "legitimate" governmental interest.[224] In cases presenting more palpable affronts to recognized constitutional values, however, courts apply so-called "heightened" scrutiny[225] — requir-

218. *See* Morrison v. Olson, 487 U.S. 654, 711-12 (1988) (Scalia, J., dissenting) (asserting that use of a "balancing test" on "a case-by-case basis" is "not a government of laws at all"); Bator, *supra* note 58, at 257 (criticizing balancing used in cases involving permissibility of article I agency and court adjudication as "open-ended and necessarily subjective"). On balancing, see generally Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (examining growth of balancing as method of constitutional interpretation); Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16 (1988) (advocating judicial balancing as opposed to broad rules).

219. G. GUNTHER, CONSTITUTIONAL LAW 93 n.2 (11th ed. 1985). Near the beginning of his casebook, Professor Gunther notes that use of this methodology "recurs throughout this volume, and may well be the most frequently invoked technique in the judicial review of the validity of federal and state legislation." *Id.*

220. *Id.* at 588-89.

221. *Id.* at 588.

222. *See id.* at 588-91.

223. *Id.* at 588.

224. *E.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

225. *Id.* at 440-41.

ing proof of (1) a "compelling,"[226] or at least an "important,"[227] governmental interest and (2) a "necessary,"[228] or at least a "direct, substantial,"[229] relationship between the challenged policy and the advancement of that interest.[230]

At first blush, use of this means/ends methodology may seem exotic in analyzing a separation-of-powers problem. The reality, however, is that the Supreme Court has applied means/ends analysis — and heightened scrutiny in particular — to issues arising in almost all areas of constitutional law.[231] For example, the Court has employed heightened scrutiny in assessing constitutional challenges based on the free speech and free press clauses,[232] and the free exercise clause[233] of the first amendment; the "substantive due process" component of the fifth and fourteenth amendments;[234] and the contracts

226. *Id.* at 440.

227. *Id.* at 441.

228. *E.g.*, McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

229. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

230. *See generally* G. GUNTHER, *supra* note 219, at 588-89. The Court has developed two separate forms of heightened scrutiny: so-called "strict scrutiny," developed initially in cases involving race discrimination, and so-called "intermediate scrutiny," developed initially in cases involving sex discrimination. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985). For reasons developed in Part VI, the distinction between these forms of heightened scrutiny does not matter for purposes of this Article. *See infra* notes 400-02 and accompanying text.

231. *See* G. GUNTHER, *supra* note 219, at 457. For a recent illustration, see Maryland v. Craig, 110 S. Ct. 3157, 3166 (1990) (face-to-face confrontation excusable under confrontation clause only when "necessary to further an important public policy").

232. *E.g.*, Butterworth v. Smith, 110 S. Ct. 1376, 1381 (1990); Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1396 (1990) ("To determine whether Michigan's restrictions on corporate political expenditures may constitutionally be applied to the Chamber, we must ascertain whether they burden the exercise of political speech and, if they do, whether they are narrowly tailored to serve a compelling state interest." (citation omitted)).

233. *E.g.*, Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963) (after finding a "burden on the free exercise of appellant's religion," Court inquires "whether some compelling state interest . . . justifies the substantial infringement"); *see also infra* note 240 and accompanying text. *See generally* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1615 n.1 (1990) (Blackmun, J., dissenting) (collecting earlier free-exercise cases in which Court applied heightened scrutiny).

234. *E.g.*, Roe v. Wade, 410 U.S. 113, 155, 164 (1973) (where "certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' " (citations omitted)); *accord* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (plurality opinion) (regulations imposing burden on decision whether to bear or beget a child "may be justified only by compelling state interests"); *see* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding that "means . . . sweep unneces-

clause,[235] the takings clause,[236] and the privileges and immunities clause of article IV.[237]

Most important, the Court long has applied forms of heightened scrutiny to answer questions involving the proper allocation of governmental powers. It has used such analysis, for example, in determining whether state laws impinge too much on Congress's powers to regulate the free flow of interstate commerce.[238] Even more significant for present purposes,

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sarily broadly" to justify state's contraceptive-control statute); *id.* at 497 (Goldberg, J., concurring) (requiring government to show an "interest which is compelling" to justify statute).

235. United States Trust Co. v. New Jersey, 431 U.S. 1, 29 (1977) (requiring that challenged law impairing contracts be "reasonable and necessary to serve the admittedly important purposes claimed by the state").

236. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (requiring that state regulation impinging on use of private property " 'substantially advance[s] legitimate state interests' " (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

237. *E.g.*, United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984) (requiring both a " 'substantial reason' " for rule discriminating against non-residents and an inquiry " 'whether the degree of discrimination bears a close relation' " to such a reason (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)). In other constitutional contexts, the Court has triggered heightened scrutiny by finding an infringement of a "fundamental" right or interest. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (right to marry); Dunn v. Blumstein, 405 U.S. 330, 336, 338 (1972) (right to vote and travel); Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (right of interstate travel). This "fundamental interest" concept is surely capacious enough in its phrasing to embrace one branch's invasion of another's constitutional authority; after all, both the judiciary and the citizenry as a whole have a "fundamental interest" in avoiding the usurpation or dilution of the judicial power on which all constitutional rights depend. *See generally* G. GUNTHER, *supra* note 219, at 457 n.10 (noting that "strict scrutiny" is "exercised when 'fundamental interests' are impinged"). To be sure, past fundamental-interest cases have involved the protection of individual liberties. That fact hardly renders them irrelevant, however, because the underlying goal of the separation of powers is to "better . . . secure liberty," United States v. Munoz-Flores, 110 S. Ct. 1964, 1970 (1990) (quoting Morrison v. Olson, 487 U.S. 654, 694 (1988) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))), and "to protect individual rights," *id.* at 1971.

238. *E.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353-54 (1977) (invalidating state statute because it "does remarkably little" to advance its "laudable goal" and because "nondiscriminatory alternatives . . . are readily available"); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (finding discrimination against interstate commerce unconstitutional where "reasonable nondiscriminatory alternatives, adequate to conserve legitimate [program] interests, are available"); *see also* Graham v. Richardson, 403 U.S. 365, 378 (1971) (applying strict scrutiny in invalidating state statute discriminating against resident aliens in part because it "conflict[s] with . . . overriding national policies in an area constitutionally entrusted to the Federal Government").

the Court has used the argot of heightened scrutiny in a number of separation-of-powers decisions. In *Nixon v. Administrator of General Services*,[239] for example, the Court required "an *overriding need* to promote objectives within the constitutional authority of Congress" to justify congressional regulation of the disposition of presidential papers.[240] Generalizing from this principle, the Court in *Mistretta v. United States*[241] suggested that such an " 'overriding need' " must be shown whenever there exists the "potential for disruption" of the executive's " 'accomplishing its constitutionally assigned functions.' "[242] In *United States v. Nixon*,[243] the Court insisted that something "more than a generalized claim of the public interest in confidentiality" was necessary to sustain the "executive privilege,"[244] because assertions of the privilege threatened to "gravely impair the role of the courts under Art[icle] III."[245] Similarly, in *Nixon v. Fitzgerald*,[246] the Court found that presidential immunity from private damage actions was proper, because no "broad public interests" justified the threat to executive authority that imposition of such liability would produce[247] and "alternative remedies and deterrents" were available to achieve the aims of permitting money-damages suits.[248] These cases signal that when one branch's action threatens the

239. 433 U.S. 425 (1977).

240. *Id.* at 443 (citation omitted) (emphasis added). *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983) (requiring in a strict-scrutiny free-exercise case, proof of "an overriding governmental interest"; further finding proffered interest "compelling" because government has "a fundamental, overriding interest in eradicating racial discrimination"). *See generally In re* Griffiths, 413 U.S. 717, 722 n.9 (1973) ("The state interest required [in strict scrutiny cases] has been characterized as 'overriding,' 'compelling,' 'important,' or 'substantial.' We attribute no particular significance to these variations in diction." (citations omitted)).

241. 109 S. Ct. 647 (1989).

242. *Id.* at 660 & n.13 (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 433 (1977)).

243. 418 U.S. 683 (1974).

244. *Id.* at 707; *see id.* at 706 ("broad, undifferentiated claim of public interest in . . . confidentiality" is inadequate); *id.* at 713 ("generalized interest in confidentiality" constitutes an insufficient justification).

245. *Id.* at 707; *see id.* at 712.

246. 457 U.S. 731 (1982).

247. *Id.* at 754; *see also id.* at 754 n.37 (noting "that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions").

248. *Id.* at 757-58. Glidden Co. v. Zdanok, 370 U.S. 530, 547-48 (1962) (plurality opinion) (requiring judicial scrutiny of "practical necessities, and the possible alternatives"); *cf.* G. GUNTHER, *supra* note 219, at 278 & n.7 ("When a 'rationality' standard of scrutiny prevails, courts do not speculate about alter-

central authority of another, the justifications for that action must at least survive "close scrutiny."[249]

Such an inquiry obviously approximates the "heightened scrutiny" analysis found applicable in other constitutional settings. A readiness to use that analysis, moreover, promises meaningful benefits. It should, for example, channel the judicial task by bringing into play discernable guideposts already tested and refined in a wide body of case law.[250] It should also help negate rule-of-law-based complaints about open-ended balancing,[251] which carry their sharpest sting when courts — as in intracircuit-nonacquiescence cases — undertake to vindicate rule-of-law values.[252] At the least, a means/ends analysis offers an alternative to the much-maligned separation-of-powers methodologies the Court has floundered with in past decisions.[253]

To make these observations is not to suggest that use of a means/ends methodology is a panacea.[254] Means/ends analysis,

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natives" but "inquiry about the existence of less burdensome alternative means has become a common part of the Court's 'strict scrutiny' ").

249. *See* Bowsher v. Synar, 478 U.S. 714, 727 (1986); *see also* Meltzer, *supra* note 122, at 295 & n.24 (favoring "evaluating the force of the legislative justification for assigning [adjudicatory] matters to an article I tribunal").

250. *See infra* notes 403-10 and accompanying text.

251. *See supra* notes 217-18 and accompanying text.

252. *See, e.g., infra* note 391 and accompanying text.

253. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 105-13 (1982) (White, J., dissenting) (canvassing history of Court's treatment of non-article III courts and finding it "unsuccessful," "mystifying," and marked by "confusion and controversy"). *See generally* Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587 (1990) (discussing pre-Burger, Burger, and Rehnquist Courts' approaches to separation of powers).

254. Notably, Professors Estreicher and Revesz recognize and reject the possibility of employing heightened constitutional scrutiny in evaluating intracircuit nonacquiescence. Estreicher & Revesz I, *supra* note 4, at 720 n.216. Their rejection of such an approach, however, takes up only three sentences in a footnote. *See id.* They say in one sentence that there is "no need" to apply "intermediate" scrutiny because APA review is necessarily stricter than constitutional "rationality review." *Id.* Whether or not this assertion about APA review is accurate, it is beside the point. Intermediate scrutiny — unlike APA review — is a recognized form of constitutional analysis that — unlike APA analysis — calls for particularized inquiries into the weight of the claimed government interest and the closeness of fit between that interest and the challenged policy.

Professors Estreicher and Revesz also assert that "a rejection of 'strict scrutiny' . . . is fairly subsumed in our rejection of the per se argument of unconstitutionality." *Id.* Their "rejection of the per se argument," however, appears to refer essentially to their demonstration that *Cooper v. Aaron* is not on point. *Cooper v. Aaron* may well not be on point, *see supra* notes 84-91 and

like any other constitutional methodology, is in many respects indeterminate and subject to manipulation. A means/ends methodology is also surely not well suited for *all* separation-of-powers issues. For example, some issues may be disposed of by an unencumbered resort to constitutional text or history,[255] while other issues simply may not fit the mold of a traditional means/ends appraisal.[256] As the analysis below seeks to show, however, means/ends analysis *does* provide a workable framework for assessing the many countervailing considerations bearing on the particular separation-of-powers problem presented by intracircuit nonacquiescence.

For these reasons, this Article assesses the constitutionality of intracircuit nonacquiescence using modern means/ends analysis. It addresses first (in Part V) whether intracircuit nonacquiescence so seriously trenches on recognized constitutional concerns as to warrant more than minimal scrutiny.[257] It then addresses (in Part VI) whether intracircuit nonacquiescence operates in a careful enough manner to promote sufficiently important governmental interests to satisfy the level of scrutiny that is applicable.[258]

It bears emphasis that neither the name nor the precise framing of the constitutional methodology used to assess intracircuit nonacquiescence is of surpassing importance. What *is* important is that the ensuing analysis supports two basic conclusions. First, intracircuit nonacquiescence intrudes greatly on a host of important separation-of-powers values. Second, the justifications for that intrusion are insubstantial. Given these conclusions, the constitutional case against intracircuit nonacquiescence must succeed, regardless of how one describes the applicable legal "test."[259]

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accompanying text, but such a conclusion does not remove the possibility that some form of heightened scrutiny is constitutionally appropriate for other reasons, *see generally infra* Part V (discussing and defending the propriety of heightened scrutiny).

255. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512-13 (1869).

256. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

257. *See infra* Part V.

258. *See infra* Part VI.

259. In assessing intracircuit nonacquiescence, Professor Maranville asserts that "application of the separation of powers doctrine is undercut by the absence of a neutral vantage point." Maranville, *supra* note 4, at 528. She accordingly reaches no conclusion with respect to the separation-of-powers issue presented by intracircuit nonacquiescence. For better or worse, however, constitutional issues must be resolved, and this is so regardless of whether a "neutral vantage point" can be found in some abstract sense. I submit that the

V. THE PROPRIETY OF HEIGHTENED SCRUTINY

How does one decide whether a particular governmental practice is properly subject to heightened judicial scrutiny? In many cases the task is easy. In cases involving non-benign race and sex discrimination, for example, settled precedent demonstrates that heightened scrutiny is proper.[260] In other cases, however, the lack of clear precedent forces courts to explore in greater detail whether the challenged practice so seriously threatens the constitutional plan as to mandate elevated judicial review.[261]

This task is complicated in separation-of-powers cases because the American system is one "not of rigidly separated but rather of divided and overlapping powers."[262] This difficulty, however, has not led to judicial abdication in separation-of-powers cases. Rather, the Court has recognized repeatedly the judiciary's responsibility to guard against attempts by any branch improperly "to increase its own powers"[263] or to "undermine the authority and independence of . . . another coordinate Branch."[264] In particular, the Court has exercised "vigilance" to forestall any practice that " 'impermissibly threatens the institutional integrity of the Judicial Branch.' "[265]

In considering whether intracircuit nonacquiescence so threatens these principles as to warrant heightened scrutiny, attention must focus first on such orthodox sources of constitutional argument as constitutional text, judicial precedent, and established traditions of governance. In addition, Supreme Court authority requires courts to ask whether the "practical consequences" of intracircuit nonacquiescence comport with the policies underlying the Constitution's distribution of powers.[266] An assessment of these key considerations — under-

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analysis presented here *is* "neutral," at least in the critical sense that it seeks to draw on the existing legal materials in an intellectually honest fashion and to assess deliberately and fairly all arguments made in favor of intracircuit nonacquiescence.

260. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985).

261. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190-95 (1986).

262. Bator, *supra* note 58, at 265; *see* Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 310 (1990) (citing difficulty of defining each branch's constitutional "turf").

263. Morrison v. Olson, 487 U.S. 654, 694 (1988).

264. Mistretta v. United States, 109 S. Ct. 647, 659-60 (1989).

265. *Id.* at 383 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

266. *Id.* at 393; *see, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478

taken in Subpart A below as to text, authority and tradition, and in Subpart B below as to the practice's "practical consequences" — leads to an unmistakable conclusion: Intracircuit nonacquiescence poses so clear a "dange[r] of . . . usurpation of [Judicial] Branch functions"[267] that it at least warrants that form of heightened scrutiny described as "intermediate."

A. TEXT, AUTHORITY AND TRADITION

Any look at the constitutionality of intracircuit nonacquiescence must begin with the constitutional text.[268] Although no constitutional provision flatly condemns the practice, the case against intracircuit nonacquiescence finds support in constitutional language more specific and suggestive than commonly is invoked to invalidate governmental action. That language appears in article II, section 3. The fourth clause of that section provides simply but definitively that "the President" — and consequently those who work under him[269] — "shall *take Care* that the Laws be *faithfully* executed."[270] This language, like all language, is subject to different interpretations. Indeed, the executive branch might urge that "faithfully" executing the

U.S. 833, 851 (1986) (key question concerns the "practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary"); Glidden Co. v. Zdanok, 370 U.S. 530, 544-48 (1962) (plurality opinion) (observing that "practical considerations" authorized Congress to create certain non-article III courts without offending article III). Notably, concerns about practical consequences date all the way back to *Marbury*, in which the Court relied in part on "the practical and real omnipotence" that the legislature would enjoy in the absence of judicial review. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

267. Morrison v. Olson, 487 U.S. 654, 694 (1988) (quoting Bowsher v. Synar, 478 U.S. 714, 727 (1986)).

268. *Cf.* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("the starting point for interpreting a statute is the language of the statute itself"). This conclusion is suggested by the fountainhead of heightened-scrutiny analysis, the *Carolene Products* footnote four, which teaches that "[t]here may be narrower scope for operation of presumption of constitutionality" when government action "appears on its face to be within a specific prohibition of the Constitution." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The Court's recent separation-of-powers decisions emphasize similarly the salience of constitutional text. *See, e.g.*, *Mistretta*, 109 S. Ct. 647, 671 (1989); Bowsher v. Synar, 478 U.S. 714, 722-23 (1986); INS v. Chadha, 462 U.S. 919, 945-46 (1983).

269. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) (presidential subordinates "act by his authority" so as "[t]o aid him in the performance of [his] duties"); *see also* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 39, 88th Cong., 1st Sess. 529 & n.71 (1964).

270. U.S. CONST. art. II, § 3, cl. 4.

laws requires strict adherence to executive perceptions of congressional intent regardless of contrary judicial interpretations. Such a view, however, insists on a primacy of executive interpretations of law over even the clear and considered interpretations of a supervisory, multi-judge article III court. On its face, this position rubs hard against the heedful, unresisting role suggested by an official "tak[ing] care" to "faithfully" execute binding legal rules.

If more is needed to make the case against intracircuit nonacquiescence, it is supplied by *Marbury v. Madison*.[271] The enduring contribution of *Marbury* is its endorsement of the Framers' understanding that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[272] In recognizing this principle, the Court added a critical layer of meaning to the faithful execution clause and stated a principle of central importance to the intracircuit-nonacquiescence debate. The point is simple: Because laws assume meaning only through interpretations, and because the judiciary has the "peculiar province" of providing those interpretations, those "faithfully execut[ing]" the laws would seem bound to heed legal interpretations provided by article III courts.[273] This proposition is, of course, not a prescription for bizarre results. For example, a federal agency need not immediately internalize on a nationwide basis the first interpretation of a governing statute

271. 5 U.S. (1 Cranch) 137 (1803).

272. THE FEDERALIST NO. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961); *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to [s]ay what the law is."); *cf.* American Trucking Ass'ns, Inc. v. Smith, 110 S. Ct. 2323, 2343 (1990) (Scalia, J., concurring) ("judicial role . . . is to say what the law is").

273. *See* Lopez v. Heckler, 725 F.2d 1489, 1503 (9th Cir.) (noting "that the Secretary, as a member of the executive, is required to apply federal law as interpreted by the federal courts cannot seriously be doubted"), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984) (mem.); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) (stating that the "constitutional duty" arising under the faithful-execution clause "does not permit the President to refrain from executing laws duly enacted by the Congress *as those laws are construed by the judiciary*" (emphasis added)). This is not to say, of course, that the executive has no role in the interpretation of laws. *See* Bowsher v. Synar, 478 U.S. 714, 732-33 (1986); *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 34 (M. Farrand rev. ed. 1937) [hereinafter RECORDS] (remarks of James Madison, July 17) (noting that "[t]he [executive] expounded & applied [the laws] for certain purposes"). Most important, when statutory directions are ambiguous, the executive branch has no choice but to interpret that language in deciding how to structure its own affairs. Once judicial interpretation removes the ambiguity, however, the executive can no longer claim a power of interpretation based on necessity.

adopted by the most remote federal district court.[274] If a mandate to follow the laws as interpreted by courts has any substantial meaning, however, it should require at least that an executive official not wilfully defy a clear interpretation of a governing statute made by the sole appellate court with mandatory review authority over that official's conduct.

