To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law

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The Constitutional Case Against
Intracircuit Nonacquiescence

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* Associate Professor of Law, University of Georgia. The author wishes
to thank Carl Lawrence Meyer for valuable cite-checking and research assist-
ance; Adele Lee Shiver for her fine and patient work in typing the Article;
and each of the following colleagues and friends for valuable comments and
suggestions: Thomas A. Eaton, Paul J. Heald, Paul M. Kurtz, Nancy
Morawetz, Mark C. Rahdert, Charles MacBrayer Sasser, Michael L. Wells, and
Rebecca H. White. The author notes that he has served as co-counsel for the
plaintiffs in the Hyatt litigation described in note 8 and cited elsewhere in the
Article.

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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.”\(^4\)

\(^1\) 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”).


\(^3\) See infra note 71.


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. 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. 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.”

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).

hand, have defended the practice.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{10} This clash between executive and judicial


\textsuperscript{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).

\textsuperscript{10} See, e.g., S & H Riggers & Erectors v. Occupational Safety & Health Review Comm’n, 659 F.2d 1278, 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.\textsuperscript{11}

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\item 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 \textit{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.” \textit{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 \textit{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 \textit{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 \textit{Draft Recommendation on Federal Agency Nonacquiescence}, 53 Fed. Reg. 24,531, 24,532-33 (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 698; 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), \textit{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 \textit{de facto} policy of nonacquiescence in the law of the circuit”), \textit{cert. denied}, 110 S. Ct. 59 (1989); COMMITTEE REPORT, supra
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A lively exchange of views in the legal literature has increased the visibility of the intracircuit-nonacquiescence issue. In 1989, Samuel Estreicher and Richard Revesz set forth a substantial defense of intracircuit nonacquiescence. In the wake of that article, two other scholarly pieces — one by Matthew Diller and Nancy Morawetz and the other by Joshua Schwartz — 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. It

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).


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. 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. 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.
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.  

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” and “nonacquiescence in the face of venue choice.” 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. 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. Nonacqui-
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. 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.

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.
This form of nonacquiescence is well illustrated by the administration of the Social Security program. Social Security disability claimants initiate the claim-seeking process by filing a request for benefits in a local Social Security office. 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. Thus, Social Security decision makers can determine readily which circuit court has review authority over any particular claimant’s case. 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. In addition, SSA policy makers generally informed agency decision makers that they should apply SSA rules even if incompatible with local circuit court law. 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.

Questions of definitional nicety lurk in any discussion of in-
tracircuit nonacquiescence. The SSA’s practices, however, il-

34. For example, one definitional question concerns how certain a particu-
lar court’s review authority must be before an agency may be said to be engaging in intracircuit 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 cir-
cuit 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 sug-
ggested 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 “nonacquis-
ence” 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 in-
ternal 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 129. 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 409.

Finally, an agency may “nonacquiesce” in different types of legal rulings. For example, an agency may nonacquiesce in constitutional rulings or in interpre-
tations 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 nonacquies-
cence, 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
intracircuit nonacquiescence illustrate 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. 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 and due process embodied in the fifth amendment. These additional 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.


38. Commentators have argued also that intracircuit nonacquiescence vio-
A. EQUAL PROTECTION

The equality-based challenge to intracircuit nonacquiescence arises because the practice produces unequal treatment of the rich and the poor. 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. This discrimination against the

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 Administrative 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." 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. Second, even if they did, the practice of intracircuit nonacquiescence "was not established for the purpose of discriminating" against the poor. These realities leave little doubt that a straightforward equal protection challenge to intracircuit nonacquiescence will produce only minimal scrutiny and a resulting refusal to invalidate the practice. Critics thus

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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 "[s]mall 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").


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* because it impinges on a "protected right" of meaningful access on the part of indigents to the application of controlling legal principles. Recent Supreme Court decisions, however, have restricted the room to argue for recognition of such a right. 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. In *Ortwein v. Schwab*, however, the Court rejected a claimed right of government-paid access to judicial review of agency-conducted benefits proceedings. 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." *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.


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." This risk arises, the argument goes, because intracircuit nonacquiescence necessarily deprives agency claimants of the benefit of controlling law. Critics of this argument urge that it "entails circular reasoning," because circuit court pronouncements cannot constitute "controlling law" unless separation-of-powers considerations require agency adherence to circuit court precedent. 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. Due process, in contrast, mandates "fundamental fairness" in the government's treatment of individuals. 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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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.
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. 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.