Proponents of intracircuit nonacquiescence attack this position by claiming that *Marbury*'s principle of judicial supremacy imposes no greater duty on the executive than to honor the actual *judgments* of federal courts.[275] This claim tends to prove too much, however, because it renders constitutionally unobjectionable even an executive agency's routine disregard of the most unshakable Supreme Court precedents.[276] Even more important, this argument clashes with *Cooper v. Aaron*,[277] in which the Court held that judicial interpretations of legal texts — not just discrete judgments — bind government officials.[278] Indeed, because *Cooper* declared that such judicial interpretations are "the supreme *law* of the land,"[279] it supports directly

274. *See, e.g.*, Schwartz, *supra* note 4, at 1859-60 (no duty to acquiesce in district-court precedent because there is no "law of the district").

275. *See, e.g.*, Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372 (1988); Schwartz, *supra* note 4, at 1829 n.41, 1857-58 & nn.161-63 (collecting authorities); *see also* Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 n.33 (1983) (questioning whether *Marbury* envisions judicial pronouncements that bind "other branches of government, particularly the coordinate branches of the national government"); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) ("[u]nder *Marbury*, the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared").

276. Indeed, this prove-too-much response seems especially potent because "federal administrative agencies uniformly acknowledge that Supreme Court decisions are binding." Maranville, *supra* note 4, at 484; *accord* H.R. REP. NO. 432, 98th Cong., 1st Sess. 428 (1983) ("The application of Supreme Court decisions to executive branch policies is virtually undisputed."); Schwartz, *supra* note 4, at 1857 & n.160 (noting that "[a]gencies typically concede the obligation to follow Supreme Court precedent" and collecting authorities); COLUM. J. Note, *supra* note 4, at 464 (noting that "most federal agencies consider themselves bound by decisions of the United States Supreme Court"); *see also* Estreicher & Revesz I, *supra* note 4, at 723 (acknowledging that acquiescence in Supreme Court pronouncements is required). For other commentaries rejecting this judgment-focused view of judicial decision making, see *Oversight Hearings*, *supra* note 4, at 130 (statement of Professor Brilmayer) (noting that argument "not only authorizes administrative law judges to disregard contrary law of the circuit; it authorizes them to ignore contrary Supreme Court precedents as well"); Kubitschek, *supra* note 4, at 434-36.

277. 358 U.S. 1 (1958).

278. *Id.* at 18.

279. *Id.* (emphasis added).

the proposition that the executive, charged with faithfully executing "the laws," must follow a supervisory court's clear exposition of legal texts.[280] Although some have criticized *Cooper*,[281] its continuing vitality cannot be doubted. The Framers themselves lent support to the teaching of *Cooper* by speaking of Article III courts not as issuers of discrete judgments, but as "[e]xpositors of laws."[282] Moreover, *Cooper* itself stands as a uniquely potent precedent because the Court's unanimous opinion in the case was signed individually by each Justice of the

280. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("faithful execution" clause "gives a governmental authority that reaches *so far as there is law*" (emphasis added)); *see also* Diller & Morawetz, *supra* note 4, at 822 (relying on *Cooper* in arguing that the "judiciary . . . announces declarations of law binding on the executive branch through precedential effect").

281. *See* Meese, *supra* note 9, at 986-87 (*Cooper* "was, and is, at war with the Constitution" and "would have shocked men like John Marshall and Joseph Story").

282. *See* 2 RECORDS, *supra* note 273, at 75 (remarks of Governor Morris, July 21); *accord id.* at 430 (remarks of James Madison, Aug. 27) (noting "[t]he right of expounding the Constitution" properly belonging to the judicial branch in "cases of a Judiciary Nature"); 1 *id.* at 97 (remarks of Elbridge Gerry, June 4) (noting that "Judiciary . . . will have a sufficient check agst. encroachments on their own department by their exposition of the laws"); *id.* at 98 (remarks of Rufus King, June 4) ("Judges ought to be able to expound the law as it should come before them."); 2 *id.* at 75 (remarks of Caleb Strong, July 21) (noting judicial "power . . . of expounding . . . the laws" and judges' "function of expositors"); *id.* at 79 (remarks of Nathaniel Ghorum, July 21) (describing judges' role in "exposition of the laws"); *id.* (remarks of John Francis Mercer, Aug. 15) (describing judges as "expositors"). Moreover, *Marbury* supports the view that judicial decisions have consequences reaching beyond the immediate parties to the dispute. To be sure "[i]n *Marbury* the Court derived the authority of the courts to declare what the law is . . . directly from the judicial function of deciding concrete disputes placed before the courts for decision." Schwartz, *supra* note 4, at 1829 n.40 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803)); *see* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 79 (3d ed. 1988) ("Marshall derives the Court's power . . . to make authoritative determinations of constitutional law[ ] solely from the power to decide cases."). That fact does not, however, in any way prove that judicial pronouncements of law have no external legal effect *once they have been issued in the context of deciding a justiciable dispute.* Indeed, language in *Marbury* suggests just the opposite. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); *cf.* G. GUNTHER, *supra* note 219, at 14 ("Marbury can be read as emphasizing a narrow, incidental role of courts in constitutional cases; but there are also passages suggesting a broader, central role of courts."). In short, "[i]t is a proper part of the judicial function to *make law* as a necessary by-product of the process of deciding actual cases and controversies." Florida v. Wells, 110 S. Ct. 1632, 1640 (1990) (Stevens, J., concurring) (emphasis added).

Court.[283] As already suggested, the distinctive agency-related justifications for intracircuit nonacquiescence may serve to distinguish *Cooper*. *Cooper*'s broad endorsement of judicial primacy in declaring the law, however, suggests that those justifications at least should be subjected to more than minimal scrutiny.

Nor are *Marbury* and *Cooper* fairly read as articulating a principle restricted to pronouncements of law issued by the Supreme Court.[284] *Marbury* assigned the duty of saying "what

283. *Cooper*, 358 U.S. at 4.

284. In addition to this proposed distinction between the Supreme Court and circuit courts, commentators have suggested a number of other distinctions between the nonadherence to judicial pronouncements condemned in *Cooper* and cases of intracircuit nonacquiescence. For example, one may contend that *Cooper* involved an earlier pronouncement of *constitutional*, rather than *statutory*, law. *See generally* S. CAL. Note, *supra* note 4, at 1153-58 (setting forth, but rejecting, argument for distinguishing *Cooper* and other cases on constitutional/statutory grounds). The seminal declaration of *Marbury*, however, suggested no such distinction. *See* Monaghan, *supra* note 275, at 2 ("Marshall's grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation."). Indeed, in finding the power of Constitution-based judicial review, the *Marbury* Court reasoned from the premise that the judiciary indisputably was responsible for declaring the meaning of *sub*constitutional law. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803); *accord* THE FEDERALIST NO. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961); *see also* Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1983) ("judiciary is the final authority on issues of statutory construction"); Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 272 (1968) ("courts are the final authorities on issues of statutory construction").

Defenders of nonacquiescence might say also that *Cooper* involved a judicial clash with state officials, rather than a coequal branch of the national government. The Constitution, however, envisions a large role for states and state officials in the nation's governance. Moreover, because nothing in *Cooper* suggests an intent to limit the Court's affirmation of judicial law-pronouncing supremacy to rules of law aimed at state officials, that decision at least *presumptively* forecloses federal executive, no less than state executive, disregard of judicial pronouncements. This is especially the case because United States v. Nixon, 418 U.S. 683 (1974), reemphasizes that *"[n]o man"* — including the President himself — "is above the law." United States v. Lee, 106 U.S. 196, 220 (1882) (emphasis added); *see Nixon*, 418 U.S. at 715.

Finally, as already suggested, *see supra* notes 89-90 and accompanying text, some might urge that particularly powerful justifications support an authorization of intracircuit nonacquiescence by specialist federal agencies, *see also infra* notes 487-91 and accompanying text (discussing *Chevron* and judicial deference to agency expertise). Although full consideration of this argument is postponed to Part VI, it merits mention that the justifications for intracircuit nonacquiescence based on official expertise and the need for broad discretion in operating governmental programs sound a familiar note. In the wake of *Brown*, four southern states passed interposition resolutions on the theory that local education officials were expert administrators in a field long com-

the law is" not to the Supreme Court, but to "the judicial department."[285] *Cooper* reiterated the "settled doctrine"[286] and "basic principle"[287] that "*the federal judiciary* is supreme in the exposition of the law."[288] These formulations leave limited room for nice distinctions between Supreme Court and supervisory circuit court pronouncements — especially in an age when circuit courts of necessity do much of the work envisioned by the Framers as being handled by the Supreme Court.[289]

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mitted to exclusive state regulation. *See* Constitutional Law: Interposition and Nullification, 1 RACE REL. REP. 437-47 (1956) (reprinting statutes). When the invalidation of Louisiana's resolution was appealed, the Supreme Court responded in terms that are telling in this context: "The main basis for challenging this ruling is that the State of Louisiana 'has interposed itself in the field of public education over which it has exclusive control.' This objection is without substance, as we held, upon full consideration, in *Cooper v. Aaron*." Bush v. Orleans Parish School Bd., 364 U.S. 500, 501 (1960) (per curiam) (denial of application for stay).

285. *Marbury*, 1 U.S. (5 Cranch) at 177.

286. *Cooper*, 358 U.S. at 17.

287. *Id.* at 18.

288. *Id.* (emphasis added). For a similar observation, see Diller & Morawetz, *supra* note 4, at 823.

289. *See, e.g.*, R. WHEELER & C. HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 24 (Federal Judicial Center pub. 1989) ("What did the [Evarts Circuit Court of Appeals] Act do? Essentially, it shifted the appellate caseload burden from the Supreme Court to new courts of appeals."); Estreicher & Revesz I, *supra* note 4, at 730 (recognizing "Supreme Court's inability to review more than a small percentage of the cases on its certiorari docket"); *see also* Diller & Morawetz, *supra* note 4, at 822-23 (arguing that "the system of judicial review created by Congress and the courts . . . delegates the power to create binding precedent within each region to the courts of appeals"). *See generally* COLUM. J. Note, *supra* note 4, at 486-87 (arguing that the Supreme Court is unable to review so many circuit court decisions, particularly in the area of administrative law, that the Court is no longer " 'the court of last resort for most litigants nor the final arbiter of all federal law' " (quoting Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in Courts of Appeals*, 87 YALE L.J. 1219, 1223 (1978)). The *Marbury*- and *Cooper*-based case for condemning intracircuit nonacquiescence by analogy to "intra-Supreme Court" nonacquiescence draws support from three additional considerations. First, if "the federal judiciary" — apart from the Supreme Court — has *any* power to issue decisions binding in the sense envisioned by *Cooper*, that power must exist when decisions come from a court of appeals with exclusive review authority over the actions of a fixed set of nonjudicial decision makers. Second, Congress created circuit courts to handle, on a regional basis, responsibilities previously assigned to the Supreme Court; therefore, agency officials who are subject directly and exclusively to a particular circuit court's jurisdiction logically should be bound to honor that circuit court's pronouncements just as those of the Supreme Court. Third, the decentralization of the judiciary caused by the creation of the courts of appeals has in a significant way augmented executive power. This is so because that decentralization effectively has validated widespread *inter*circuit nonacquiescence in decisions that the executive would be bound to honor if the decisions

An additional reason exists for rejecting the argument that circuit court rulings are so "modifiable"[290] and "intermediate"[291] that they should not bind executive officers. This defense of intracircuit nonacquiescence offends American "traditions"[292] and "long-continued practice."[293] It is simply a postulate of our legal system that there is such a thing as "the law of the circuit."[294] Congress has assumed the existence of distinctive bodies of circuit court law in creating and shaping the courts of appeals.[295] The Supreme Court has recognized that

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had been issued by the Supreme Court. To countenance intracircuit nonacquiescence as well is to gild the lily.

290. Estreicher & Revesz I, *supra* note 4, at 727.

291. *Id.* at 726.

292. Morrison v. Olson, 487 U.S. 654, 709 (1988) (Scalia, J., dissenting); *see id.* at 695 (majority opinion) (rejecting separation-of-powers challenge to judicial authority to review grounds for Attorney General's removal of independent counsel because that "function . . . is well within the traditional power of the judiciary"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government . . . give meaning to the words of [the constitutional] text."); D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 3 (noting that in pre-colonial England, "[t]hose opposed to the exercise of royal or parliamentary authority often based their arguments on . . . common law, custom and tradition"); *see also, e.g.*, Burnham v. Superior Court, 110 S. Ct. 2105, 2110 (1990) (Scalia, J., plurality opinion) (emphasizing "American tradition" in assessing constitutionality of personal-jurisdiction rule); *id.* at 2122 (Brennan, J., concurring) (acknowledging relevance of tradition); Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (relying on " 'Nation's history and tradition' " in upholding constitutionality of state law prohibiting consensual homosexual sodomy (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

293. Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).

294. *E.g.*, Pierce v. Underwood, 487 U.S. 552, 561 (1988); *see* Diller & Morawetz, *supra* note 4, at 811 ("[O]ur legal system treats the law of the circuit as authoritative until it is overturned."); *see also* Maranville, *supra* note 4, at 490 ("participants in the American legal system have become accustomed to differences in the law applied by different circuits"). *See generally* Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 413 (1972) (circuit courts are "not overly impressed by the fact that another has reached a contrary conclusion" and "have become increasingly . . . self-contained"); Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 931 (1983) (noting that "[m]ost litigants easily adapt to the law within their particular circuit" because "most litigants live and work within the confines of only one circuit").

295. *See, e.g.*, H.R. REP. NO. 1390, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4236, 4237 (division of Fifth Circuit creates judicial structure "capable of meeting the clear mandates of our judicial system — the rendering of consistent, expeditious, fair and inexpensive justice"); H.R. REP. NO. 432, 98th Cong., 1st Sess. 428 (1983) ("Under the Federal judicial system, decisions by a circuit Court of Appeals are considered the 'law of the circuit.' ").

each circuit properly seeks " 'to maintain *its* integrity as an institution' " and " 'to secure uniformity and continuity in *its* decisions.' "[296] Thus, each circuit court has taken pains to articulate and purify its own corpus of law.[297] This system, moreover, comports with sound policy because it "allocate[s] the judicial power among manageable units that can preserve the rule of law within their jurisdictions."[298] Because there *is* a "law of the circuit," and because executive officers are bound to execute "the laws," American tradition counsels that an executive officer must honor legal interpretations issued by that circuit court that alone has supervisory authority over the action that officer is contemplating.

The so-called "district court analogy" bolsters this conclusion.[299] The law, after all, leaves no doubt that a federal district court must follow the precedents of the circuit court with review authority over its rulings.[300] When agency officials simi-

296. United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689-90 (1960) (quoting Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954)) (emphasis added); *see also, e.g.*, United States v. Stauffer Chem. Co., 464 U.S. 165, 177 (1984) (White, J., concurring) (noting that circuits are not bound to follow other circuits and that "[c]onflicts in the circuits are generally accepted and in some ways even welcomed"); Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 268-69 (1953) (Frankfurter, J., concurring) (arguing that "the function of the courts of appeals in the federal judicial system requires that their independence, within the area of their authority, be safeguarded").

297. *See, e.g.*, Maranville, *supra* note 4, at 487 n.52 (citing numerous "law of the circuit" cases); COLUM. J. Note, *supra* note 4, at 466 n.23 (collecting illustrative references to "the law of the circuit" in circuit court opinions).

298. Diller & Morawetz, *supra* note 4, at 805. Recognizing the value of maintaining a "law of the circuit," the recently devised Federal Circuit and Eleventh Circuit have embraced the precedents of their predecessor tribunals. *See* South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982) ("To proceed without precedent, deciding each legal principle anew, would for too long deprive the bar and the public of the stability and predictability essential to the effort of a free society to live under a rule of law."); Bonner v. City of Prichard, 661 F.2d 1206, 1211 (11th Cir. 1981) ("Theoretically this court could decide to proceed with its duties without any precedent, deciding each legal principle anew . . . . This court, the trial courts, the bar and the public are entitled to a better result than to be cast adrift among the differing precedents of other jurisdictions, required to examine afresh every legal principle . . . .").

299. *But see* Estreicher & Revesz I, *supra* note 4, at 722-25; Estreicher & Revesz II, *supra* note 4, at 840; *see also* Schwartz, *supra* note 4, at 1827 (suggesting that existing constitutional arguments suffer from assumption "that administrative adjudicators . . . are required to model their behavior on that expected of inferior article III courts").

300. *E.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982); Jaffree v. Wallace, 705 F.2d 1526, 1532-33 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985); *see* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.401, at 3-4 (2d ed. 1988).

larly must answer to a single, identifiable supervisory circuit court, symmetry of logic counsels that they too must adhere to that court's precedents.[301] Professors Estreicher and Revesz argue that this analogy breaks down because agency decision makers, unlike district court judges, are specialists administering national programs.[302] As explained below, however, the specialist character of agencies has produced a rule of judicial deference in the initial formulation of court-made precedents that strengthens, rather than dilutes, the district court analogy.[303] In addition, district court judges possess many characteristics — such as life tenure, protection against salary reduction, Senate confirmation, and appointment from an exclusive pool of lawyers to a highly prestigious office — that would seem to justify giving them even *more* decisional autonomy vis-à-vis circuit courts than is given to agency adjudicators.[304] Indeed, because lawyers typically view agency officials as resting lower on the adjudicatory totem pole than district court judges, an agency's duty to follow a supervisory circuit court's precedents would seem to follow a fortiori from the settled obligation of federal district courts.[305] The bottom line is that the considerations bolstering the "district court analogy" seem at least as strong as the considerations said to weaken it.[306] Thus, that analogy — though no more flawless than most analogies — retains significant persuasive force.[307]

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301. *E.g.*, Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.) ("[A]s must a district court, an agency is bound to follow the law of the Circuit."), *cert. denied*, 449 U.S. 975 (1980); Morand Bros. Beverage Co. v. NLRB, 204 F.2d 529, 532 (7th Cir.) ("The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review, is much akin to . . . a United States District Court. . . . That is to say, it is the 'inferior' tribunal."), *cert. denied*, 346 U.S. 909 (1953).

302. *See supra* note 299.

303. *See infra* notes 493-94 and accompanying text.

304. *See infra* notes 359-60 and accompanying text.

305. This is all the more true because not only district court judges, but even three-judge panels of the circuit court itself, must adhere to circuit court precedent. *E.g.*, Estreicher & Revesz I, *supra* note 4, at 727-28.

306. *See also* Schwartz, *supra* note 4, at 1846 n.121 (concluding that "there are strong practical reasons to expect that nonacquiescence by administrative agencies will pose a greater threat to the maintenance of the authority of the article III courts than does nonacquiescence by inferior courts").

307. *See* Weis, *supra* note 4, at 849-50 (noting that district court analogy is not entirely apt, but nonetheless finding separation-of-powers violation); *cf.* Keller v. State Bar, 110 S. Ct. 2228, 2235 (1990) (relying on "substantial analogy" between union/member relationship and bar association/member relationship). Professor Schwartz questions the district court analogy, but invokes a rationale that is fundamentally different from that of Professors Estreicher and Revesz. Professor Schwartz suggests that the analogy may prove too

A prohibition on executive intracircuit nonacquiescence also comports with the recognized duties of private citizens.[308] If a private employer in the Sixth Circuit, for example, used a job-applicant screening test found by that court to violate Title VII of the Civil Rights Act, neither that employer nor a neighboring employer could successfully "nonacquiesce" by continuing to use the test. If an employer did act in this manner, the next lawsuit would not be difficult. The reviewing court would swiftly enjoin the employer's flagrant disregard of Title VII as interpreted by circuit court precedent.[309] Proponents of intracircuit nonacquiescence, however, urge (as they must) that a similar injunction compelling agency decisionmakers to comply with local circuit court precedent would be impermissible.[310] This disparity in results clashes with the settled notion that ex-

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much because whenever district courts violate circuit court precedent, the circuit court "will ordinarily simply remand for any further proceedings necessary to complete the adjudication. It will not enjoin the lower court from ever committing the same error again." Schwartz, *supra* note 4, at 1849-50 n.137. It follows, he suggests, that judicial injunctions of agency nonacquiescence range beyond the "norms of judicial practice" properly suggested by the district court analogy. *Id.*

One answer to this argument is that the point of the district court analogy is to show that district courts and agencies share the same duty to abide by circuit court precedent; given this central conclusion, it does not matter that the differing postures of the two institutions may warrant different *remedial* approaches when violations of this duty occur. An even easier answer, however, is that the phenomenon of intracircuit nonacquiescence by district courts is unknown, or at least unlitigated, so that any analogy-based argument that agencies should be free of injunctive remedies lacks a proper basis. *See* BROOKLYN Note, *supra* note 4, at 111 (noting that "good faith of these lower courts can usually be taken for granted"). In any event, federal appellate courts have not hesitated to exercise broad equitable supervisory powers when a subordinate district court does disregard controlling rules. *See, e.g.*, Will v. United States, 389 U.S. 90, 97, 100, 104-05 (1967); La Buy v. Howes Leather Co., 352 U.S. 249, 257-60 (1957).

308. *See generally* WAYNE Note, *supra* note 4, at 171 n.140 (suggesting that disobedience "of private parties who deliberately ignore binding federal [circuit] court precedents . . . would not be tolerated").

309. *See, e.g.*, Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 759 (M.D. Ala. 1969) (Johnson, J.).

310. Estreicher & Revesz I, *supra* note 4, at 721-22 & n.218, 728 n.253, 731 n.261; *cf.* Conference Transcript, *supra* note 4, at 81 (remarks of Professor Revesz) (arguing against certification of classes that include future litigants in such a manner as effectively to preclude nonacquiescence). I say "as they must" because otherwise any rule "authorizing" intracircuit nonacquiescence would be meaningless. This is so because nonacquiescence cannot be effective if, although the court cannot enjoin nonacquiescence per se, the court *can* order an agency not to pursue conduct on the ground that the conduct is inconsistent with the supervisory circuit's reading of governing law.

ecutive decisionmakers are not "above the law."[311] Indeed, if anything, executive officials would seem to have a *greater* duty than private citizens to adhere to legal rules.[312] The Constitution, after all, was designed to check *governmental* excesses, and the Constitution imposes the duty to faithfully execute the laws specifically on the *executive* branch.[313]

There exists a final reason, rooted in authority and tradition, why intracircuit nonacquiescence merits heightened scrutiny: The practice already has generated a fire storm of vilification from both the judiciary and other segments of the

311. United States v. Nixon, 418 U.S. 683, 715 (1974); *see* Lopez v. Heckler 713 F.2d 1432, 1441 (9th Cir 1983) (Pregerson, J., concurring) ("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."), *denying stay*, 572 F. Supp. 26 (C.D. Cal. 1983), *partial stay granted*, 463 U.S. 1328 (Rehnquist, Circuit Justice), *motion to vacate stay denied*, 464 U.S. 879 (1983); HARV. Note, *supra* note 4, at 854 ("[O]ur political system presumes that the government must set at least the same standards for its official conduct as it sets for the actions of private citizens."); Conference Transcript, *supra* note 4, at 67 (remarks of Judge Re) ("This would be a privilege accorded an agency not possessed by any other American . . . ."); *id.* at 82-83 (remarks of Judge Walker) (questioning intracircuit nonacquiescence because case not made "that somehow agencies stand in [sic] a different footing than other litigants"). Three additional considerations bolster the refusal to exempt agencies from the generally applicable principle that a court may enjoin conformance with that court's interpretation of federal law. First, such a refusal draws support from the Supreme Court's declaration in *Crowell* that, in overseeing the work of agency adjudicators, courts must retain "*full* authority . . . to deal with matters of law." Crowell v. Benson, 285 U.S. 22, 54 (1932) (emphasis added). Second, preclusion of injunctions against violations of congressional statutes found to exist by the courts is hard to square with the general principle that courts in fact *may* enjoin unlawful agency action. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 705 (1979). *See generally* Diller & Morawetz, *supra* note 4, at 824-25 (noting that "a clear statement of [congressional] intent should be required" before concluding that Congress has curtailed the courts' traditional injunctive powers). Finally, binding private citizens to circuit court precedent while exempting federal agencies from the same obligation creates an anomalous result. This is so because private citizens often will be "non-parties to the proceeding that created the precedent," Diller & Morawetz, *supra* note 4, at 822 n.82, whereas the nonacquiescing agency (at least normally) would have been a "party to the case determining the precedent, and [thus would have] had an opportunity to bring relevant arguments to the panel's attention, to petition for rehearing, and to suggest en banc review," *id.* at 808 n.28.

312. Edmonson v. Leesville Concrete Co., 895 F.2d 218, 225 (5th Cir.) (en banc) ("sound policy . . . requires the state to conform to stricter standards and appearances in dealing with its citizens than are demanded of those citizens in their dealings with each other"), *cert. denied*, 111 S. Ct. 41 (1990).

313. *See also* COLUM. Note, *supra* note 4, at 602 (agencies, because creatures of delegated authority, "should not be considered in the same light as a private litigant who reacts to the law, but should especially be expected to obey the limits of their power as judicially interpreted").

legal community. Infuriated federal judges have called intracircuit nonacquiescence "utterly meritless,"[314] "intolerable,"[315] "outrageous,"[316] "shocking,"[317] a "symbolic bookburning,"[318] and the equivalent of "the repudiated pre-Civil War doctrine of nullification."[319] Courts have issued circuit-wide and state-wide injunctions against intracircuit nonacquiescence;[320] relaxed procedural restrictions on plaintiffs attacking the practice;[321] found that the practice is so unjustified that it warrants attorney fees awards against the United States;[322] and threatened its perpetrators with the contempt sanction.[323] More significant than

314. Holden v. Heckler, 584 F. Supp. 463, 490 (N.D. Ohio 1984), *remanded sub nom.* Brest v. Secretary of Health & Human Servs., 754 F.2d 372 (6th Cir. 1985).

315. Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980), *cert. denied*, 449 U.S. 975 (1980).

316. Hyatt v. Heckler, 586 F. Supp. 1154, 1156 (W.D.N.C. 1984).

317. Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985).

318. NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 670 n.7 (1st Cir. 1979).

319. Lopez v. Heckler, 713 F.2d 1432, 1441 (9th Cir. 1983) (Pregerson, J., concurring), *denying stay*, 572 F. Supp. 26 (C.D. Cal. 1983), *partial stay granted*, 463 U.S. 1328 (Rehnquist, Circuit Justice), *motion to vacate stay denied*, 464 U.S. 879 (1983); *see also* Merli v. Heckler, 600 F. Supp. 249, 250 (D.N.J. 1984) (citing SSA practices as the work of "a heartless and indifferent bureaucratic monster"). *See generally* Schwartz, *supra* note 4, at 1821, 1823 & n.23 (observing that the "practice has been condemned in harsh terms" by lower federal courts, "that judicial decisions addressing nonacquiescence reflect palpable judicial *anger*," and that judicial "[o]utrage at the agencies' conduct is pervasive"); ME. Note, *supra* note 4, at 200 (describing courts as "unusually vocal" on this issue).

320. *E.g.*, Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984); Lopez v. Heckler, 572 F. Supp. 26, 31-32 (C.D. Cal. 1983), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 463 U.S. 1328 (Rehnquist, Circuit Justice), *motion to vacate stay denied*, 464 U.S. 879 (1983), *and district court aff'd in part and rev'd in part*, 725 F.2d 1489 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984) (mem.); *see also* Williams, *supra* note 4, at 263 & nn.64-66 (citing awards of injunctive relief).

321. *See, e.g.*, Hyatt v. Heckler, 807 F.2d 376, 380-81 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987). *See generally* ME. Note, *supra* note 4, at 203-14 (discussing judicial abrogation of exhaustion-of-administrative-remedies requirement).

322. *See, e.g.*, *Hyatt*, 807 F.2d at 382 (citing Anderson v. Heckler, 756 F.2d 1011 (4th Cir. 1935)); Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983); Chee v. Schweiker, 563 F. Supp. 1362, 1365 (D. Ariz. 1983). *See generally* Kubitschek, *supra* note 4, at 405 & nn.27-28 (explaining that courts have awarded attorney fees on grounds that "the government's position was not substantially justified or the government litigated in bad faith" and citing cases).

323. *See* Hillhouse v. Harris, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring); Valdez v. Schweiker, 575 F. Supp. 1203, 1205 n.3 (D. Colo. 1983); *see also* Kirkland v. Railroad Retirement Bd., 706 F.2d 99, 104 (2d Cir.

these colorful utterances and remarkable results, however, is the steady drumbeat of the cases. The decisional law reveals that *dozens of courts* over *many years* have concluded *unanimously* and *easily* that intracircuit nonacquiescence is unconstitutional.[324]

Condemnation of intracircuit nonacquiescence, moreover, has come from important quarters of the legal community other than the article III judges whom the practice would disempower. The American Bar Association twice has condemned intracircuit nonacquiescence.[325] So has the bulk of scholarly commentary.[326] The blue-ribbon Federal Courts Study Committee concluded that the practice "repudiates . . . [an] obvious and fundamental principle."[327] The most striking condemnation has come from former Solicitor General Rex E. Lee. In 1984, Mr. Lee was the highest-ranking official in the Reagan

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1983) (issuing "strong[] caution" to the Board "against ignoring rules of law established by this Court and other Courts of Appeals"); NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74, 75 (9th Cir. 1987) ("[A]ny future act of 'nonacquiescence' should be dealt with by this court in the specific context in which it occurs so that we may address the agency's particular violation of the rule of law and fashion a remedy that is appropriate in light of all the relevant circumstances.").

324. *See* Diller & Morawetz, *supra* note 4, at 801 n.2 (collecting cases); Estreicher & Revesz I, *supra* note 4, at 711 n.165 (collecting NLRB cases); Schwartz, *supra* note 4, at 1821 nn.14-15 (collecting cases); IND. Note, *supra* note 4, at 1103 n.14 (collecting SSA cases); TOURO Note, *supra* note 4, at 222 ("strongly condemned by every circuit court of appeals to address the issue"). The only judicial observation sometimes said to break step with this blitzkrieg of authority is Judge Wright's concurring opinion in Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983). In that opinion Judge Wright expressed the view that the NLRB is " 'free to decline to follow decisions of the courts of appeals with which it disagrees, even in cases arising in those circuits.' " *Id.* at 384 (quoting the NLRB's stated position in S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 659 F.2d 1273, 1298 (5th Cir. Unit B Oct. 1981)). Nonacquiescence by the NLRB, however, often is not "intracircuit" at all, *see supra* text accompanying note 25, and therefore even the lonely comment of Judge Wright does not bear directly on the subject of this Article. *See also* Estreicher & Revesz I, *supra* note 4, at 711 (examining judicial reaction to the NLRB's nonacquiescence policy). Indeed, *Yellow Taxi* provides a stark example of the venue uncertainty that confronts the NLRB, because that case arose in Minnesota, while judicial review was conducted by the United States Court of Appeals for the District of Columbia Circuit.

325. *See Annual Meeting of the American Bar Association*, 54 U.S.L.W. 2037, 2041 (1985) (House of Delegates adopted resolution urging SSA to cease policy of nonacquiescence); *ABA Backs Abortion Rights, Right to Die and Job Protection*, 58 U.S.L.W. 2474, 2478 (1990) (House of Delegates urged federal legislation prohibiting SSA from continuing policy of nonacquiescence).

326. *See* Kubitschek, *supra* note 4, at 400 (noting that "most" scholarly commentary is "negative"); Schwartz, *supra* note 4, at 1822 n.17.

327. COMMITTEE REPORT, *supra* note 4, at 60.

Administration to urge congressional rejection of legislation prohibiting SSA intracircuit nonacquiescence. To this end, he prepared and submitted to Congress a document expressing "serious objection" to the "unprecedented interference" with the executive branch posed by the proposed legislation.[328] By 1990, however, Mr. Lee was expressing a different view. He acknowledged that "[he] can now say, now that [he is] not part of government" that the SSA's motives in pursuing intracircuit nonacquiescence "border on the unlawful"[329] and has indicated further that intracircuit nonacquiescence undertaken because "it is cheaper . . . to disregard what [a] court has done" is "outrageous."[330] Mr. Lee's sentiments are not unique.[331] At least two United States Attorneys — even while still in office — refused to comply with their own administration's program of intracircuit nonacquiescence.[332]

The widespread sense among judges and lawyers that intracircuit nonacquiescence is wrong does not prove that it is unconstitutional. It does reveal, however, that there exists a tension between intracircuit nonacquiescence and widely shared assumptions in this nation about the rule of law. The bottom line is that constitutional text, authority, and tradition combine to make a powerful case against intracircuit nonacquiescence. That case finds reinforcement in the real-world consequences of the practice.

B. PRACTICAL CONSEQUENCES AND SEPARATION-OF-POWERS POLICY

In assessing whether governmental conduct affronts the separation-of-powers principle, the Supreme Court has emphasized not only text, authority, and tradition, but also the "practical consequences" of the challenged action in light of the policies underlying the separation of powers.[333] For at least

328. Lee Letter, *supra* note 8, *reprinted in* 130 CONG. REC. at 25,977.

329. 1 Transcript of Proceedings of the 60th Judicial Conference, United States Judge and Magistrates of the Fourth Circuit 57 (June 29, 1990) (on file with author).

330. *Id.* at 57-58; *see also Committee Report*, *supra* note 4, at 60 (summarizing Mr. Lee's position as viewing SSA intracircuit nonacquiescence as "lawless").

331. *See* Schwartz, *supra* note 4, at 1823 (noting that the "instinctive response" of lawyers and non-lawyers "is that the practice of nonacquiescence must be unlawful").

332. *See* Diller & Morawetz, *supra* note 4, at 802; N.Y. Times, Sept. 23, 1984, § 1, at 54, col. 4.

333. *See supra* note 266 and accompanying text.

eight reasons, these considerations confirm that intracircuit nonacquiescence "impermissibly interferes with the functioning of the Judiciary."[334]

First, intracircuit nonacquiescence "undermine[s] the authority"[335] of the judicial branch by diminishing systematically the authoritativeness of judicial pronouncements.[336] It does so by signaling both to executive officers and to others that circuit court interpretations of law are no more legitimate or deserving of respect than interpretations made by nonjudicial actors.[337] This message creates more than a "symbolic challenge" to the judiciary;[338] it erodes the "public esteem for the federal courts"[339] on which, as a practical matter, all judicial authority ultimately rests.[340]

Second, intracircuit nonacquiescence creates a system of dispute resolution in which claimants seeking proper results must exhaust agency remedies, then go to court to get an order directing enforcement of circuit court law, and then (at least usually) return to the agency for reprocessing of the claim in conformance with circuit court precedent.[341] This regime im-

334. Mistretta v. United States, 109 S. Ct. 647, 667 (1989).

335. *Id.* at 659.

336. *See* Maranville, *supra* note 4, at 498 ("As agencies consciously and visibly engage in nonacquiescence, agency personnel have less reason to internalize the values associated with the rule of law, such as consistency, fairness to individuals, and respect for the judiciary."); Neuborne, *supra* note 41, at 378 (expressing concern about "a cacophonous set of voices" if executive officials are "equally legitimate expositors of what the law is").

337. *See* Schwartz, *supra* note 4, at 1853 (describing intracircuit nonacquiescence as "a negation of the courts' supremacy as arbiters of the law in adjudicating cases"); Weis, *supra* note 4, at 852 (expressing concern about the "disrespect for the administration of justice generated by the spectacle of a federal agency which refuses to acknowledge that a court's ruling applies to it as well as to other litigants"); WAYNE Note, *supra* note 4, at 187 (intracircuit nonacquiescence "undermine[s] the respect accorded a federal court decision"); Conference Transcript, *supra* note 4, at 83 (remarks of Judge Walker) (questioning intracircuit nonacquiescence because it "encourag[es] governmental behavior . . . that we might wish not encourage private citizens to undertake"); *cf.* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself . . . .").

338. Schwartz, *supra* note 4, at 1851.

339. United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

340. *See* Mistretta v. United States, 109 S. Ct. 647, 672 (1989) (expressing concern about practice that "undermines public confidence in the disinterestedness of the Judicial Branch," whose "legitimacy . . . ultimately depends on its reputation").

341. *See supra* note 33 and accompanying text.

poses heavy and avoidable burdens on individual claimants.[342] It also engenders stark inequities between those claimants well-off and wise enough to seek judicial review and those too poor or ill informed to do so.[343] As already noted, these results render intracircuit nonacquiescence vulnerable to due process and equal protection challenges.[344] Of no less importance, however, these results subject intracircuit nonacquiescence to a separation-of-powers attack on the ground that the practice "unduly interfer[es] with the role" of the judiciary.[345] This is so because an accepted function of appellate courts is to set forth rules of law precisely so that the "need to . . . relitigate questions of law" is minimized[346] and "equality of treatment" is secured.[347] By undercutting these core functions of article III courts, intracircuit nonacquiescence not only threatens equal justice, but also compromises the judicial power.

Third, intracircuit nonacquiescence creates a "potential for disruption"[348] of the judicial branch by "exhausting [its] resources."[349] Intracircuit nonacquiescence has this effect because it forces courts to divert scarce resources from other important matters to large numbers of judicial review petitions that never would be filed in the absence of a nonacquiescence policy.[350] Indeed, intracircuit nonacquiescence serves to *shift*

342. *See* Kubitschek, *supra* note 4, at 410-12.

343. *See supra* notes 39-41 and accompanying text.

344. *See supra* Part II.

345. Morrison v. Olson, 487 U.S. 654, 693 (1988).

346. Maranville, *supra* note 4, at 502 (discussing functions of judicial stare decisis).

347. Diller & Morawetz, *supra* note 4, at 804.

348. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

349. Mistretta v. United States, 109 S. Ct. 647, 672 (1989).

350. Diller & Morawetz, *supra* note 4, at 808 ("When agencies apply rules differently from the courts, agency adjudication becomes simply a hurdle to overcome before obtaining judicial review. The potential for overwhelming the courts with challenges to agency determinations is staggering."); Schwartz, *supra* note 4, at 1818, 1853-54 (concluding that impact of intracircuit nonacquiescence on judiciary is "unusually severe" and involves "a substantial burden" because it "may spawn a vast number of actions for judicial review"); WAYNE Note, *supra* note 4, at 180 ("[r]elitigation and appeal consume an inordinate amount of judicial resources"). The SSA's program of intracircuit nonacquiescence in fact has given rise to "an extraordinary number of actions for judicial review." Schwartz, *supra* note 4, at 1817 n.3 (collecting documentation); *accord* Kubitschek, *supra* note 4, at 408-10 (providing statistics on improperly denied claims and increased judicial workload attributed to SSA nonacquiescence). Moreover, cases coming to the courts as a result of intracircuit nonacquiescence are not simply disposed of with a whisk of a pen; rather, like other cases, they require "careful judicial review." Diller & Morawetz, *supra* note 4, at 817 n.63.

costs from the executive branch (for which the policy results in an escape from or delay in awarding monetary or other benefits) to the judiciary (for which the policy results in a need to commit substantial resources to handling otherwise unnecessary judicial review proceedings).[351] This dynamic supports heightened scrutiny of the practice under the familiar principle that counsels judicial alertness whenever " 'virtual representation' [is] not being provided" to those adversely affected by actions of a political branch;[352] after all, the burdens thrust upon the judiciary by intracircuit nonacquiescence are "likely to be given inadequate weight"[353] by executive decision makers who benefit directly from imposing those burdens.[354] This cost-shifting argument for close scrutiny of intracircuit nonacquiescence is strengthened by the vast disparity in resources controlled by the executive and judicial branches to begin with.[355] Moreover, basing careful scrutiny on executive cost-shifting to the judiciary finds support in the Supreme Court's initial validation of agency adjudication based in part on the notion that providing such "assistance"[356] to judges served the purpose of "*relieving* the courts of a most serious burden."[357]

Fourth, intracircuit nonacquiescence stands on its head the Framers' vision of the institutional competencies of the executive and judicial departments. Proponents of intracircuit nonacquiescence urge at bottom that decisionmakers in the executive branch, rather than decisionmakers in the judicial branch, should determine as a practical matter the law to be ap-

351. *See* Diller & Morawetz, *supra* note 4, at 812 (noting "burden of repetitive litigation, borne by the judiciary").