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, including in the agency setting. 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" and "impartial" decisionmaking that lie at the core of the due process guarantee.

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


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").


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.\footnote{543 (1985); Barry v. Barchi, 443 U.S. 55, 66 (1979); Fusari v. Steinberg, 419 U.S. 379, 38 (1975).} 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.\footnote{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).} 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.\footnote{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").} 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
powers principle." No Supreme Court decision instructs courts to employ a history-based analysis, a presumptive rule of invalidity, or a multi-factor test 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, and those cases do not purport to declare any overarching analytical framework. 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

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").


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. Stil,*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 793.
A. Cooper v. Aaron

Some suggest that Cooper v. Aaron\(^8\) 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\(^8\) even if not subject to a specific judicial desegregation decree.\(^{68}\) 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.\(^8\) 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.
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\textsuperscript{93} — may or may not justify intracircuit nonacquiescence.\textsuperscript{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.\textsuperscript{95} His imaginative article devotes eighty-nine pages to urging that intracircuit nonacquiescence in agency adjudication offends the constitutional postulates underlying Crowell v. Benson.\textsuperscript{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.\textsuperscript{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.\textsuperscript{98} The Court in Crowell rejected this attack.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{93} See infra notes 412-95 and accompanying text.

\textsuperscript{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.

\textsuperscript{95} Schwartz, supra note 4.

\textsuperscript{96} 285 U.S. 22 (1932).

\textsuperscript{97} Id. at 36-37. Crowell is described in detail in Schwartz, supra note 4, at 1837-42.

\textsuperscript{98} Crowell, 285 U.S. at 37.

\textsuperscript{99} Id. at 54.

\textsuperscript{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.
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. 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.”

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. He claims that the “seminal case” on this subject is Crowell, which established a “judicial review theory” of agency adjudication, 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.” Professor Schwartz concedes that the availability of direct review of agency action by an article III court “ordinarily” satisfies this constitutional requirement, but claims that the availability of such review alone does not suffice when an agency engages in intracircuit nonacquiescence. 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” inconsistent with the “subordinate position” of adjudicatory agencies envisioned by Crowell. 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. He reaches this conclusion by claiming that later decisions have rejected the public-rights/private-
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. This omission offends both standard practice in constitutional analysis and relevant separation-of-powers precedents. 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.

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., Thomas v. Union Carbide Agricultural Products Co., and Commodity Futures Trading Commission v. Schor. The approach of these cases is, moreover, irreconcila-
ble with the strict "judicial review theory" Professor Schwartz extracts from Crowell. 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. 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. Indeed, Professor Schwartz himself acknowledges that these recent cases opt not for the model of Crowell, but instead for an "elaborate balancing test." The balancing approach underlying

"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.\textsuperscript{124}

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. \textit{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.

\textit{Schor}, 478 U.S. at 851.

\textsuperscript{124} See \textit{supra} notes 106-08 and accompanying text; see, e.g., Strauss, \textit{Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?}, 72 CORNELL L. REV. 488, 509 (1987) ("\textit{Schor} repudiates . . . the analytic structure underpinning \textit{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 \textit{Crowell}. Professor Schwartz notes that "[o]ne route" to the rejection of intracircuit nonacquiescence is to argue that it violates \textit{Crowell}'s portrayal of agency adjudicators' function as providing "assistance" to article III courts. Schwartz, \textit{supra} note 4, at 1845-48 (citing \textit{Crowell v. Benson}, 285 U.S. 22, 51 (1932)). The invocation of this " 'judicial assistant' model," \textit{id.} at 1846, to attack intracircuit nonacquiescence, however, is plainly unavailing. See Estreicher & Revesz II, \textit{supra} note 4, at 842 n.62 (criticizing Professor Schwartz's position); see also Schwartz, \textit{supra} note 4, at 1847 n.124 (collecting authorities critical of model). \textit{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. \textit{Crowell}, 285 U.S. at 51. Professor Bator, even while lauding \textit{Crowell} as "the greatest and deepest of the cases discussing our problem," Bator, \textit{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," \textit{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, \textit{supra} note 123, at 509; indeed, they countenance agency participation in adjudication that is not conceivably describable as assistance to article III courts, see \textit{Thomas}, 473 U.S. at 568 (discussed \textit{supra} note 122 and accompanying text); see also \textit{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, \textit{supra} note 4, at 1849; see also \textit{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. It thus would seem that subjecting administrative adjudication to possible Supreme Court review — together with forced acquiescence in Supreme Court rulings — should satisfy Crowell. 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, but (in my view at least) he never adequately explains why.