352. *See* J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 84-85 (1980).

353. Meltzer, *supra* note 122, at 296.

354. *See* Diller & Morawetz, *supra* note 4, at 819 & n.74. One possible response is that so-called representation-reinforcement analysis has no role to play in cases not involving directly the rights of individuals, but involving instead the proper allocation of governmental powers. The first and most famous case to use this mode of analysis, however, itself concerned the structural question whether a state government could tax entities operated by the federal government. *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 428 (1819); *see also* South Carolina v. Baker, 485 U.S. 505, 512-13 (1988) (noting that states may have stronger claims of unconstitutional congressional intrusion where state interests are not adequately represented in the national political process).

355. *See* Weis, *supra* note 4, at 852 (noting reality of "scarce judicial resources").

356. Crowell v. Benson, 285 U.S. 22, 51 (1932).

357. *Id.* at 54 (emphasis added). For a more elaborate articulation of this argument, see Schwartz, *supra* note 4, at 1853-54.

plied in large numbers of agency proceedings.[358] The Framers, however, saw the task of interpreting laws as an "impartial" enterprise, unsuited for those with "momentary inclination" and "a disposition to consult popularity."[359] For precisely this reason, the Framers insulated federal judges from political influences by affording them life tenure and protecting them against salary reductions.[360] Against this backdrop it appears bizarre to subordinate existing declarations of law made by supervisory, multi-judge article III courts to the interpretations of statutes preferred by underlings of the politically accountable chief executive.[361] To do so, moreover, seems all the more anomalous in a time when many agree that "[o]ften agencies are the chosen instruments of private pressure groups."[362]

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358. This is so for the simple reason that "most agency decisions are not appealed." Maranville, *supra* note 4, at 476; *see, e.g.*, BROOKLYN Note, *supra* note 4, at 110 ("as a practical matter, only a small fraction of disability cases reach federal court"). *See generally* COLUM. Note, *supra* note 4, at 601 ("In effect, [intracircuit nonacquiescence] allows an agency to define its own powers").

359. THE FEDERALIST NO. 78, at 522, 527, 529 (A. Hamilton) (J. Cooke ed. 1961).

360. *See* U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 527-28 (A. Hamilton) (J. Cooke ed. 1961) (citing the "independence of judges" as "requisite to guard . . . the rights of individuals"); *see also* HARV. Note, *supra* note 4, at 847 ("view of the judge as an impartial governmental participant has endured"); S. CAL. Note, *supra* note 4, at 1157 ("the judiciary's function is not to be popular or accountable to majority whim").

361. *See* COMMITTEE REPORT, *supra* note 4, at 55 ("[R]ecent experience suggests that the [Social Security claims adjudication] process is vulnerable to unhealthy political control" because administrative law judges' "proper independence has been compromised."); Maranville, *supra* note 4, at 491-92 ("agencies often are subject to intense political pressure" and "tend to define the agency's function in such a way that power and resources accrue to the agency"); BROOKLYN Note, *supra* note 4, at 114 (noting that agencies "are headed by executive appointees with partisan interests"); S. CAL. Note, *supra* note 4, at 1155 (noting agency tendency to "fall[ ] back on a politically and bureaucratically slanted viewpoint"); *see also* Easterbrook, *Success and the Judicial Power*, 65 IND. L.J. 277, 279 (1990) (agencies are viewed as "changing course dramatically as each new President obtains working control"). Put somewhat more bluntly, one should ask whose word on the proper meaning of a law is better: the word of an article III multi-judge court that just said what the law is or the word of an agency litigant that just lost in its effort to get a different interpretation from that court, despite receiving a full and fair opportunity to be heard and substantial deference from the judicial tribunal. *See infra* notes 487-89 and accompanying text.

362. Easterbrook, *supra* note 361, at 278; *see also* Maranville, *supra* note 4, at 491 (agencies may be led to nonacquiesce by "[i]nfluential members of the agency's constituency"). One might attack this institutional-competence argument by saying it is inconsistent with *Chevron*'s endorsement of broad judicial deference to agency legal rulings. *See infra* notes 487-91 and accompanying

Fifth, intracircuit nonacquiescence rests uncomfortably on the foundation supporting the modern administrative state. As Professor Jaffe puts it:

> The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid. . . .
>
> . . . .
>
> . . . [T]here is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitution and legislatures.[363]

In reality, however, parties do not appeal most adverse agency actions.[364] Thus, as a practical matter, a court of appeals can create no significant "assurance" of conformance with "the limits set . . . by . . . legislatures" if agencies can elect without restraint whether or not to abide by circuit court precedent.[365]

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text. Having broad discretion in interpreting statutes ab initio, however, is quite different from claiming the power to opt for and implement an interpretation already definitively rejected by a supervisory article III court. Nor is this institutional-competence line of reasoning incompatible with the recognized authority of non-article III agency tribunals to participate in federal law adjudication. Again, permitting non-article III decisionmakers to participate in adjudication is quite different from permitting such adjudicators to flout the already existing pronouncements of the very courts assigned to supervise their adjudicatory work.

363. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320-21 (1965); *accord, e.g.*, COLUM. Note, *supra* note 4, at 597 ("Courts are entrusted with the essential role of confining agency action to the intended legislative delegation, a role crucial to the legitimacy of the modern administrative state."); *see, e.g.*, INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) (upholding Attorney General's delegated power to make deportation decisions because "courts . . . can enforce adherence to statutory standards"); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) ("the judicial branch . . . has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch"); *see also* Monaghan, *supra* note 271, at 6 ("the court's interpretation task is . . . to determine the boundaries of delegated power"); *cf.* 2 REPORTS, *supra* note 273, at 46 (remarks of Nathaniel Ghorum, July 18) ("Inferior tribunals are essential to render the authority of the Natl. Legislature effectual . . . .").

364. *See supra* note 358.

365. *See* Stieberger v. Heckler, 615 F. Supp. 1315, 1357 (S.D.N.Y. 1985) ("The judiciary's duty and authority, as first established in *Marbury*, 'to say what the law is' would be rendered a virtual nullity if coordinate branches of government could effectively and unilaterally strip its pronouncements of any precedential force."), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); IND. Note, *supra* note 4, at 1115 (intracircuit nonacquiescence precludes courts from exercising "meaningful control," thus undermining "the reliance that administrative law places on judicial review as the primary method of controlling agency action"); *see* Maranville, *supra* note 4, at 497 ("[a]s an agency becomes less susceptible to judicial control, it may acquire greater ability to engage in comprehensive regulation"). *See generally* Schwartz, *supra* note 4, at 1851-52 (intracircuit nonacquiescence "interferes markedly with the

Given this practical reality, intracircuit nonacquiescence is hard to reconcile with the judiciary's status, aptly described by Professor Jaffe, as "the senior partner" in the court/agency relationship.[366]

Sixth, the practice of intracircuit nonacquiescence may threaten the most fundamental of policies underlying our constitutional structure. The Framers separated governmental powers because they feared "the danger of . . . faction."[367] They foresaw that powerful segments of society, either singly or in combination, would — if not checked through inhibiting governmental structures — improperly use the government to "oppress" weaker minorities.[368] Recent history suggests how intracircuit nonacquiescence may fit this pattern. In the early 1980s, a newly installed administration adopted a policy of intracircuit nonacquiescence "[i]n an effort to reduce the number of recipients of Social Security benefits."[369] This effort corresponded with the interests of powerful factions concerned about increased taxes and the long-term availability of Social Security benefits,[370] and it worked to the disadvantage of disabled persons, a numerical minority few would characterize as

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efficacy of conventional judicial review as a mechanism for ensuring the proper application of law").

366. *See* L. JAFFE, *supra* note 363, at 546. One might challenge this logic by pointing to the broad autonomy courts give agencies to fashion law under the *Chevron* doctrine. A senior partner, however, often will afford a junior partner much discretionary latitude. For this reason, it is not inconsistent with their "senior partner" role for courts under the *Chevron* doctrine to afford broad discretion to agencies to adopt reasonable interpretations of law. *See* Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45, 865-66 (1984). It surely does seem inconsistent with any senior partner/junior partner conception of the court/agency relationship, however, for a "junior partner" agency to ignore a clearly and formally declared limitation on its authority already handed down by a supervisory "senior partner" court. *Cf.* Schwartz, *supra* note 4, at 1845-47 (discussing inconsistency of intracircuit nonacquiescence with the " 'judicial assistant' model of adminstrative adjudication").

367. THE FEDERALIST No. 10, at 61 (J. Madison) (J. Cooke ed. 1961); *see id.* No. 51, at 351-52 (government must "guard one part of society against the injustice of the other part").

368. *See id.* No. 51, at 352 ("In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may . . . truly be said to reign . . . .").

369. Estreicher & Revesz I, *supra* note 4, at 681-82.

370. Maranville, *supra* note 4, at 491-92 (concluding that SSA intracircuit nonacquiescence was the product of "attempts to reduce growth in expenditures for disability benefits" in an effort "to cut the portion of the federal budget that finances social programs").

politically powerful.[371] SSA nonacquiescence also threatened strong claims of entitlement, especially among persons already found to be disabled and counting on the continued receipt of benefits.[372] One might respond that such minority-disadvantaging results are the inevitable and desirable consequence of majority rule.[373] When intracircuit nonacquiescence is at issue, however, added earmarks of "injustice"[374] and "oppression"[375] appear. This is so because the executive policy in such a case is not written on a clean slate. Rather, it is pursued in the face of a supervisory court's multi-judge pronouncement — presumably taken with the principled and long view characteristic of judicial action — that the policy is unlawful.[376] In such a setting, those disadvantaged by the agency's action may have a special claim that they are being victimized by a majority faction.[377]

Seventh, any practical assessment of intracircuit nonacquiescence must take account of the comparative strengths of the branches vying for supremacy in this field. Americans have long recognized that the executive branch — with its unitary head, its resulting potential for efficiency and direct action, and its effective control over all military and law-enforcement personnel — poses a grave danger of unchecked and excessive power.[378] History has proven this concern well founded.[379] For

371. *Cf.* L. TRIBE, *supra* note 82, § 7-1, at 547 ("[F]ederal courts have a special mission in defending substantive personal interests from governmental action that overreaches because of its unduly limited constituency — action that oppresses people because they are outsiders.").

372. *See supra* note 31 (recounting widespread intracircuit nonacquiescence in benefit-termination cases through disregard of circuit courts' medical-improvement rule).

373. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (refusing to agree that "majority sentiments about the morality of homosexual sodomy" are "insufficient" to validate state's ban on homosexual sodomy).

374. THE FEDERALIST NO. 51, at 351 (J. Madison) (J. Cooke ed. 1961).

375. *Id.* NO. 10, at 61.

376. *See* Meltzer, *supra* note 122, at 296 (citing judicial function of "protect[ing] enduring constitutional values likely to be given inadequate weight by the political branches").

377. *See* THE FEDERALIST NO. 10, at 57 (J. Madison) (J. Cooke ed. 1961) (noting that, absent proper checks, "measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority"); *cf.* L. TRIBE, *supra* note 82, at 546 ("In protecting expectations created by law, and in assuring governmental regularity, we defend a part of what liberty must ultimately mean.").

378. *See, e.g.*, The Letters of Cato IV, *reprinted in* THE ANTIFEDERALISTS 305-07 (C. Kenyon ed. 1966) (attributed to George Clinton) (questioning "wherein does this president, invested with his powers and prerogatives, essentially differ from the king of Great Britain"); Manifesto of a Number of Gen-

example, Justice Jackson wrote in 1953 of the vast "gap that exists between the President's paper powers and his real powers."[380] He noted that "[n]o other personality in public life can begin to compete with [the President] in access to the public mind through modern methods of communications;"[381] he cited the power that flows from "[the President's] prestige as head of state;"[382] and he explained that the "rise of the party system has made a significant extraconstitutional supplement to real executive power."[383] Justice Jackson explained that these forces "exert[] a leverage upon those who are supposed to check and balance [executive] power which often cancels their effectiveness."[384] Thus, he saw no reason "to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review."[385]

The events of the past thirty-eight years have done nothing to diminish the dangers identified by Justice Jackson. Indeed, "the potential dominance of the executive branch in the complex and interdependent technological world in which we live has become an increasing concern."[386] A central source of that increasing concern has been Congress's ever-expanding delegation of broad fields of its own powers to executive or quasi-executive agencies.[387] Moreover, this delegation has resulted in even greater shifts of power than might first meet the eye, because congressional grants often come with no meaningful lim-

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tlemen from Albany County, *reprinted in* THE ANTIFEDERALISTS, *supra*, at 362 (objecting that "[t]he vast executive power in one man (not elected by the people) who, though called President, will have power equal if not superior to many European kings"); *cf.* THE FEDERALIST NO. 70, at 471 (A. Hamilton) (J. Cooke ed. 1961) (acknowledging concerns that "a vigorous executive is inconsistent with the genius of republican government").

379. *See generally A. Schlesinger, The Imperial Presidency* (1973) (examining the historical shift of constitutional power to the presidency and arguing that the contemporary presidency is out of control and needs restraint).

380. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

381. *Id.*

382. *Id.*

383. *Id.* at 654.

384. *Id.* at 653-54.

385. *Id.* at 654.

386. P. KAUPER & F. BEYTAGH, CONSTITUTIONAL LAW 342 (5th ed. 1980).

387. *See* COLUM. J. Note, *supra* note 4, at 468 (noting that "administrative agencies . . . have only recently played a major role in our legal system"); *cf.* COMMITTEE REPORT, *supra* note 4, at 4 (noting "the burst of federal lawmaking that began with President Johnson's 'Great Society' programs and has continued virtually unabated since").

iting instructions[388] and provide the executive branch with a wide choice to implement its views through rulemaking, adjudication, or other means of action.[389] "The proliferation of non-article III adjudication," in particular, "gives the executive branch great power to implement policies in a most troubling way: not by persuading Congress to enact them into law, nor even by announcing them publicly, but by quietly influencing the orientation of the adjudicators."[390] In such an environment, the principal check on the executive branch must be an insistence on adherence to law and rule-of-law values.[391] Those values hardly can be said to be advanced by validating executive disregard of a supervisory circuit court's existing declarations of law.

Finally, a ban on intracircuit nonacquiescence does not unduly aggrandize the judicial power; instead, the prohibition simply effectuates the recognized authority of the "least dangerous"[392] branch to hand down precedents that have meaning.[393] Moreover, a ban on intracircuit nonacquiescence vindicates judicial power principally in the field of *statutory* interpretation[394] — a sphere in which the exercise of judicial review authority is least questionable historically,[395] and in which substantial deference to executive pronouncements is accorded already.[396] In the area of statutory interpretation, ample checks on judicial abuses exist even if nonacquiescence in supervisory circuit court rulings is disallowed. Precisely be-

388. *See generally* G. GUNTHER, *supra* note 219, at 366-67 (discussing then Justice Rehnquist's dissent in American Textile Mfrs. Inst. v. Donavan, 452 U.S. 490 (1981)).

389. *See* Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 380-83 (1986) (criticizing strict division of agency action into "adjudication" and "rulemaking").

390. Strauss, *supra* note 262, at 312.

391. *See, e.g.*, Maranville, *supra* note 4, at 528-29.

392. THE FEDERALIST NO. 78, at 522 (A. Hamilton) (J. Cooke ed. 1961).

393. *See supra* notes 294-98, 365 and accompanying text.

394. *See* Estreicher & Revesz I, *supra* note 4, at 726 n.245; *see also supra* note 34 (discussing limited significance of agency nonacquiescence in constitutional rulings).

395. *See supra* note 284 (noting that *Marbury* Court deemed judiciary clearly responsible for declaring the meaning of subconstitutional law). On the particularly controversial character of judicial law pronouncing of the constitutional variety, see Eakin v. Raub, 12 Serg. & Rawle 330, 348 (Pa. 1825) ("It is the business of the judiciary, to interpret the laws, not scan the authority of the lawgiver . . . ."); G. GUNTHER, *supra* note 219, at 14 ("viewing a constitution as a species of 'law' [was] hardly a prominent feature in the political theory of the Revolutionary era"); *id.* at 18-19 (collecting literature).

396. *See infra* notes 487-89 and accompanying text.

cause such rulings come from a circuit court, the executive may move to protect its interests by appealing to the Supreme Court.[397] In addition, the executive, when faced with a disfavored statutory precedent, has access to the corrective route laid out by the Constitution itself: to go to the House and Senate and "recommend to their Consideration such Measures as he shall judge necessary and expedient."[398]

These considerations may or may not demonstrate conclusively the unconstitutionality of intracircuit nonacquiescence.[399] They may or may not mandate the strongest form of "strict[] scrutiny," utilized "when particularly cherished constitutional rights are threatened."[400] At the very least, however, these many considerations — based on constitutional text, authority, tradition, and policy — should trigger in their totality application of the "somewhat heightened review"[401] referred to as "intermediate."[402]

VI. SCRUTINIZING THE JUSTIFICATIONS FOR INTRACIRCUIT NONACQUIESCENCE

Heightened scrutiny of even the intermediate variety requires a "searching analysis" of the challenged governmental practice.[403] First, the government must show that its policy

397. *See infra* note 418 and accompanying text.

398. U.S. CONST. art. II, § 3; *see also, e.g.*, Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370-71 (1989) (noting special precedential force of judicial statutory interpretations because of ability to secure correction through legislation); *id.* at 2380 (Brennan, J., dissenting in part) (same). An understanding of the intentions of the Framers in structuring the executive also should reduce concern that recognition of judicial power to insist on intracircuit acquiescence would inappropriately transfer authority from the executive to the judiciary. This is so because, although the Framers surely intended to create a powerful executive, they did so "to provide a check on the legislature," D. FARBER & S. SHERRY, *supra* note 292, at 86, rather than on the judiciary. *See* 2 RECORDS, *supra* note 273, at 35 (remarks of James Madison, July 19) (citing need for "restraining the instability & encroachments" of the legislature); *id.* at 52 (remarks of Gouverneur Morris, July 19) ("Executive Magistrate should be the guardian of the people . . . agst. Legislative tyranny . . . .").

399. *See* Kramer, *The Constitution as Architecture: A Charette*, 65 IND. L.J. 283, 289 (1990) ("Like other constitutional doctrines, separation of powers is not absolute and may yield to a sufficiently compelling governmental interest.").

400. G. GUNTHER, *supra* note 219, at 457.

401. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441 (1985).

402. G. GUNTHER, *supra* note 219, at 644.

403. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982).

rests on an interest that ranks as "important"[404] or "exceedingly persuasive."[405] Not just any interest will do; in particular, claims of "administrative ease and convenience" typically will fail.[406] Second, the government must show a "direct, substantial relationship"[407] between the challenged policy and the interests said to justify it. In applying this requirement, courts focus on whether there are "less restrictive means" for accomplishing the government's goals without impinging so much on the threatened constitutional values.[408] Thus the governmental policy is unconstitutional if there is a "weak congruence"[409] or "unduly tenuous 'fit' "[410] between the policy and its objectives.

In applying these principles to intracircuit nonacquiescence, one must first identify those particular interests relied on to justify the challenged practice.[411] Although one might write the list in different ways,[412] advocates of intracircuit nonacquiescence have argued in substance that the practice advances three important goals: (1) the achievement of a salutary and congressionally preferred uniformity in the administration of agency programs; (2) the advancement of sound development of the law through the uninhibited "percolation" of legal issues through the lower federal courts; and (3) the vindication of congressionally created and judicially recognized agency expertise in the administration of agency programs.[413] A close examina-

404. *E.g.*, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3009 (1990) (inquiring whether congressionally mandated, race-based affirmative action classifications "serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives"); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) (gender-based discriminations must meet same standard); Califano v. Webster, 430 U.S. 313, 316-17 (1977) (same); Craig v. Boren, 429 U.S. 190, 197 (1976) (same).

405. *Hogan*, 458 U.S. at 724; *accord, e.g.*, Heckler v. Mathews, 465 U.S. 728, 744-45 (1984).

406. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198 (1976). *See generally* L. TRIBE, *supra* note 82, at 1602-03 (collecting relevant case law).

407. *E.g.*, *Hogan*, 458 U.S. at 725-26.

408. *See, e.g.*, Supreme Court v. Piper, 470 U.S. 274, 284 (1985); *see also, e.g.*, *Wengler*, 446 U.S. at 151-52 (gender-based policy will fail where state does not demonstrate valid advantage of discriminatory policy over equal treatment).

409. Craig v. Boren, 429 U.S. 190, 199 (1976).

410. *Id.* at 202. *See* L. TRIBE, *supra* note 82, at 1603.

411. *See* Schwartz, *supra* note 4, at 1818 n.6 (noting that "[s]erious students of nonacquiescence generally agree that agencies practicing nonacquiescence have substantial practical justifications for their conduct and are not simply interested in denying benefits to individuals or frustrating the courts' power of judicial review").

412. *See, e.g.*, Kubitschek, *supra* note 4, at 417-40.

413. *See, e.g.*, Schwartz, *supra* note 4, at 1818-19 (citing goals of uniform administration and assuring "a stream of 'test cases,' " as well as the significance

tion of each of these interests, however, reveals that none of them supplies an adequate justification for intracircuit nonacquiescence.

A. UNIFORMITY

In creating the administrative state, Congress envisioned substantially uniform administration of each agency's program throughout the United States. The Supreme Court has cited "Congress' oft-repeated goal of uniform administration of the [Social Security] Act."[414] The Court has emphasized also the importance of "uniform federal interpretation" of the federal labor laws administered by the NLRB.[415] Agency advocates argue that a policy of intracircuit nonacquiescence is needed to achieve uniformity.[416] They reason that, in the absence of such nonacquiescence, an agency must take account of each circuit's rulings, and as a result agency practice will vary from one circuit to another.[417] Avoiding such disuniformity, the argument continues, constitutes an important governmental interest.

This analysis is subject to criticism on many levels. For example, complaints of nonuniformity have something of a hollow ring because the agencies themselves can cure most problems of nonuniformity by promptly seeking Supreme

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of agency's administering "the statutory provisions for which it is responsible"); S. CAL. Note, *supra* note 4, at 1172 (noting uniformity and administrative-expertise justifications).

414. Heckler v. Day, 467 U.S. 104, 116 (1984); *cf.* 42 U.S.C. § 421(a)(2) (1988) (calling for "effective and uniform administration of the disability insurance program").

415. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).

416. *E.g.*, Insurance Agents' Int'l Union, 119 N.L.R.B. 768 (1957) (requiring administrative law judge's nonacquiescence in circuit court authority because "[o]nly by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved"), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958) (per curiam), *aff'd*, 361 U.S. 477 (1960); Estreicher & Revesz I, *supra* note 4, at 708 (noting that NLRB justifies its nonacquiescence policy based on "its congressionally delegated responsibility to ensure a nationally uniform administration of its organic statute"); *Social Security Hearing*, *supra* note 4, at 105-06 (statement of Martha A. McSteen, Assistant Commissioner, SSA) ("policy of nonacquiescence is essential to ensure that the agency follows its statutory mandate to administer the Social Security program nationwide in a uniform and consistent manner"); *see also* Schwartz, *supra* note 4, at 1819 (citing result of "horizontal equity in the agency's treatment of similarly situated persons"); GEO. WASH. Note, *supra* note 4, at 150 n.21 (noting IRS's uniformity justification).

417. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 748-49.

Court review and a resulting clarification of national law.[418] In addition, the uniformity-based defense of intracircuit nonacquiescence is vulnerable because substantial nonuniformity is an inescapable consequence of having agency actions reviewable by a system of multiple, regional circuit courts. Thus, even if an agency nonacquiesces in a circuit court's invalidation of a "uniform" agency rule, dissatisfied claimants in that circuit who seek judicial review will get the circuit's "nonuniform" rule applied to their claims in the end.[419] Indeed, intracircuit nonacquiescence in a very real sense *undermines* the goal of

418. *See, e.g.*, H.R. REP. NO. 618, 98th Cong., 2d Sess. 23 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3060-63 (faulting SSA for not seeking Supreme Court review in cases in which it later nonacquiesced); Heaney, *supra* note 4, at 10 (decrying Secretary's failure to seek certiorari with more frequency to resolve divisive issues under Social Security Act); Kubitschek, *supra* note 4, at 403 (noting that "an integral part of the agency's nonacquiescence is its refusal, with rare exceptions, to seek Supreme Court review"). *But cf. infra* note 461 and accompanying text (noting that supporters of nonacquiescence urge that the policy serves goal of percolating issues through the circuit courts prior to Supreme Court intervention). To be sure, significant practical restrictions exist on the Supreme Court's ability to grant petitions for certiorari. Those restrictions should not, however, pose an insurmountable obstacle to Supreme Court review of circuit court rulings that give rise to serious friction between a national agency and regional circuit court. In particular, federal agencies have a special claim to Supreme Court intervention — even in the absence of an intercircuit conflict — if serious practical problems of nonuniformity are present. *See* Rothensis v. Elec. Battery Co., 329 U.S. 296, 299 (1946) (granting certiorari due to "gravity of [lower court's] holding to the administration of the tax laws"). In addition, the Court is uniquely receptive to certiorari petitions filed by the Solicitor General. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 192 (6th ed. 1986). For these reasons, problems of nonuniformity are often problems largely of the agencies' own making when they or their attorney — that is, the Solicitor General — fail to seek Supreme Court review. *See, e.g.*, American Medical Int'l, Inc. v. Secretary of HEW, 677 F.2d 118, 123 (D.C. Cir. 1981) ("federal agencies are in a better position than most litigants to petition the Supreme Court or Congress to modify what they believe to be erroneous interpretations of national law"). *But see* GEO. WASH. Note, *supra* note 4, at 163-64 (opposing immediate appeals to Supreme Court). Also, agencies can remove uniformity problems through the alternative means of *inter*circuit acquiescence — that is, by simply following on a national level the first circuit court ruling that invalidates an agency rule. *But see infra* note 465 and accompanying text (noting potential undesirability of agency's simply following nationwide the ruling of the first circuit court that decides an issue).

419. *See, e.g.*, GEO. WASH. Note, *supra* note 4, at 162 (uniformity argument weakened because it is defeated whenever claimant appeals). In addition, some disuniformity is built into almost any national administrative system "because of the need to delegate decisionmaking to regional offices and front line personnel." Maranville, *supra* note 4, at 496 n.79; *see* S. CAL. Note, *supra* note 4, at 1173 (noting that nonuniformity in SSA Program flows from fact that "each state is involved in the day to day administration").

uniformity because it necessarily results in nonuniform treatment of those who seek and those who do not seek judicial review.[420]

Responding to this point, Professors Estreicher and Revesz distinguish between so-called "horizontal" and "vertical" uniformity.[421] They urge that intracircuit nonacquiescence creates at least a horizontal uniformity — that is, like treatment on a national level of all persons in the context of initial agency proceedings.[422] That observation, however, does little to advance the constitutional ball because, as Professors Estreicher and Revesz recognize, horizontal uniformity in administering agency programs is not an end in itself.[423] Thus, proper evaluation of this justification for intracircuit nonacquiescence must focus on the broader aims of maximizing horizontal uniformity. Professors Estreicher and Revesz identify four such objectives: (1) proper handling of "externalities;"[424] (2) avoidance of intercircuit competition;[425] (3) fairness;[426] and (4) reduction of costs.[427]

1. Externalities

Professors Estreicher and Revesz argue that "a bar against intracircuit nonacquiescence, even where it contemplates limited exceptions, . . . undermines important goals of uniformity that underlie the administrative law system."[428] The first such

420. *See* Stieberger v. Heckler, 615 F. Supp. 1315, 1363 (S.D.N.Y. 1985), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Diller & Morawetz, *supra* note 4, at 815 ("nonacquiescence creates its own disuniformities by making a different set of rules available to those who can litigate and those who cannot"); *id.* at 813 (citing "gross disuniformity between those who can pursue their appeals and those who cannot"); COLUM. Note, *supra* note 4, at 602-03 ("[i]ntracircuit nonacquiescence . . . creates inequities" among similarly situated persons); WASH. & LEE Note, *supra* note 4, at 1243 (commentators and "courts have noted . . . that implementation of an intracircuit nonacquiescence policy actually leads to less uniformity, rather than more uniformity"); *see also* Estreicher & Revesz I, *supra* note 4, at 750 (noting that some nonuniformity is created by nonacquiescence). *See generally supra* notes 42-45 and accompanying text (discussing disparity of treatment created by intracircuit nonacquiescence).

421. Estreicher & Revesz I, *supra* note 4, at 750.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* at 748.

426. *Id.*

427. *Id.* at 748-49.

428. *Id.* at 747.

goal that they identify concerns the proper treatment of so-called "externalities." They explain:

> [EPA] emission standards are uniform nationwide and are set by reference to categories of polluters (for example, coal-fired electric plants). If one circuit were to strike down regulations limiting the permissible emissions of a particular pollutant, the effects would be felt not only in that circuit, but in downwind circuits as well. For the ambient standards to be met in those circuits, the agency would have to define more stringent circuit-specific emission standards for those downwind states. Thus, the actions of the court of appeals that struck down the administrative policy will have important effects even outside the geographic jurisdiction of that circuit, forcing the agency to take suboptimal measures in the downwind circuits to counteract the impact of the court's action.[429]

The best response to this observation is: So what? The "externalities" problem identified by Professors Estreicher and Revesz exists not because of the unavailability of intracircuit nonacquiescence, but because Congress has created a system of geographically defined circuit courts. Thus, persons in "downwind" circuits will feel the effects of the agency-disrupting pro-pollution ruling regardless of the agency's power to nonacquiesce. This is so because the court's ruling necessarily was embodied in a judgment, and even the most vociferous proponents of intracircuit nonacquiescence concede that agencies must honor judicial decrees.[430]

Nor would an ability to nonacquiesce significantly reduce such "externalities" problems. For example, the operators of a "coal-fired electric plant" certainly are going to be aware of important and favorable local circuit court rulings concerning emission standards. As a result, even if the agency nonacquiesces, the electric plant will seek judicial review; the circuit court (applying its own settled precedent) will grant relief to the plant; and both the EPA and "downwind" neighbors will be in the same boat they would have been in if the agency had acquiesced.

Additional reasons support the conclusion that any "externalities" justification for intracircuit nonacquiescence is unavailing. First, even if externalities problems are real and recurring, they surely do not justify nonacquiescence with respect to all agency programs. For example, the operation of the Social Security program does not present "externalities" problems remotely resembling the "downwind pollution" hypo-

429. *Id.*

430. *See supra* note 275 and accompanying text.

thetical invented by Professors Estreicher and Revesz. Second, no reason exists to believe that such problems are common or even that they exist at all. Indeed, Professors Estreicher and Revesz note that their own illustrative case is one that will never arise, because Congress has vested review of emission standards in a single court of appeals.[431] Surely a stronger showing is necessary to establish that the remedying of "externalities" constitutes an "exceedingly persuasive"[432] governmental interest that a program of intracircuit nonacquiescence will advance in a "direct [and] substantial"[433] way.

2. Intercircuit Competition

Professors Estreicher and Revesz suggest also that a ban on intracircuit nonacquiescence will exacerbate problems of "undesirable regional competition."[434] For example, they observe that:

> If one circuit takes a more restrictive view than does the NLRB of what constitutes a mandatory subject for collective bargaining, employers in that circuit have more entrepreneurial flexibility, and perhaps lower labor costs, than their counterparts in other circuits, creating incentives for new industry to establish itself in that circuit and for existing industry to move there from other circuits.[435]

To suggest that intracircuit nonacquiescence should be permitted to mitigate such untoward and inefficient business location shopping, however, is to rely on fantasy. First, it is farfetched to believe that firms select business sites based on differences in approach to a federal statute between a local court of appeals and a governing agency.[436] In the absence of some "concrete

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431. Estreicher & Revesz I, *supra* note 4, at 747 n.319; *see also* Diller & Morawetz, *supra* note 4, at 813 n.46 (noting that "[w]hen uniform national rules are especially important, Congress can create special courts or venue rules to assure uniformity").

432. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

433. *Id.* at 725-26.

434. Estreicher & Revesz I, *supra* note 4, at 748.

435. *Id.*

436. This is the case for a number of reasons going beyond the obvious fact that businesses typically will respond to more traditional economic considerations than a difference in statutory interpretation between a regional circuit court and a federal agency. For example, even if a favorable circuit court rule otherwise might attract a company, that company would have to recognize that the rule later might be adopted by other circuits or the agency itself; it might be supplanted by Supreme Court or congressional action; or it might be rendered obsolete through subsequent agency action, such as the adoption of an entirely new set of rules. In addition, locating an operation in a particular circuit will not assure that the circuit's law will control a case concerning that operation. For example, Professors Estreicher and Revesz hypothesize that

evidence"[437] of such conduct, this supposed interest cannot justify intracircuit nonacquiescence. Second, even if businesses shop for favorable legal rules in this way, permitting intracircuit nonacquiescence will not stop them. This is so, once again, because persons subjected to intracircuit nonacquiescence can always seek judicial review.[438] If a company is so enamored of a particular circuit court's ruling that it is willing to relocate its entire business in that circuit, the company surely will not stand idly by if the agency chooses to nonacquiesce in the ruling. Rather, the company will go to court, receive the benefit of the ruling, and thus render useless the agency's effort to stop its intercircuit shopping trip with the crude tool of intracircuit nonacquiescence. For these reasons, the avoidance of "intercircuit competition" is not an "important" governmental interest that intracircuit nonacquiescence is "carefully tuned"[439] to advance.

3. Fairness

Defenders of intracircuit nonacquiescence have argued that the practice enhances fairness by producing a uniform treatment of claimants in different circuits despite variations among circuit court rules.[440] In particular, federal officials have argued that if one circuit has displaced an SSA rule with a more generous one, fairness dictates that the SSA should treat claimants in that circuit pursuant to the same national standard it continues to apply in other circuits.[441] This view of "fairness" is an odd one indeed. In practice, it means that all claimants should be treated equally poorly — that is, that "fairness" commands evaluation of all claimants' cases according to the SSA's inhospitable standards even if a particular circuit has adopted a

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companies may settle on business locations to secure the benefits of local circuit court labor law. The venue rules governing NLRB judicial review proceedings, however, typically support review in any number of circuits regardless of the location of a particular company plant. *See supra* note 25 and accompanying text. The resulting uncertainties as to where judicial review proceedings will in fact occur would reduce any incentive companies otherwise might perceive to shift locations to capitalize on favorable circuit court law.

437. Frontiero v. Richardson, 411 U.S. 677, 689 (1973).

438. *See supra* text following note 430.

439. Mathews v. Lucas, 427 U.S. 495, 513 (1976).

440. *See* Estreicher & Revesz I, *supra* note 4, at 748.

441. *See, e.g., Social Security Hearing, supra* note 4, at 105-06 (statement of Martha A. McSteen, Assistant Commissioner, SSA) ("[I]t would not be equitable to people to subject their claims to differing standards depending on where they reside.").

more pro-claimant rule. Of course, determining whether conduct qualifies as "fair" is not a simple business. A useful way of making the inquiry, however, is to determine the likely outlook of the persons who supposedly are the victims of the treatment described as unfair. Taking this perspective, the question becomes whether claimants in circuits that have upheld the inhospitable SSA rule would advocate that outsiders be dragged down with them in the interest of ensuring "fairness"? Such a callous view of fairness seems so improbable that this justification for intracircuit nonacquiescence cannot qualify as "exceedingly persuasive."[442]

This response to the government's fairness argument does not apply to programs (such as the program administered by the NLRB) designed not to dispense governmental benefits, but to resolve disputes between private parties.[443] Even with respect to those programs, however, it is doubtful that an agency seeking "fair" results should be able to insist on achieving equality of treatment only on the agency's own terms.

In any event, and regardless of the type of agency program involved, the government's claimed interest in avoiding inequitable treatment falters because the cure it proposes is worse than the disease. This is so because intracircuit nonacquiescence itself produces grave inequality of treatment. As already explained,[444] when an agency engages in intracircuit nonacquiescence, those claimants with the wherewithal and sophistication to seek judicial review will do so and thereby secure application of favorable circuit court law. Those not so blessed, however, will not seek judicial review, and accordingly their claims will remain rejected on the basis of unfavorable agency rules.[445] Under this regime, even next-door neighbors with identical job skills and medical conditions could receive different resolutions of their disability claims. Such a result travels far from accepted conceptions of equity and justice.[446]

In reality, any fairness-based defense of intracircuit nonac-

442. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

443. *See* Maranville, *supra* note 4, at 495-96.

444. *See supra* notes 39-41 and accompanying text.

445. *See, e.g.*, H.R. REP. NO. 618, 98th Cong., 2d Sess. 24 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3061 (noting inequities caused by SSA nonacquiescence).

446. *See, e.g.*, Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (citing "principle of treating similarly situated defendants the same"); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1064-65 (1975) (arguing that cases should be decided on arguments of principle, which requires "consistency from one case to the next").

quiescence is a makeweight. The government cannot show that any true interest in fairness — much less an "important" one — justifies intracircuit nonacquiescence.

4. Administrative Inconvenience

The final uniformity-based justification for intracircuit nonacquiescence focuses on the practical burdens thrust upon an agency precluded from nonacquiescing. As explained by Professors Estreicher and Revesz: "If an agency cannot engage in intracircuit nonacquiescence, it will have to administer its statute differently in various parts of the country . . . . Differential administration can impose significant costs on an agency."[447] A basic difficulty with this cost-saving argument is that intracircuit nonacquiescence may well increase, rather than decrease, costs for the government as a whole. This is the case because, for reasons already given, the practice serves to *shift* costs, so that any saving by the executive branch may well be offset by additional costs imposed on the federal courts.[448] In addition, the administrative cost savings flowing to the executive branch from intracircuit nonacquiescence may well be overstated. For example, Professors Estreicher and Revesz suggest that, if intracircuit nonacquiescence is barred, "whenever the agency loses a case in a court of appeals, [its instruction manuals] will have to be updated."[449] The experience of the SSA illustrates the exaggerated character of this assertion. That agency often loses cases on "substantial evidence" grounds in unpublished circuit court decisions that add nothing to the corpus of Social Security law.[450] Even the staunchest critic of nonacquiescence would not suggest that instruction manuals for local decision makers must identify or explain all decisions of

447. Estreicher & Revesz I, *supra* note 4, at 748; *see, e.g.*, Schwartz, *supra* note 4, at 1819 (nonacquiescence "simplifies the task of administering the agency's program"); GEO. WASH. Note, *supra* note 4, at 150 (noting argument that mandatory acquiescence "could wreak havoc on administrative efficiency").

448. *See supra* note 351 and accompanying text. *See generally* WASH. Note, *supra* note 4, at 749 ("[o]nce a circuit court firmly establishes its policy, relitigation of that question within the circuit wastes governmental resources").

449. Estreicher & Revesz I, *supra* note 4, at 449.

450. *See* H.R. REP. NO. 618, 98th Cong., 2d Sess. 23 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3060 ("Most disability cases decided in the Federal courts have little value as precedent."); COMMITTEE REPORT, *supra* note 4, at 56 ("[p]rinciple issues in most Social Security disability cases are factual and technical").

this sort.[451] Moreover, even when circuit courts issue important decisions, it is not clear that national instruction manuals must immediately and invariably pick them up. Instead, agency officials might be able to advise local decision makers in general terms that they must follow local circuit court authority, while placing the burden on claimants to identify specific circuit court precedents applicable to that claimant's case and incompatible with agency rules.[452]

In any event, an administrative burden argument cannot justify intracircuit nonacquiescence under settled constitutional doctrine. This is so because the Court's decisions have "rejected administrative ease and convenience as sufficiently important objectives" to satisfy even intermediate constitutional scrutiny.[453] In a similar vein, the Court has refused to excuse serious intrusions on separation-of-powers values on the grounds of "[c]onvenience and efficiency."[454] It follows that under any form of analysis even approximating heightened scrutiny, intracircuit nonacquiescence cannot be defended as a cost-saving measure. This conclusion negates even the government's most plausible argument for justifying intracircuit nonacquiescence on the ground of uniformity.[455]

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451. *See also* Diller & Morawetz, *supra* note 4, at 814 n.48 (noting that "the problem of updating instructions is one that agencies already face and have established mechanisms to accommodate").