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\textsuperscript{129} is greatly exaggerated.\textsuperscript{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.\textsuperscript{131} Given this doctrinal reality, however, a reasonable conclusion is that agency adjudications of public rights cases

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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.  

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"? What does it mean to preserve "complete authority to insure the proper application of the law"? 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. 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. Yet Professor Bator himself was un persuaded that intracircuit nonacquiescence violates the constitutional separation of powers.

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.

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.
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. I-ibi, 414 U.S. 5, 8 (1973) (per curiam)).
collateral estoppel against the United States.\textsuperscript{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 \textit{Mendoza}.\textsuperscript{148}

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

First, \textit{Mendoza} simply was not a case involving a constitutional challenge. Thus no one argued in \textit{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.\textsuperscript{153} It follows that, whatever else the Court decided in \textit{Mendoza}, it did not decide the distinctive separation-of-powers issue presented by intracircuit nonacquiescence.

\begin{itemize}
\item[147.] \textit{Id.} at 162.
\item[148.] Brief for Appellants at 41, Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986) (No. 85-6310), \textit{quoted in} Estreicher & Revesz I, \textit{supra} note 4, at 684 n.21; see Kuhl, \textit{supra} note 4, at 814 (Deputy Assistant Attorney General, Justice Department) (arguing that legislative restrictions on nonacquiescence "would create many of the same problems identified" in \textit{Mendoza}); Schwartz, \textit{supra} note 4, at 1876-77 & nn.231-32 (noting government reliance on \textit{Mendoza} and collecting additional authorities); HARV. Note, \textit{supra} note 4, at 854-55 (noting government reliance on \textit{Mendoza}); TOURO Note, \textit{supra} note 4, at 203-04 (noting SSA's reliance on \textit{Mendoza}); see also White, \textit{supra} note 4, at 669-70 (arguing \textit{Mendoza}'s "reasoning suggests that commanding acquiescence is improper"); CUMB. Comment, \textit{supra} note 4, at 125 (relying on \textit{Mendoza} in defending intracircuit nonacquiescence).
\item[149.] See Estreicher & Revesz I, \textit{supra} note 4, at 684-86; Schwartz, \textit{supra} note 4, at 1875-81; see also \textit{id.} at 1877 n.233 (collecting authority rejecting government's \textit{Mendoza}-based arguments).
\item[150.] See Schwartz, \textit{supra} note 4, at 1877-80 & n.234 (noting, for example, inapposite arguments that \textit{Mendoza} supports a distinction between constitutional and statutory rulings or permits a "hardship" exception).
\item[151.] See Estreicher & Revesz I, \textit{supra} note 4, at 685-86.
\item[152.] Professor Schwartz's treatment of \textit{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 \textit{Mendoza}. See Schwartz, \textit{supra} note 4, at 1875-81.
\item[153.] For a general discussion of collateral estoppel, and nonmutual collateral estoppel in particular, see F. JAMES & G. HAZARD, \textsc{Civil Procedure §§} 11.16-31 (3d ed. 1985).
\end{itemize}
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.\(^{161}\)

\(^{154}\) 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.


\(^{157}\) 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. At the core of *Mendoza* lay a concern about "freezing the first final decision rendered on a particular legal issue," for all time, in all courts, in all parts of the country. Faced with such a prospect, the Supreme Court insisted on "allowing litigation in multiple forums," emphasizing in particular "the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." 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" that the Court in *Mendoza* eschewed.

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
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 120-21 (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).
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]plication of an es-
toppel when the Government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the Gov-
ernment 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 docket[s] 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. But the greater jurisdiction-stripping power assumed by this argument may not exist at all, and even if it does exist, a "greater" constitutional power often does not include what might be characterized as a "lesser" one. 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" than eliminating altogether lower court interaction with an executive agency.