452. In particular, this procedural mechanism provides an adequate response to concerns that a duty to acquiesce places an inordinate burden on agency decision makers to sort out cases in which application of the agency's national rules will result in nonacquiescence. In a similar vein, Professors Estreicher and Revesz observe that administrative "problems are exacerbated in agencies with regional offices that do not match the geographic jurisdictions of the courts of appeals." Estreicher & Revesz I, *supra* note 4, at 691 n.41. Even assuming that such nonparallelism increases costs and burdens, however, it seems redressable through the less restrictive alternative of simply restructuring agency offices. Surely agencies cannot cry foul when forced to acquiesce if the costs and inconveniences are the product of the agency's own choice in drawing bureaucratic boundaries.

453. *See* Craig v. Boren, 429 U.S. 190, 198 (1976); *see also* Keller v. State Bar, 110 S. Ct. 2228, 2237 (1990) (denigrating "administrative burden" justification for impinging on first amendment rights). *See generally supra* note 406 and accompanying text (discussing validity of government claims of administrative ease and convenience).

454. INS v. Chadha, 462 U.S. 919, 944 (1983); *see also, e.g.*, Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("[D]octrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power.").

455. *See* Kubitschek, *supra* note 4, at 430 (suggesting that the "primary" reason for favoring uniformity "is that it is a cheaper and more efficient way to operate"); COLUM. Note, *supra* note 4, at 602 ("soundest justification for

B. PERCOLATION

Proponents of intracircuit nonacquiescence rely on more than the claimed advantages of maximized uniformity; they argue also that broad protection of intracircuit nonacquiescence best advances the goal of sound judicial lawmaking.[456] They urge in particular that intracircuit nonacquiescence is necessary to ensure a proper "percolation" of important legal issues through the federal judicial system.[457] Like "horizontal uniformity," however, "percolation" is only a means to other ends. The most prominent of those ends is well recognized: to ensure that different circuits courts — bringing to the task differing backgrounds and perspectives — lay down multiple analyses of a legal issue before the Supreme Court acts (or chooses not to act) on that issue.[458] In its direct operation, a ban on intracircuit nonacquiescence does not threaten this interest at all. This is so because such a ban requires agency adherence to circuit court decisions only within the decision-issuing circuit.[459] It does not restrict the development of federal law in other circuits in any way.[460]

Critics argue, however, that a prohibition on intracircuit

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nonacquiescence" is that intracircuit acquiescence "may be costly and burdensome").

456. *See, e.g.*, Estreicher & Revesz I, *supra* note 4, at 743-47.

457. *See, e.g.*, Stieberger v. Heckler, 615 F. Supp. 1315, 1359 (S.D.N.Y. 1985) (citing government's percolation defense for intracircuit nonacquiescence), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986).

458. *See* United States v. Mendoza, 464 U.S. 154, 160 (1984) (noting concern about depriving "this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari"); Wallace, *supra* note 294, at 929 (noting value of "providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments"); COLUM. J. Note, *supra* note 4, at 467 (intercircuit percolation serves to ensure that "issues will become ripe for Supreme Court review"); HARV. Note, *supra* note 4, at 850 ("The only value of percolation that the Court identified in *Mendoza* is the benefit to the Supreme Court from the existence of different lower court opinions on the same legal issue."); Conference Transcript, *supra* note 4, at 42 (remarks of Professor Estreicher) ("multicircuit consideration of issues and multicircuit dialogue [serve] both as a means of identifying the cases that the Supreme Court ought to hear and also as a basis for deciding the cases that it ultimately grants certiorari to hear").

459. *See supra* note 170 and accompanying text.

460. *Accord, e.g.*, Diller & Morawetz, *supra* note 4, at 812 ("agency compliance with circuit law within a circuit does not inhibit the primary form of intercircuit dialogue where circuits consider issues that have been ruled on by other circuits"); Kubitschek, *supra* note 4, at 420 ("[e]ven if the agency must follow court of appeals decisions within the circuit, it remains free to litigate the same issues in other circuits").

nonacquiescence may *indirectly* inhibit the "percolation" of legal issues in other circuit courts. For example, if intracircuit nonacquiescence were prohibited, agencies faced with unfavorable circuit court decisions might rush to secure immediate Supreme Court review before optimum percolation had occurred.[461] This argument, however, faces a number of difficulties.[462] The most obvious is that the Supreme Court can simply deny the agency's petition for certiorari if it desires further lower court dialogue before it acts.[463] To be sure, the agency will suffer inconvenience whenever forced to acquiesce in a circuit court decision as to which certiorari has been denied. As already shown, however, such inconvenience does not justify intracircuit nonacquiescence.[464]

Agency advocates make an alternative "real-world" argument that mandated intracircuit acquiescence will unduly threaten intercircuit dialogue. The nub of this argument is that an agency confronted with the complexity of applying one rule in one circuit, while sticking by its own rule in all others, may simply capitulate to the adverse circuit court ruling and thus truncate judicial dialogue altogether.[465] Given an agency's natural loyalty to its own rules, however, this scenario is unlikely often to unfold. Moreover, even if it does, that fact cannot validate intracircuit nonacquiescence under "heightened scrutiny" principles. After all, the stifling of judicial dialogue that results under this scenario does not occur because of the ban on intracircuit nonacquiescence; instead it occurs because of the agency's own choice to acquiesce in the circuit court ruling nationwide. Stated another way, a less-restrictive alternative for

461. *See* Lee Letter, *supra* note 8, *reprinted in* 130 CONG. REC. at 25,977; Kuhl, *supra* note 4, at 914-15.

462. For example, the argument is speculative because agencies may not act in this manner. In addition, even if agencies do seek certiorari when they first lose on an important issue, there may already have been extensive circuit court treatment of the issue in cases the agency has won. Moreover, further dialogue may unfold while the case is pending before the Supreme Court. Finally, intercircuit dialogue, while useful, is hardly indispensable to sound Supreme Court decision making. In fact, the Court commonly decides issues before any intercircuit dialogue on them has occurred. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404, 2406-07 (1990).

463. *See* 28 U.S.C. § 1254 (1988).

464. *See supra* note 453 and accompanying text.

465. Estreicher & Revesz I, *supra* note 4, at 749 (expressing concern about "indirectly" forcing agencies to follow nationwide "the first adverse decision by a court of appeals"); Maranville, *supra* note 4, at 496 (noting possibility that agency will "abandon its preferred approach . . . each time a court adopts a different position").

achieving the government's interest in ensuring intercircuit dialogue would be for the agency not to assimilate the first adverse circuit court ruling on a nationwide basis, but instead to accept the ruling only locally, while engaging in *inter*circuit nonacquiescence.[466] Again, an agency might find this course of action inconvenient to implement, but the avoidance of such inconvenience cannot justify intracircuit nonacquiescence.[467]

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466. *See supra* notes 22-23 and accompanying text.

467. *See supra* note 453 and accompanying text. Three other practical aspects of the percolation argument are said to favor broad executive authority to engage in intracircuit nonacquiescence. First, a ban on intracircuit nonacquiescence might "overburden the Supreme Court with appeals from adverse decisions" because of the practical requirement that "government . . . seek all possible avenues of review of the first adverse decision in any circuit." Kuhl, *supra* note 4, at 914. Any acquiescence-induced increase in the Supreme Court docket (which already comprises over 5,000 cases per year), however, seems unlikely to be functionally significant. Moreover, "while acquiescence might increase congestion in the Supreme Court, nonacquiescence increases congestion in the district courts and courts of appeals" to a far greater extent. Kubitschek, *supra* note 4, at 440. In any event, the Supreme Court can manage its own workload through discretionary control of its certiorari docket.

Second, Professors Estreicher & Revesz complain that a ban on intracircuit nonacquiescence "skews the law's development in a direction that is always antagonistic to the agency's position." Estreicher & Revesz II, *supra* note 4, at 835. They say this is so because "an agency whose position has been rejected in a circuit may not relitigate in that circuit," while when an agency's position is endorsed "opponents of the agency not party to the previous proceeding may continue to press their position in the face of contrary circuit law." *Id.* This argument does not apply to agencies that — unlike the SSA — decide private disputes, because the losing private litigant can always appeal, and the agency can then support that private appellant's position. Even as to agencies like the SSA, however, the argument is fallacious because it ignores both the real-world opportunities that do exist for agency relitigation, *see infra* notes 483-84, and the practical restraints imposed on nongovernment litigants faced with existing "contrary circuit law." *See, e.g.*, FED. R. CIV. P. 11. This argument fails also to recognize that circuit courts in general do not disrupt their own precedents for any party and that the federal government, when genuinely bent on dislodging a circuit court precedent, can bring far more resources and influence to bear than other federal court litigants. *See, e.g.*, Commissioner, INS v. Jean, 110 S. Ct. 2316, 2322 n.14 (1990) (noting " 'greater resources and expertise' " of government) (quoting H.R. REP. NO. 1418, 96th Cong., 2d Sess. 12 (1980)); Ruppert v. Bowen, 871 F.2d 1172, 1177 (2d Cir. 1989) (citing "disparity between the resources at [the claimant's] command and those available to the SSA"); HARV. Note, *supra* note 4, at 852-53 (citing government's "considerable" advantages as a litigator).

Finally, the Justice Department has suggested that "mandatory acquiescence would severely damage the government's litigation practices." WAYNE Note, *supra* note 4, at 171; *accord* Lee Letter, *supra* note 8, *reprinted in* 130 CONG. REC. at 25,977 (nonacquiescence prohibition "represents an unprecedented interference with the ability of the Justice Department to determine the cases it will appeal"); *cf.* United States v. Providence Journal Co., 485 U.S. 693, 702-03 & n.7 (1988) (Supreme Court relies on Solicitor General not to file

Faced with these difficulties, Professors Estreicher and Revesz contend that "percolation," if correctly conceived, involves more than facilitating the independent review of a legal issue by multiple circuit courts. They argue that the appellate system also should facilitate ready *reconsideration* of circuit court precedent *by the precedent-issuing court itself*.[468] This interest, they add, is especially great after other circuits have rejected the targeted precedent as unpersuasive.[469] Having

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certiorari petitions in most cases the government has lost in the appellate courts). This argument comes with something of a pedigree because the Supreme Court in *Mendoza* deemed inadvisable a disruption of the government's litigation practices. United States v. Mendoza, 464 U.S. 154, 159-61 (1984). The reasoning of *Mendoza* (which concerned irreversible nationwide "law-freezing" and important decisions regarding appeals from district court, as well as circuit court, rulings), however, does not carry over to a rule of mandated intracircuit acquiescence (which involves only circuit-wide effects of court rulings that can be reversed by a subsequent challenge, and appeal decisions relating to only circuit court, and not district-court, judgments). In any event, a rule of compulsory intracircuit acquiescence "simply puts the agency in the same position as every private litigant with a nationwide constituency, who must make a difficult decision as to whether to seek Supreme Court review, weighing such factors as the cost of appealing, the likelihood of success, and the danger of setting a nationwide precedent against the litigant." Kubitschek, *supra* note 4, at 437. Indeed, the government generally is in a far *better* position than any ordinary litigant in making this choice because: (1) unlike a private party, the government is not precluded by collateral estoppel from thereafter relitigating the issue in any court even if it declines to seek certiorari; (2) such relitigation in other circuits may well produce an intercircuit conflict, which the government may readily take to the Supreme Court; (3) the uniquely expansive nature of government programs often will provide agencies with ample opportunities to relitigate even in the decision-issuing circuit; and (4) the government, in any event, has far greater resources and influence in litigation than any private party. *See, e.g.*, S. CAL. Note, *supra* note 4, at 1168 (noting "strategic luxury" given to agencies that may, unlike individuals, "pick and choose" cases best suited for appeal).

468. Estreicher & Revesz I, *supra* note 4, at 727; *see also* Lee Letter, *supra* note 8, *reprinted in* 130 CONG. REC. at 25,977 (expressing concern regarding intracircuit percolation); Schwartz, *supra* note 4, at 1878 (citing circuit court reconsideration as "a useful alternative to recourse to the Supreme Court's certiorari jurisdiction"). Perhaps supporting this reasoning is a general unease about insisting on conformance with a judicial decision that later might be repudiated by the issuing court. However, "reliance on court decisions that may one day be overturned is inherent in a legal system designed to protect rights in a timely manner." Diller & Morawetz, *supra* note 4, at 829. Indeed, the United States Supreme Court — whose decisions are viewed as binding even by proponents of intracircuit nonacquiescence, *see supra* note 276 and accompanying text — has overruled itself no fewer than 172 times. *See* COLUM. Note, *supra* note 4, at 593.

469. Estreicher & Revesz II, *supra* note 4, at 835 n.22 (arguing that prohibition of intracircuit nonacquiescence "prevents a circuit that has already passed on a question from benefitting from the views of circuits that rule subsequently, including criticism by such circuits").

identified this interest, Professors Estreicher and Revesz argue that a flat rule mandating intracircuit acquiescence inhibits too much the opportunities for agencies to secure circuit court reconsideration of past decisions concerning agency rules.[470]

Concerns about restraints that intracircuit nonacquiescence places on *intra*circuit percolation, however, do not apply at all to the conduct of those many agencies (such as the NLRB) that decide disputes between private parties.[471] This is so because in those cases, the private party that loses because the agency acquiesces in circuit-court precedent can appeal freely to the circuit court and ask it to reconsider its earlier decision.[472] Other agencies (such as the SSA) cannot count on private parties to seek circuit court reconsideration of decisions that the agency has applied but seeks to have overturned.[473] Even for those agencies, however, ensuring opportunities to ask for circuit court reconsideration of past decisions is an interest of "insufficient importance"[474] to justify a practice impinging so profoundly on the separation of powers.

This is especially true because courts of appeals are seldom moved — by intercircuit conflicts or otherwise — to overturn their past decisions.[475] This disinclination reflects more than the natural human reluctance to admit bad mistakes (a reluctance that is heightened when the mistake is said to lie in a written multi-judge opinion issued solemnly after much reflection, deliberation, and hard work). It results also from the settled procedural rule that circuit courts will overturn past decisions only through the cumbersome and seldom-used vehicle of en banc review.[476] In addition, facilitating circuit court

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470. *See* Estreicher & Revesz I, *supra* note 4, at 727.

471. *See supra* note 19.

472. Moreover, the agency can encourage such a private party to take such an appeal and then support the appellate's position in the circuit court.

473. *See* BROOKLYN Note, *supra* note 4, at 97 (noting that SSA itself may not seek judicial review from adverse internal decisions by agency ALJs or the Social Security Review Council).

474. Craig v. Boren, 429 U.S. 190, 198 (1976).

475. Diller & Morawetz, *supra* note 4, at 812 n.44 ("courts are . . . hesitant to abandon their precedents"); Kubitschek, *supra* note 4, at 424-25 & n.152 (finding interest in intracircuit reconsideration "more theoretical than real" and "worth little" because SSA "experience shows that the courts, when faced with issues previously decided, have generally adhered to their former decisions").

476. Diller & Morawetz, *supra* note 4, at 805-7 nn.17, 21 & 26 (collecting authorities setting forth requirement of panel adherence to past panel rulings while "limit[ing] reconsideration of precedent to the en banc process"); *id.* at 806 & n.22 (detailing that "resolution of inconsistencies across circuits is not a

reconsiderations is an interest of limited significance because agencies — especially when conflicts arise — can readily secure "reconsideration" of troublesome precedent through the alternative route of bringing the issue before the Supreme Court.[477]

Professors Estreicher and Revesz reply to this point by urging that it is preferable to have "conflicting positions . . . harmonized without the need for review by the Supreme Court."[478] To be sure, Supreme Court review has its costs. The system of intracircuit error correction envisioned by Professors Estreicher and Revesz, however, also would entail a substantial commitment of resources.[479] For example, the circuit court en banc proceeding they prefer could tie up the time and attention

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central purpose of the en banc procedure" and that "99.5 percent of all court of appeals decisions have been rendered without the en banc process"); White, *supra* note 4, at 672-73, 675 n.232 ("[I]n terms of describing the reality of circuit courts' treatment of precedent, Diller and Morawetz, not Estreicher and Revesz, are correct. Intracircuit stare decisis is the traditionally followed rule, and en banc reversal of precedent is not occurring routinely."); COLUM. Note, *supra* note 4, at 593 (citing unlikelihood of en banc review). *See generally* 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 235.02 n.3 (2d ed. 1990) (en banc hearings "are comparatively rare"). While generally questioning the perception of circuit-court reluctance to overturn past rulings, *see* Estreicher & Revesz II, *supra* note 4, at 838, even Professors Estreicher and Revesz acknowledge that a circuit court might well decline to reconsider its precedent "where there has been ample multi-circuit consideration of an issue and Supreme Court review is imminent." Estreicher & Revesz II, *supra* note 4, at 837 n.34; *see also* Schwartz, *supra* note 4, at 1868 n.200 ("[a]vailability of certiorari review in the Supreme Court as a mechanism for resolution of intercircuit conflicts may cause some courts of appeals to refuse to reconsider their precedents when faced with a conflict"). Notably, this description will fit many, if not most, situations in which an intercircuit conflict has arisen. On the other hand, if *no* conflict exists, a circuit court is also unlikely to reconsider its precedent because the situation will provide little basis for concluding that its original ruling was misbegotten.

477. *See, e.g.*, Schwartz, *supra* note 4, at 1869 n.205 ("It is virtually inconceivable that the Court would decline to resolve a well-entrenched intercircuit conflict, when asked to do so by the Solicitor General, if the issue affects the ongoing administration of a significant government program.").

478. Estreicher & Revesz I, *supra* note 4, at 743.

479. Moreover, the costs of facilitating reconsideration through intracircuit nonacquiescence range well beyond financial ones. *See generally supra* notes 335-57 and accompanying text (discussing practical consequences of intracircuit nonacquiescence). Thus, the "conflicting positions" that supposedly would warrant circuit court reconsideration may never arise (or even if they do, the circuit court may still choose not to reconsider its precedent). In addition, even if a conflict arises, the "Supreme Court may sustain the court of appeals that ruled against the agency." Diller & Morawetz, *supra* note 4, at 811. In all of these instances, intracircuit nonacquiescence will not serve its purpose of generating intracircuit error correction; rather, its effect will be simply to produce large numbers of agency proceedings in which a supervisory circuit's settled rule was not applied.

of more than a dozen judges.[480] Moreover, if en banc reconsideration fails to dislodge the circuit court's prior statement of law, the agency must *also* secure Supreme Court review, thus generating all the additional costs that intracircuit percolation is theoretically designed to avoid.[481] In light of these practical considerations, any interest in broadly facilitating intracircuit reconsideration of past decisions adverse to an agency seems "dubious"[482] at best.

Even if facilitating intracircuit reevaluation of precedent were a governmental interest of the highest order, however, it would not justify intracircuit nonacquiescence. This is so because many opportunities exist for agencies to secure circuit court reconsideration of controversial circuit court rulings without resort to intracircuit nonacquiescence. For example, agencies may file declaratory judgment actions requesting the overturning of unfavorable circuit court rulings.[483] In addition, an agency may seek reconsideration of a disfavored circuit court precedent whenever occasions arise for testing the scope and limits of that precedent.[484] Finally, even if the declaratory-

480. *See* Judges of the Federal Courts, 923 F.2d vii, vii-xxxii (noting number of judges in various circuit courts). To be sure, courts of appeals in some cases may overrule precedents without full-scale en banc review. *See* Estreicher & Revesz II, *supra* note 4, at 838. Even such a "streamlined" procedure, however, necessitates at least a limited participation by "all active members of the court." *Id.* In any event, the use of such a procedural shortcut is very much the exception to the general rule. *See* Bennett & Pembroke, *"Mini" In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531, 557 (1986).

481. *See* Schwartz, *supra* note 4, at 1868-69 ("Of course, if the conflict is not resolved, a definitive Supreme Court resolution will likely be forthcoming.").

482. Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

483. *Oversight Hearings*, *supra* note 4, at 131 (statement of Professor Brilmayer) (suggesting declaratory judgment route is available and far less "harsh" than intracircuit nonacquiescence); Kubitschek, *supra* note 4, at 426-27 (suggesting that SSA can sue under 28 U.S.C. § 1345 (1988), as well as 28 U.S.C. § 2201 (1988), and faulting agency because it has not attempted to use these routes). To be sure, experts have debated whether the declaratory judgment route is open. *See* Estreicher & Revesz I, *supra* note 4, at 745-46. It seems inappropriate, however, to permit agencies to rely on an intracircuit-percolation rationale until they have failed in actual efforts to prosecute such actions. Moreover, even if the declaratory-judgment option is foreclosed, that fact does not so much constitutionalize intracircuit nonacquiescence as suggest the need for a limited congressional response extending the right to seek declaratory relief to this distinctive situation.

484. *See* Stieberger v. Heckler, 615 F. Supp. 1315, 1360 & n.32 (S.D.N.Y. 1985), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); *Oversight Hearings*, *supra* note 4, at 131 (statement of Professor Brilmayer) ("original precedent can be criticized in the context of an attempt to distinguish or

judgment and scope-testing-case routes prove inadequate, an interest in intracircuit percolation cannot justify the practice of intracircuit nonacquiescence in *all* agency proceedings. This is so because a "less restrictive alternative" is readily available to facilitate timely circuit court reconsideration of precedents the agency opposes. Under this alternative approach, an agency would apply its own rule only to a targeted "test-case" claimant, who then could appeal and thus put in issue the disfavored circuit court ruling.[485] Such selective intracircuit nonacquies-

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limit its holding" or in "future litigation designed to extend the precedent's scope;" predicting that agencies will be "amply creative" in finding ways to secure reconsiderations); Diller & Morawetz, *supra* note 4, at 812 n.42; Kubitschek, *supra* note 4, at 427 & n.159 (citing authorities noting availability of circuit-court reconsideration in context of litigating scope of rule); *see also* Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 HOUS. L. REV. 1101, 1104 (1974) (noting that "even in the same circuit, the United States may be willing to relitigate an issue if minor factual distinctions can be made between the pending matter and the preceding decision"). Notably, in making the case *for* intracircuit nonacquiescence, then-Solicitor General Lee stated that "it is often difficult to ascertain the precise scope of a particular appellate decision until subsequent cases arise on somewhat different facts and a court is asked to distinguish prior precedent." Lee Letter, *supra* note 8, *reprinted in* 130 CONG. REC. at 25,977. Of course, it is precisely when such "subsequent cases arise" that the government may seek circuit court reconsideration of the earlier ruling.

485. *See, e.g.*, Schwartz, *supra* note 4, at 1820 (concluding that intracircuit nonacquiescence is unlawful except when "selectively employed in a small number of test cases"); *see also* COMMITTEE REPORT, *supra* note 4, at 60 (recommending that Congress prohibit intracircuit nonacquiescence by the SSA with a narrow exception for "any case that the Solicitor General has determined is appropriate to use as a test case of existing law"). *But see* Estreicher & Revesz I, *supra* note 4, at 746. Professors Estreicher & Revesz criticize this test-case approach, reasoning in part that the agency will have to instigate "a relatively large number" of test cases, because "the 'test' parties against whom the agency issues complaints may not be inclined to pursue their remedies to the level of a court of appeals." *Id.* at 746-47. This view exaggerates the agency's difficulties. The agency can greatly increase the chances that adversely affected parties will pursue judicial remedies simply by (1) choosing test cases involving important consequences, and (2) specifically informing the adversely affected parties of the favorable circuit court law the agency wishes to test. At the very least, agency nonacquiescence in a "large number" of cases should be impermissible until these avenues have been tried without success.

On a more general level, some have noted that test-case actions (as well as declaratory actions) entail a distasteful and inequitable singling out of particular claimants for harsher treatment than is received by all other claimants. As with getting old, however, the alternative is worse. After all, full-scale intracircuit nonacquiescence subjects everybody, including the potential test-case claimant, to application of unfavorable agency rules that are incompatible with supervisory circuit court law. *Cf. supra* notes 440-46 and accompanying text (refuting defense of intracircuit nonacquiescence on grounds of fairness).

As to appropriate procedures that might be used in connection with such "test-case" nonacquiescence, see Schwartz, *supra* note 4, at 1870-72.

cence would adequately protect any governmental interest in intracircuit relitigation while avoiding the serious separation-of-powers problems posed by routine flouting of local circuit court pronouncements.[486]

C. VINDICATING AGENCY EXPERTISE

In *Chevron USA, Inc. v. National Resources Defense Council, Inc.*,[487] the Supreme Court held that courts must accept an agency's interpretation of a governing statute so long as it is "reasonable"[488] and not "manifestly contrary to the statute."[489] This principle of deference emanates from the recognition that Congress created agencies to serve as "experts" in their field of operation.[490] It also gives rise to the argument that an impor-

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486. This discussion is designed to show only that the test-case option undermines the intracircuit-percolation justification for intracircuit nonacquiescence. It is not designed to advocate a test-case exception to the intracircuit-nonacquiescence prohibition. Indeed, for at least the following reasons, no test-case exception should be recognized: (1) the intracircuit-percolation justification for the exception is not weighty, (2) alternative avenues exist for securing intracircuit reconsideration of questioned precedents even if intracircuit acquiescence is required without exception, (3) a test-case exception involves a singling out of claimants that should be avoided, (4) courts should be hesitant to embrace *any* exception to the ban on intracircuit nonacquiescence, and (5) any such exception would be difficult in practice to apply and police. On the last point, compare Schwartz, *supra* note 4, at 1872 (suggesting that "test case" nonacquiescence is permissible when circuit court "may reasonably be thought to be receptive to reconsideration of its precedent"). At the least, any such exception to the otherwise complete ban on intracircuit nonacquiescence, *see infra* note 524, should be judicially tolerated only if either endorsed by Congress, *see supra* notes 208-11 and accompanying text, or established by a solid evidentiary record as the only available means of securing intracircuit reconsideration of an important precedent.

487. 467 U.S. 837 (1984).

488. *Id.* at 843 n.11, 865.

489. *Id.* at 842-44. *See generally* Starr, Sunstein, Willard & Morrison, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353 (1987) (panel discussion of *Chevron*). For more recent decisions applying the *Chevron* principle, see NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1549 (1990); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987); *see also* Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 417-19 (1982) (deferring to the NLRB, because agency's rule was "consistent with its mandate and promotes the underlying congressional purpose" of the National Labor Relations Act); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 496-500 (1978) (upholding NLRB rule because "nothing in the legislative history . . . indicates a congressional policy inconsistent with Board's general approach").

490. *Chevron*, 467 U.S. at 865; *accord, e.g.*, Pension Benefits Guaranty Corp. v. LTV Corp., 110 S. Ct. 2668, 2679 (1990) ("practical agency expertise is one of the principal justifications behind *Chevron* deference"); *see also, e.g.*, Estreicher & Revesz I, *supra* note 4, at 708 (explaining that the NLRB justifies

tant interest justifying intracircuit nonacquiescence is the propriety of vindicating agency expertise.[491]

The flaw in this argument is that it "allow[s] the agencies to double dip on their *Chevron* rights to deference."[492] This is so because, whenever a circuit court invalidates an agency rule on nonconstitutional grounds, it must do so only after applying the substantial degree of deference mandated by *Chevron*. It follows that when an agency invokes its expertise to nonacquiesce in an earlier decision invalidating an agency rule, it is seeking a second bite at the *Chevron* apple. No Supreme Court decision even remotely suggests that a federal agency deserves *that much* deference. Indeed, the "district court analogy" — decried as inapplicable by Professors Estreicher and Revesz in light of judicially established principle of deference — assumes an added force because of that very principle.[493] After all, it surely is *least* defensible for a subordinate decision maker to persist in applying a rule when that rule has been found by a reviewing authority not only to be wrong, but "beyond the zone of reasonableness."[494] In any event, there is no overriding interest in doubly protecting "agency expertise" in this manner.[495] Any legitimate interest in vindicating agency expertise is amply protected by the broad deference courts must give agencies in reviewing the legality of their rules ab initio.

VII. THE SEARCH FOR LIMITS

All that precedes shows that intracircuit nonacquiescence violates the Constitution's separation of powers. That declaration does not end discussion, however, because inventive law-

its nonacquiescence policy on the ground that "it is the primary policymaker under the statute and the Supreme Court has often sided with it").

491. *See* Estreicher & Revesz I, *supra* note 4, at 723-25; Estreicher & Revesz II, *supra* note 4, at 841; White, *supra* note 4, at 665-67; *cf.* Schwartz, *supra* note 4, at 1825 n.27 (noting that defenders of intracircuit nonacquiescence assert that any limit on the practice interferes with authority delegated to the executive branch by Congress or assigned under the Constitution).

492. Diller & Morawetz, *supra* note 4, at 821.

493. For a discussion of the "district court analogy," see *supra* notes 299-307 and accompanying text.

494. Strauss, *One Hundred-Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121-22 (1987).

495. Indeed, in seeking to respond to this "double dipper" challenge to use of an expertise-based rationale, Professors Estreicher and Revesz simply fall back on the uniformity and percolation justifications, *see* Estreicher & Revesz II, *supra* note 4, at 842, already considered and rejected above, *see supra* Part VI. A.-B.

yers will seek to confine the constitutional restriction by urging that it admits of exceptions. Indeed, agency advocates have already proposed four important limitations on any general prohibition of intracircuit nonacquiescence. They maintain that each of the following policies should pass constitutional muster: (1) a policy of agency bifurcation, under which intracircuit nonacquiescence is pursued at the initial, but not the final, levels of agency decision making;[496] (2) a rule permitting intracircuit nonacquiescence with respect to "questionable" circuit court precedents;[497] (3) a policy of nonacquiescing in a circuit court precedent so long as the agency is seeking to "correct" the circuit court's perceived error;[498] and (4) the practice of nonacquiescing in a circuit court decision until the opportunity for Supreme Court review of that decision has expired.[499]

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496. *See infra* notes 502-11 and accompanying text.

497. *See infra* notes 512-24 and accompanying text.

498. *See infra* notes 525-39 and accompanying text.

499. *See infra* notes 540-49 and accompanying text. In addition, agencies have asserted that they may nonacquiesce when litigating cases in court, regardless of their duty to follow circuit court law in conducting their own internal proceedings. *See supra* note 34. For example, the NLRB may seldom engage in intracircuit nonacquiescence in issuing enforcement orders due to uncertainties about which circuit court will review the order upon its issuance. Once enforcement of an agency order is challenged, however, the agency necessarily knows the identity of the reviewing court. This fact notwithstanding, NLRB lawyers refuse to acknowledge the controlling effect of a reviewing circuit court's precedents. Instead, they routinely file briefs in which they "respectfully disagree" with such otherwise dispositive authorities. *See, e.g.*, Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 966-67 (3d Cir. 1979); White, *supra* note 4, at 642-43; *cf.* COLUM. Note, *supra* note 4, at 583 (suggesting difference between "nonacquiescence" in primary agency conduct and in "litigation in a court").

The courts have for good reason found this practice impermissible. *See, e.g.*, NLRB v. Ashkenazy Property Management. Corp., 817 F.2d 74 (9th Cir. 1987); Yellow Taxi Co. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983). The rationales supporting the unconstitutionality of intracircuit nonacquiescence in ordinary agency decision making carry over — at least as a general matter — to agency decision making in the litigation context as well. For example, because advocacy of legal positions is an aspect of executing the laws, *see* Morrison v. Olson, 487 U.S. 654, 691 (1988), the constitutional text requires that it be done "faithful[ly]" and with "care." *See supra* notes 230-38 and accompanying text; *see also* text accompanying notes 309-13 (highlighting propriety of like treatment of governmental and private actors); notes 335-40 (emphasizing importance of safeguarding perception of courts as sound law-pronouncing institutions); notes 348-57 (expressing concern about avoidable costs placed on judiciary by intracircuit nonacquiescence); notes 358-62 (noting institutional features of courts supporting acceptance of existing court rulings); notes 393-98 (noting absence of risk of aggrandizement of judicial power in requiring adherence to existing circuit court decisions). Nor does *Mendoza* support a wide-open power to constantly and routinely attack circuit court precedent in the context of liti-

To be sure, the constitutional considerations marshalled above do not condemn these peripheral forms of intracircuit nonacquiescence as plainly as they do full-scale flouting of all circuit court pronouncements. At the same time, the long history of flagrant agency overreaching should not dull the alertness of courts to more selective and less visible forms of intracircuit nonacquiescence.[500] Indeed, precisely because the reasons for banning that practice run so wide and deep, proposed exceptions to the constitutional prohibition should meet with a strong presumption of invalidity. Separate analysis of each of the four limiting proposals confirms that no exception to a flat ban on intracircuit nonacquiescence is warranted.[501]

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gating in that circuit. *See* Schwartz, *supra* note 4, at 1880 (noting that "policy concerns expressed in *Mendoza* . . . have diminished force in the setting of intracircuit relitigation"); *Oversight Hearings*, *supra* note 4, at 131 (statement of Professor Brilmayer) ("*Mendoza* merely rejected the extreme position that the government should never be able to relitigate; there is no reason to read it as espousing the opposite extreme position that the government should *always* be able to relitigate" (emphasis added)). Indeed, the routine dismissal of circuit court precedent in the advocacy of agency cases seems particularly indefensible given the special status of agency representatives in this context as "officers of the court." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1980). Agency lawyers, like other lawyers, may be permitted to make "a good faith argument for the extension, modification or reversal of existing law." FED. R. CIV. P. 11; *see* Wyandotte Sav. Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982) (finding that agency had "reasonable basis" for challenging prior controlling Sixth Circuit decision); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1980). A policy of invariably challenging circuit court decisions in the decision-issuing circuit, however, places the agency well outside this protected zone. *See, e.g.*, Jones v. Heckler, 583 F. Supp. 1250, 1256 & n.7 (N.D. Ill. 1984). *See generally* COLUM. Note, *supra* note 4, at 596 (citing authorities in noting that Rule 11 applies to government lawyers).

500. *See* Stieberger v. Sullivan, 738 F. Supp. 716, 759 (S.D.N.Y. 1990) (considering present SSA policy and concluding that it "leaves a great deal of room for non-acquiescence").

501. A separate question is whether Congress would have the power to enact these exceptions after the judiciary had already rejected them. Because these forms of intracircuit nonacquiescence rest on the edge, rather than at the center, of the constitutional prohibition, the case for some such congressional power seems strong as to proposed exceptions two and four, *see supra* text accompanying notes 497, 499, and perhaps exception one, *see supra* text accompanying note 496. *See generally* Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 26-30 (1975) (discussing role of Congress in rejecting or modifying judicial decisions in proposed federal common law of civil liberties). As developed below, however, the proposed "correction-of-precedent" exception — that is, exception three, *see supra* text accompanying note 498 — is so likely to swallow the nonacquiescence rule, that no congressional power to establish that exception should be recognized unless Congress is found to have the power to authorize intracircuit nonacquiescence in general. *See generally supra* notes 172-211 and accompanying text (exploring possible constitutional arguments for sustaining

A. AGENCY BIFURCATION

Following its failed defense in the lower courts of its generalized policy of intracircuit nonacquiescence,[502] the SSA took a new approach in 1985. In effect, the agency agreed to acquiesce in circuit court law at the third and fourth stages of agency review of a claimant's case, but continued to nonacquiesce at the first and second stages.[503] This bifurcated approach, however, failed to cure the basic constitutional difficulty with intracircuit nonacquiescence. After all, defiance of controlling judicial rules is no less defiance because it is carried out by the foot soldiers of the agency, rather than its majors and colonels. This conclusion becomes all the more clear, moreover, when it is recalled that all these subordinates act on the orders of agency generals.[504]

In adopting a bifurcated approach, the SSA sought to pursue a "less restrictive alternative" to agency-wide intracircuit nonacquiescence. In particular, the agency recognized that third-level and fourth-level decisionmakers — the agency's regional administrative law judges (ALJs) and national Appeals Council — generally are well educated, are comparatively few in number, and have a working familiarity with judicial precedent. Thus, the agency concluded that forced acquiescence in circuit court precedent by these decisionmakers would not sub-

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congressional authorization of intracircuit nonacquiescence). Because the intriguing question whether such a power exists is entirely hypothetical, nothing will be added here to the brief comments on the issue offered elsewhere in the Article. *See id.*

502. *See supra* note 7.

503. *See generally* Estreicher & Revesz I, *supra* note 4, at 695-99 (describing revised SSA policy); TOURO Note, *supra* note 4, at 215-17 (detailing bifurcated approach); IND. Note, *supra* note 4, at 1107-09 (discussing bifurcated SSA approach). Notably, the SSA later revised its nonacquiescence policy again, leaving some question as to whether its bifurcated policy was ever implemented to a significant degree. *See* 20 C.F.R. § 404.984 (1990). Even so, the SSA's policy of bifurcation illustrates how one agency sought to structure a compromise position on intracircuit nonacquiescence in order to satisfy constitutional challenges, and how other agencies may structure program operations in the future. For a discussion of the SSA policy put in place following withdrawal of its bifurcated approach, see Schwartz, *supra* note 4, at 1866-68.

504. *See* IND. Note, *supra* note 4, at 1114 ("[t]he fact that the SSA is likely to remedy the use of an incorrect standard at a higher appellate level does not excuse the initial abuse of power"). Notably, in the NLRB context, "[t]he courts have been critical of nonacquiescence, whether it occurs when the General Counsel issues a complaint at odds with circuit law, or when an ALJ refuses to follow circuit law in issuing a recommended decision and order, or when the Board itself rejects circuit law in its own decisions." White, *supra* note 4, at 660 n.137 (citations omitted).

ject the agency to undue disruption or expense. In contrast, the agency reasoned that forced acquiescence by frontline decisionmakers would necessitate major modifications to national agency manuals and substantial training, monitoring and updating of thousands of agency workers.[505] The SSA concluded that such retooling was unacceptable.[506]

The problem with the agency's approach is that even a less restrictive means of obtaining a governmental goal cannot stand if the goal is not a permissible one. Because a cost-savings goal cannot justify nonacquiescence in general, it should not justify a policy of "low-level" agency nonacquiescence designed to avert inconvenience and disruption.[507] Additionally, the bifurcated approach only perpetuates problems of discrimination between claimants who do and claimants who do not exercise appeal rights.[508] Finally, the SSA's change of policy had only the most limited "practical consequences,"[509] because the large majority of claimants denied benefits by frontline decisionmakers do not pursue agency appeals to the ALJ level.[510] For all these reasons, the only court to consider

505. *See* Estreicher & Revesz I, *supra* note 4, at 748 (explaining why acquiescence at low agency levels is "far more cumbersome" than at high levels; noting in particular that enforcement staff often is made up of "nonlawyers . . . responsible for large caseloads"); Maranville, *supra* note 4, at 493 & n.68 (noting that many SSA personnel performing "formal adjudication, informal investigation, enforcement activities, and claims processing . . . have no formal legal training").

506. Estreicher & Revesz I, *supra* note 4, at 690 (noting that added costs result from non-bifurcated system); *see* Maranville, *supra* note 4, at 493 ("process of transmitting instructions may be complex, costly, [and] time consuming"). *But cf.* Maranville, *supra* note 4, at 508 n.121 (downplaying difficulties of instructing decision makers who "are accustomed to receiving detailed instructions"). The agency also argued that its bifurcated procedure was necessary to facilitate identification of proper "test cases" by ensuring that the Appeals Council was able to review actual cases — those involving the denial of benefits by frontline decisionmakers — that brought into play rules disfavored by the circuit court. *See* IND. Note, *supra* note 4, at 1110-11. This justification improperly assumes that there is a proper "test case" exception to the duty to acquiesce. *See supra* note 486. In any event, the SSA should be able to protect any interest it has in identifying test cases through closer monitoring of cases at the state-agency level. *See* IND. Note, *supra* note 4, at 1116.

507. *See supra* note 453 and accompanying text.

508. *See supra* notes 39-41 and accompanying text.

509. *See supra* note 266 and accompanying text.