177. [Citation]

178. See [Citation]

179. See [Citation]

180. See [Citation]

181. See [Citation]
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. 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" and the congressional goal in establishing agency programs of advancing "uniformity in the administration of federal law." 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. 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.

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.

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 generally supra note 525 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), Congress took its one and only hard look at intracircuit nonacquiescence. 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. 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. In this legislative posture, the congressional conference committee that forged the 1984 Act took

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administrative 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.


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).


190. See id.
up the issue of intracircuit nonacquiescence. 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. The full Congress then acceded to that approach.

In opting for inaction, however, Congress specifically refused to authorize intracircuit nonacquiescence. 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." This refusal to approve nonacquiescence was hardly surprising, because a widespread and deeply felt hostility toward the SSA policy existed in the Congress. The conference committee report itself stated that "many of the conferees" had "strong concerns" about intracircuit nonacquiescence and the entire committee flatly criticized the policy's "clearly . . . undesirable consequence" of generating repetitious appeals costly to both claimants and the government. Representative Pickle, who was

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

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." 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." 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. With respect to the practical problems, Congress decided to forego formal legislation, but to "jawbone" the agency in the conference report. 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.

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

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.”

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” is unsupported and, indeed, extraordinary.

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. 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. 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. 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."

The key point is that Congress has not authorized — im-
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”).
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”).
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. 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." Under the modern-day version of this methodology, a court determines first what "level of scrutiny" it must apply to the challenged governmental policy. 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. This methodology surfaces most often in equal protection cases. In those cases, the courts usually apply so-called "minimal" scrutiny — requiring only that the governmental policy be "rationally related" to a "legitimate" governmental interest. In cases presenting more palpable affronts to recognized constitutional values, however, courts apply so-called "heightened" scrutiny — 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.


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 “di-
rect, 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 as-
sessing constitutional challenges based on the free speech and
free press clauses,232 and the free exercise clause233 of the first
amendment; the “substantive due process” component of the
fifth and fourteenth amendments;254 and the contracts

226. Id. at 440.
227. Id. at 441.
230. See generally G. GUNThER, supra note 219, at 588-89. The Court has
developed two separate forms of heightened scrutiny: so-called “strict scru-
tiny,” developed initially in cases involving race discrimination, and so-called
“intermediate scrutiny,” developed initially in cases involving sex discrimina-

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 ex-
cusable under confrontation clause only when “necessary to further an impor-
tant public policy”).
232. E.g., Butterworth v. Smith, 110 S. Ct. 1376, 1381 (1990); Austin v. Mich-
igan Chamber of Commerce, 110 S. Ct. 1391, 1396 (1990) (“To determine
whether Michigan’s restrictions on corporate political expenditures may con-
stitutionally be applied to the Chamber, we must ascertain whether they bur-
den the exercise of political speech and, if they do, whether they are narrowly
tailored to serve a compelling state interest.” (citation omitted)).
“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., Dept of Human Resources v. Smith, 110 S. Ct. 1595, 1615 n.1 (1990) (Black-
mun, J., dissenting) (collecting earlier free-exercise cases in which Court
applied heightened scrutiny).
rights’ are involved, the Court has held that regulation limiting these
rights may be justified only by a ‘compelling state interest’” (citations omit-
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 unnes-
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. Even more significant for present purposes,

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”).


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.

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 Article 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 produce247 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

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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)).
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.
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”).
central authority of another, the justifications for that action must at least survive “close scrutiny.”

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. It should also help negate rule-of-law-based complaints about open-ended balancing, which carry their sharpest sting when courts — as in intracircuit-nonacquiescence cases — undertake to vindicate rule-of-law values. 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.

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


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, while other issues simply may not fit the mold of a traditional means/ends appraisal. 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. 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.

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.”

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).

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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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").
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 “danger[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 him269 — “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. 539, 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).


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 non-acquiescence, it is supplied by Marbury v. Madison. 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." 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. 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 [say what the law is."); cf. American Trucking Ass'ns, Inc. v. Smith, 110 S. Ct. 2323, 2349 (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.  

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 willfully 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. 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. Even more important, this argument clashes with Cooper v. Aaron, in which the Court held that judicial interpretations of legal texts—not just discrete judgments—bind government officials. Indeed, because Cooper declared that such judicial interpretations are "the supreme law of the land," it supports directly

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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 1839 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 Estricher & 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.