510. *See* Stieberger, 615 F. Supp. at 1371 (only approximately one-third of claimants denied funds at first and second stages of SSA process get to third stage, where intracircuit acquiescence is required), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Maranville, *supra* note 4, at 503 n.103, 519-20, 531 n.200 (ALJ hearings amount to only "a small percentage of the agency's work" so that "[a]ccurate agency decisionmaking at the initial

squarely the SSA's bifurcated approach properly found it unconstitutional.[511]

B. DERELICT PRECEDENT

Judicial rulings may lose vitality. Some are explicitly overruled, while others become so battered and bruised that they forfeit all precedential force.[512] It follows that agency refusals to honor some past decisions may be appropriate and indeed unavoidable.[513] The practical task is to identify those circuit court precedents that have become so derelict that agencies may properly refuse to follow them.

In identifying such "nonacquiescable" decisions, some considerations should count for nothing. Most important, the fact that other circuits have parted ways with the decision at issue should be without consequence.[514] After all, the ban on intracircuit nonacquiescence stems from the rightness of vindicating the authority of the *supervisory* court of appeals, and the law of *that* circuit is in no way altered by developments in

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stage of processing claims . . . is much more significant in the overall system than accurate decisionmaking at adjudicatory hearings"; consequently bifurcated system had "extremely limited" effect).

511. *See Stieberger*, 615 F. Supp. at 1367-74.

512. *Cf.* South Carolina v. Baker, 485 U.S. 505, 517-527 (1988); Limbach v. Hooven & Allison Co., 466 U.S. 353, 357-61 (1984) (although not explicitly overruled at the time, Court's decision "retain[ed] no vitality" when the decision upon which it had been based was overruled).

513. *See, e.g.*, Diller & Morawetz, *supra* note 4, at 806-07 & n.24; Estreicher & Revesz I, *supra* note 4, at 725 n.239 (advocating legitimacy of intracircuit nonacquiescence in "desuetude" or "substantially eroded" precedents); Schwartz, *supra* note 4, at 1859-60; Colum. Note, *supra* note 4, at 584. Obviously, intracircuit nonacquiescence in one decision is "unavoidable" if two circuit court decisions are flatly inconsistent.

514. *Accord, e.g.*, Diller & Morawetz, *supra* note 4, at 807 & n.25. *But see* Stieberger v. Sullivan, 738 F. Supp. 716, 730 (S.D.N.Y. 1990) (indicating that when a conflict arises, an agency is expected to acquiesce, except in certain limited circumstances); Kuhl, *supra* note 4, at 913 (urging that intracircuit nonacquiescence is "necessary" and "certainly . . . justified" when intercircuit disagreement with a relevant decision arises); *see also* COLUM. Note, *supra* note 4, at 605-06 (setting forth vague standards permitting a "very limited justification for acting contrary to applicable circuit law when other circuits have failed to follow the initial precedent-creating decision"). Notably, current regulations permit the SSA to engage in intracircuit nonacquiescence with respect to a circuit court decision so long as "[s]ubsequent circuit court precedent in other circuits supports [the SSA's] interpretation of the Social Security Act or regulations on the issues in question." 20 C.F.R. § 404.985(c)(1)(iii) (1990); *see also id.* § 404.985(a).

other circuits.[515] In addition, whenever intercircuit conflicts surface, the agency will be most able to solve problems of nonuniformity through the medium of Supreme Court review.[516] Finally, insistence on agency adherence to circuit court precedent in this setting follows the principle of law that governs federal district court judges.[517] Because those judges lack authority to ignore the law of their circuit simply because another circuit opts for a different legal rule, so too should federal agency decisionmakers.[518]

In a similar vein, in only the rarest case should later developments within a circuit or in the Supreme Court warrant agency disregard of a circuit court decision. Reasons of both policy and authority support this conclusion. From the standpoint of policy, agency lawyers will often be able to construct arguments that disfavored circuit court precedents have been eroded by later developments.[519] Thus, practical protection of the basic principle prohibiting intracircuit nonacquiescence favors a strict rule that preempts agency use of such self-serving rationalizations.[520] From the standpoint of authority,

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515. *See supra* notes 294-98 and accompanying text (discussing "law of the circuit" doctrine).

516. *See supra* note 418 and accompanying text.

517. *See generally supra* notes 299-307 and accompanying text (discussing so-called "district court analogy").

518. *See* Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985) (agency is "bound by the precedents in this circuit until they are displaced by higher authority or are overruled by this court"); Beverly Enters. v. NLRB, 727 F.2d 591, 593 (6th Cir. 1984).

519. *See, e.g.*, Stieberger v. Heckler, 615 F. Supp. 1315, 1344 (S.D.N.Y. 1985) (noting SSA's argument that it may nonacquiescence in Second Circuit's treating physician rule because "the Second Circuit's standards are less than consistent"), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986).

520. *See, e.g.*, GEO. WASH. Note, *supra* note 4, at 159 (attacking "when the law is firmly established" test as providing "no real guidance"). Even in the *Stieberger* case, for example, the district court left open the possibility of intracircuit nonacquiescence whenever "subsequent consideration of the disputed issue in other forums has created conditions which are likely to lead . . . to reconsideration." *Stieberger*, 615 F. Supp. at 1365-66. A standard of this type plainly leaves the Secretary with a wide opportunity to rationalize the permissibility of intracircuit nonacquiescence in many circuit court decisions. Beyond this, whenever later decisions of the same circuit or of the Supreme Court cast doubt on an earlier ruling, the agency has alternative means to cure its problems. After all, the agency will be in the best position to secure circuit court reconsideration if a genuine tension exists among that circuit's precedents, and the agency will find a sympathetic audience for any certiorari petition if a true conflict exists between a circuit court decision and a later Supreme Court ruling. *See* SUP. CT. R. 17.1. Finally, any proposed exception to the no-nonacquiescence rule based on subsequent Supreme Court, in-circuit, or out-of-circuit decisions entails a request that agencies be able to *discontinue*

subordinate courts must generally honor a superior court's rulings until they are overturned.[521] It follows that reference to the "district court analogy"[522] supports only the narrowest departure from the general duty of intracircuit acquiescence based on post-decision developments within the same circuit or in the Supreme Court.

A proper assessment of these considerations supports rejection of any free-standing "questionable decision" exception to the general prohibition against intracircuit nonacquiescence.[523] Instead, agency non-adherence to a past circuit court decision should be permitted only if it has become so patently derelict that it no longer qualifies as a surviving "precedent" at all.[524]

C. CORRECTION OF PRECEDENT

The basic purpose of the elaborate work of Professors Estreicher and Revesz is to advocate a major exception to the general prohibition on intracircuit nonacquiescence. They urge that an agency may engage in such nonacquiescence whenever:

> (1) the agency has responsibility for securing a nationally uniform policy with respect to the question that was the subject of the adverse judicial decision; (2) there is a justifiable basis for belief that the agency's position falls within the scope of its delegated discretion; and

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acquiescence in circuit court precedent. *Continuing* to acquiesce in a circuit court decision that it already is honoring, however, is far less onerous for an agency than *initiating* acquiescence on the heels of a new decision. *See supra* notes 449, 505-06 and accompanying text.

521. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 109 S. Ct. 1917, 1921-22 (1989) (noting that lower courts must follow a precedent of the Court even if it "appears to rest on reasons rejected in some other line of decisions . . . leaving to this Court the prerogative of overruling its own decisions").

522. *See supra* notes 299-307 and accompanying text.

523. For an analysis proposing a somewhat similar result, see Schwartz, *supra* note 4, at 1860. Professor Schwartz, however, sees "little need to define nonacquiescence to include dubious efforts to distinguish precedent." *Id.* at 1861 n.174. This view is too lenient in light of both the reasons set forth above and the need for definitional integrity set forth below. *See infra* note 524.

524. Some may contend that this "no exception" approach involves only semantic quibbling and ultimately requires (like the alternatives it seeks to displace) manipulable subjective judgments about whether a circuit court decision does or does not "survive" as a "precedent." The crucible of law is language, however, and the choice of linguistic symbols inevitably has effect in conveying meaning. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 67-68 (1961) (Black, J., dissenting) (advocating "absolutist" view of First Amendment free-speech clause). Given the discussion in Parts III-VI, *supra*, and the obvious existence of opportunities for evasion, *see supra* notes 519-20 and accompanying text, the proper message to convey is that intracircuit nonacquiescence is unacceptable without exception.

> (3) the agency is reasonably seeking the vindication of its position both in the courts of appeals and before the Supreme Court.[525]

The basic premises underlying this approach have been challenged elsewhere in this Article.[526] The central difficulty with this formula, however, lies in its "practical consequences."[527] Indeed, the "exception" proposed by Professors Estreicher and Revesz is so broad that it would all but swallow the no-nonacquiescence rule.[528]

This is the case because none of the three parts of their test imposes any significant restriction on agencies. The first prong is essentially meaningless, because each agency has a mandate for "securing a nationally uniform policy with respect to its own rules and procedures."[529] The second prong — requiring a "justifiable basis" for the agency rule — also imposes no serious restriction; agencies, after all, seldom will adopt policies that courts can reject out of hand even in the face of *Chevron*'s principle of substantial deference to the agency's judgment.[530] The third prong requires that the agency be "reasonably" seeking to vindicate its position "in the courts of appeals." That standard also should routinely be met, because an agency can be expected to defend the very policy the claimant is challenging on appeal as invalid under circuit court precedent.[531]

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525. Estreicher & Revesz I, *supra* note 4, at 753.

526. In particular, Part VI critiques each of the rationales from which this standard is derived.

527. *See supra* note 266 and accompanying text.

528. *See* Kubitschek, *supra* note 4, at 453 (concluding that result of Estreicher and Revesz rule would be to "continue . . . widespread nonacquiescence").

529. *See* Conference Transcript, *supra* note 4, at 48 (remarks of Professor Estreicher) (describing agency-mandate prong of test as "not a terribly demanding requirement").

530. Moreover, Professors Estreicher and Revesz define their "justifiable basis" requirement so broadly and vaguely that it almost certainly imposes no meaningful restriction on agencies. *See* Estreicher & Revesz I, *supra* note 4, at 754-55 (requiring that the agency's position be "so bereft of support in available legal materials that it is unlikely to be accepted by any other court of appeals"); *see also* Conference Transcript, *supra* note 4, at 49 (remarks of Professor Estreicher) (justifiable basis test is not "terribly demanding").

531. Notably, some observers believe that the SSA has consciously declined to appeal adverse district court decisions to the courts of appeals out of fear of establishing adverse circuit court precedent. The agency may be expected, however, to defend its challenged policy at the initial stage of review in the district court and if it succeeds, again to defend its position in the court of appeals when the claimant seeks circuit court review. In addition, the decisions of many agencies are appealable directly to the court of appeals without a stop in the district court. *See, e.g.*, 29 U.S.C. § 160(e)-(f) (1990) (review of orders of

The Estreicher and Revesz "test" thus boils down to the other component of its third requirement: that the agency "reasonably" be seeking "the vindication of its position . . . before the Supreme Court."[532] This putative limitation, however, also leaves open the door for virtually limitless intracircuit nonacquiescence. For example, Professors Estreicher and Revesz acknowledge that "it might be reasonable for the agency not to seek [Supreme Court] review in advance of an intercircuit conflict."[533] In the real world, however, it may take years for an intercircuit conflict to arise. In addition, Professors Estreicher and Revesz emphasize the value of seeking to resolve intercircuit conflicts without Supreme Court intervention.[534] Thus, it would seem "reasonable" for an agency that is "seeking . . . Supreme Court" vindication to continue to nonacquiesce while awaiting the chance to cure any conflict that has emerged through circuit court reconsideration prior to petitioning for Supreme Court review. The key point is evident. Under the Estreicher and Revesz formulation, an agency might nonacquiesce in almost *any* circuit court decision stating almost *any* sub-constitutional rule for *many* years prior to seeking Supreme Court review.[535] Such a result is irreconcilable with any meaningful prohibition on intracircuit nonacquiescence.

Three additional considerations remove all doubt on this score. First, in the real world of constant legislative tinkering, "[m]any statutory issues are . . . shortlived."[536] This fact creates the unsettling result that, under the Estreicher and Revesz

NLRB). In any event, private litigants, as a practical matter, would have difficulty showing that an agency is seeking consciously to avoid vindication of its own rules in the courts of appeals.

532. Estreicher & Revesz I, *supra* note 4, at 753.

533. *Id.* at 756; *see also id.* at 746 (rejecting the position limiting permissible nonacquiescence to situations in which at least one circuit court has upheld the agency's policy). *See generally* Diller & Morawetz, *supra* note 4, at 802 n.6 (model permits nonacquiescence even "in the face of repetitive rulings" because it "only asks whether there is a chance of convincing another circuit of the agency's position, and whether the agency is pursuing a reasonably vigorous litigation strategy"); Schwartz, *supra* note 4, at 1833 (reading Estreicher and Revesz as contending that "[a]n agency would be permitted to maintain its position in the face of adverse circuit precedent as long as there is a reasonable prospect that the agency's position will ultimately be accepted by at least one court of appeals, and as long as the agency is engaged in a reasonable litigation program designed to achieve that end").

534. *See supra* notes 468-70, 478 and accompanying text.

535. *Accord* Diller & Morawetz, *supra* note 4, at 803, 811 (concluding that Estreicher and Revesz proposal authorizes nonacquiescence "for long periods of time" that are "often measured in years").

536. *Id.* at 809.

wait-and-see approach, even rock-solid circuit court interpretations of statutes might *never* be honored as precedents by agencies. Second, Professors Estreicher and Revesz in effect justify intracircuit nonacquiescence on the basis of contingencies that often will not occur. For example, an intercircuit conflict may never arise, and even if one does, "the Supreme Court may sustain the courts of appeals that ruled against the agency."[537] Finally, however tight or loose one intends the "reasonably seeking" requirement to be, it is in the end indeterminate.[538] Considerations of certainty and judicial manageability thus press hard against its adoption.[539]

D. NONACQUIESCENCE PENDING SUPREME COURT REVIEW

Must an agency acquiesce in a circuit court decision while time remains to seek direct Supreme Court review of that decision? And even if the agency generally must acquiesce during the certiorari-petitioning period, must it acquiesce pending disposition of the case after the agency in fact has petitioned for Supreme Court review? Courts might hold that the general prohibition on nonacquiescence should give way in these circumstances.[540] For example, a court may plausibly decide that

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537. *Id.* at 811.

538. *See id.* at 803 & 820 n.76 (criticizing Estreicher and Revesz standard as unduly "tentative and malleable"); Kubitschek, *supra* note 4, at 456 (complaining that Estreicher and Revesz rule is "vague"); Conference Transcript, *supra* note 4, at 63 (remarks of Professor Morawetz) (noting that Estreicher and Revesz proposal is "not based on objective standards such as has the agency sought certiorari, but based on much looser, subjective standards," and that "this proposal sets up a very vague set of standards which is likely to create enormous problems in practice").

539. *See* Stieberger v. Heckler, 615 F. Supp. 1315, 1373 (S.D.N.Y. 1985) (challenging SSA policy embodied in Interim Circular 185 because it "admits of no objectively ascertainable limitation on non-acquiescence"), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Schwartz, *supra* note 4, at 1866 (citing need for highly objectifiable rule to "ensure that intracircuit nonacquiescence is not simply the expression of agency resistance to correction"). *See generally* G. GUNTHER, *supra* note 219, at 1001 (quoting letter from Learned Hand to Zechariah Chafee, Jr.: "Once you admit the matter is one of degree, while you may put it where it genuinely belongs, [you] so obviously make it a matter of administration. [I] should prefer a qualitative formula, hard, conventional, difficult to evade.").

540. *See, e.g.*, COLUM. Note, *supra* note 4, at 606-07 (advocating open-ended approach that generally, but not always, warrants intracircuit nonacquiescence pending Supreme Court action). Indeed the nonacquiescence bill enacted by the House in 1984 permitted nonacquiescence during the time allowed for filing a certiorari petition. H.R. 3755, 98th Cong., 2d Sess. § 302(b) (1984); *see* Estreicher & Revesz I, *supra* note 4, at 703; WASH. Note, *supra* note 4, at 750 (describing House Bill).

agencies must acquiesce only in *final* circuit court decisions, and that decisions still subject to Supreme Court review are not final.[541] Moreover, in the case of the agency that actually petitions for certiorari, that agency can argue that it should be rewarded for moving in the most diligent manner to secure a nationwide clarification of governing law.[542] These arguments have force, but on balance they should be rejected.

The doctrinal reason supporting this conclusion is that a circuit court decision has precedential significance as the law of the circuit from the date of issuance.[543] Given this principle, the conclusion that acquiescence is required following *issuance* of the circuit court opinion seems logical, regardless of the post-issuance possibility of Supreme Court review and reversal.[544] Functional considerations support this result. In particular, authorizing intracircuit nonacquiescence during the time available to file for certiorari makes little sense if the government does not in fact intend to seek the writ. On the other hand, if the agency does intend to file a petition (or at least wishes to consider the possibility of filing), an adequate procedure — short of nonacquiescence — is available to protect its interests: it may apply for a stay pending disposition of its petition, thus removing any duty to adhere to the circuit court ruling.[545] The government, it bears emphasis, is required to secure a stay when seeking interim relief from other consequences of a circuit court judgment.[546] No clear reason suggests why it should not be bound in similar fashion to secure a stay from the obligation

541. *Cf.* Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (judgment becomes "final" for purposes of habeas corpus retroactivity purposes when certiorari denied by Supreme Court).

542. *See supra* note 418 and accompanying text.

543. *See, e.g.*, Jones v. Superintendent, Va. State Farm, 465 F.2d 1091, 1094 (4th Cir. 1972) ("any decision is . . . a precedent"), *cert. denied*, 410 U.S. 944 (1973); *see also* cases cited *supra* note 518 (agencies bound by circuit court precedent).

544. *See* Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985) (precedents binding "until they are displaced by higher authority or are overruled by this court"); Beverly Enters. v. NLRB, 727 F.2d 591, 593 (6th Cir. 1984) (citing "basic doctrine that, *until reversed*, the dictates of a Court of Appeals must be adhered to" (emphasis added)); Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980).

545. *See* 28 U.S.C. § 2101(f) (1988); FED. R. APP. P. 41(b). One might argue that the "stay" order described here is not a stay order at all, because it envisions blocking the effect of a precedent — not of a judgment. Regardless of whether that is technically accurate, courts clearly should have the power to issue such an order pursuant to the All Writs Act, 28 U.S.C. § 1651 (1988).

546. *See* Diller & Morawetz, *supra* note 4, at 824 n.88.

to respect such a decision's precedential force.[547]

Finally, a nonfinality exemption to the rule of required acquiescence could raise troublesome problems of application. For example, what if a court of appeals strikes down an agency rule and then remands the case for district court reconsideration? May the agency persist in applying its invalidated rule on the theory that it might seek certiorari years later following district court action on remand and the predictable return trip to the court of appeals?[548] An elegant rule banning flatly all intracircuit disregard of all circuit court precedents would do more than remove such practical difficulties; it would send the strongest signal of the potency with which the Constitution condemns intracircuit nonacquiescence.[549]

CONCLUSION

The structure of American government rests in the end on "postulates which limit and control."[550] One such postulate holds that the core authority of each branch of our government must be vigilantly protected in order to maintain a workable separation of powers. Another postulate holds that a special task of the judicial branch is to ensure that the other branches conform their actions to the rule of law. This Article shows that a proper elaboration of these two presuppositions condemns intracircuit nonacquiescence to the constitutional dustheap. Many subtleties lurk in the truism that it is "the province and duty of the judicial department to say what the law is."[551] In the end, however, there is no subtlety in applying this principle to intracircuit nonacquiescence; a practice so disruptive of judicial authority and so lacking in persuasive justifications plainly violates the Constitution's separation of powers.

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547. *See* Conference Transcript, *supra* note 4, at 81 (remarks of Judge Sofaer) (questioning Estreicher and Revesz proposal because it removes nonacquiescence issue from "a traditional remedial context such as a stay or something of that kind"); *see also Ithaca College*, 623 F.2d at 228 (suggesting that agency can "stay its proceedings" in other like cases pending Supreme Court disposition of challenged decision).

548. *See, e.g.*, Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (indicating that Supreme Court is unlikely to grant certiorari in interlocutory matters, as when the court of appeals remands to the district court).

549. *See supra* note 524.

550. Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (Hughes, C.J.).

551. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).