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. Although some have criticized Cooper, 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." 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 byproduct of the process of deciding actual cases and controversies." Florida v. Wells, 110 S. Ct. 1532, 1640 (1990) (Stevens, J., concurring) (emphasis added).
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. Marbury assigned the duty of saying "what..."
the law is” not to the Supreme Court, but to “the judicial department.” Cooper reiterated the “settled doctrine” and “basic principle” that “the federal judiciary is supreme in the exposition of the law.” 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.

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 intercircuit 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

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)).


294. E.g., Pierce v. Underwood, 487 U.S. 552, 561 (1988); see Diller & Morawetz, supra note 4, at 511 (“[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." Thus, each circuit court has taken pains to articulate and purify its own corpus of law. 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." 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. 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. When agency officials simi-
larly must answer to a single, identifiable supervisory circuit court, symmetry of logic counsels that they too must adhere to that court's precedents. Professors Estreicher and Revesz argue that this analogy breaks down because agency decision makers, unlike district court judges, are specialists administering national programs. 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. 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. 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. The bottom line is that the considerations bolstering the "district court analogy" seem at least as strong as the considerations said to weaken it. Thus, that analogy — though no more flawless than most analogies — retains significant persuasive force.

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. 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.

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. This disparity in results clashes with the settled notion that 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).

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”).


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." Indeed, if anything, executive officials would seem to have a greater duty than private citizens to adhere to legal rules. 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.

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

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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 "outrage at the agencies' conduct is pervasive"); ME. Note, supra note 4, at 200 (describing courts as "unusually vocal" on this issue).
322. See, e.g., Hyatt, 807 F.2d at 382 (citing Anderson v. Heckler, 756 F.2d 1011 (4th Cir. 1985)); 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

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.


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. 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" and has indicated further that intracircuit nonacquiescence undertaken because "it is cheaper . . . to disregard what [a] court has done" is "outrageous.

Mr. Lee's sentiments are not unique. At least two United States Attorneys — even while still in office — refused to comply with their own administration's program of intracircuit nonacquiescence.

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. For at least

328. Lee Letter, supra note 8, reprinted in 130 CONG. REC. at 25,977.
329. 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").
330. 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").
331. See Diller & Morawetz, supra note 4, at 802; N.Y. Times, Sept. 23, 1984, § 1, at 54, col. 4.
332. See supra note 266 and accompanying text.
eight reasons, these considerations confirm that intracircuit nonacquiescence "impermissibly interferes with the functioning of the Judiciary."\textsuperscript{334}

First, intracircuit nonacquiescence "undermine[s] the authority"\textsuperscript{335} of the judicial branch by diminishing systematically the authoritativeness of judicial pronouncements.\textsuperscript{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.\textsuperscript{337} This message creates more than a "symbolic challenge" to the judiciary;\textsuperscript{338} it erodes the "public esteem for the federal courts"\textsuperscript{339} on which, as a practical matter, all judicial authority ultimately rests.\textsuperscript{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.\textsuperscript{341} This regime im-

\textsuperscript{335} Id. at 659.
\textsuperscript{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").
\textsuperscript{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, 435 (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 . . . .").
\textsuperscript{338} Schwartz, supra note 4, at 1851.
\textsuperscript{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").
\textsuperscript{341} See supra note 33 and accompanying text.
poses heavy and avoidable burdens on individual claimants.\textsuperscript{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.\textsuperscript{343} As already noted, these results render intracircuit nonacquiescence vulnerable to due process and equal protection challenges.\textsuperscript{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.\textsuperscript{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\textsuperscript{346} and "equality of treatment" is secured.\textsuperscript{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"\textsuperscript{348} of the judicial branch by "exhausting [its] resources."\textsuperscript{349} Infracircuit 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.\textsuperscript{350} Indeed, intracircuit nonacquiescence serves to shift
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). 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; after all, the burdens thrust upon the judiciary by intracircuit nonacquiescence are "likely to be given inadequate weight" by executive decision makers who benefit directly from imposing those burdens. 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. 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" to judges served the purpose of "relieving the courts of a most serious burden." 

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 applied.

351. See Diller & Morawetz, supra note 4, at 812 (noting "burden of repetitive litigation, borne by the judiciary").
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").
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. 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." For precisely this reason, the Framers insulated federal judges from political influences by affording them life tenure and protecting them against salary reductions. 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. 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."

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").


360. See U.S. CONST. art. III, § 1; The Federalist No. 78, at 527-28 (A. Hamilton) (J. Cooke ed. 1981) (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 ("Recent 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
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.\textsuperscript{363}

In reality, however, parties do not appeal most adverse agency actions.\textsuperscript{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.\textsuperscript{365}

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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{369} This effort corresponded with the interests of powerful factions concerned about increased taxes and the long-term availability of Social Security benefits,\textsuperscript{370} and it worked to the disadvantage of disabled persons, a numerical minority few would characterize as efficacy of conventional judicial review as a mechanism for ensuring the proper application of law”).

\textsuperscript{366} See L. JAFFE, \textit{supra} note 363, at 546. One might challenge this logic by pointing to the broad autonomy courts give agencies to fashion law under the \textit{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 \textit{Chevron} doctrine to afford broad discretion to agencies to adopt reasonable interpretations of law. See \textit{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. \textit{Cf.} Schwartz, \textit{supra} note 4, at 1845-47 (discussing inconsistency of intracircuit nonacquiescence with the “judicial assistant” model of administrative adjudication”).

\textsuperscript{367} \textbf{The Federalist} No. 10, at 61 (J. Madison) (J. Cooke ed. 1961); \textit{see id.} No. 51, at 351-52 (government must “guard one part of society against the injustice of the other part”).

\textsuperscript{368} \textit{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 . . . .”).

\textsuperscript{369} Estreicher & Revesz 1, \textit{supra} note 4, at 681-82.

\textsuperscript{370} Maranville, \textit{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. SSA nonacquiescence also threatened strong claims of entitlement, especially among persons already found to be disabled and counting on the continued receipt of benefits. One might respond that such minority-disadvantaging results are the inevitable and desirable consequence of majority rule. When intracircuit nonacquiescence is at issue, however, added earmarks of "injustice" and "oppression" 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. 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.

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. History has proven this concern well founded. For

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371. Cf. L. Tribe, supra note 82, § 7-1, at 547 ("Federal 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).


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 overpowering 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." 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;" he cited the power that flows from "[the President's] prestige as head of state," and he explained that the "rise of the party system has made a significant extraconstitutional supplement to real executive power." 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." 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."

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." 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. 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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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).


381. Id.

382. Id.

383. Id. at 654.

384. Id. at 653-54.

385. Id. at 654.


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 and provide the executive branch with a wide choice to implement its views through rulemaking, adjudication, or other means of action. "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." In such an environment, the principal check on the executive branch must be an insistence on adherence to law and rule-of-law values. 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 un- duly aggrandize the judicial power; instead, the prohibition simply effectuates the recognized authority of the "least dangerous" branch to hand down precedents that have meaning. Moreover, a ban on intracircuit nonacquiescence vindicates judicial power principally in the field of statutory interpretation — a sphere in which the exercise of judicial review authority is least questionable historically, and in which substantial deference to executive pronouncements is accorded already. In the area of statutory interpretation, ample checks on judicial abuses exist even if nonacquiescence in supervisory circuit court rulings is disallowed. Precisely be-

390. Strauss, supra note 262, at 312.
391. See, e.g., Maranville, supra note 4, at 528-29.
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.\textsuperscript{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.”\textsuperscript{398}

These considerations may or may not demonstrate conclusively the unconstitutionality of intracircuit nonacquiescence.\textsuperscript{399} They may or may not mandate the strongest form of “strict[ ] scrutiny,” utilized “when particularly cherished constitutional rights are threatened.”\textsuperscript{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”\textsuperscript{401} referred to as “intermediate.”\textsuperscript{402}

VI. SCRUTINIZING THE JUSTIFICATIONS FOR INTRACIRCUIT NONACQUIESCENCE

Heightened scrutiny of even the intermediate variety requires a “searching analysis” of the challenged governmental practice.\textsuperscript{403} First, the government must show that its policy

\begin{itemize}
  \item \textsuperscript{397} See infra note 418 and accompanying text.
  \item \textsuperscript{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 . . . .”).
  \item \textsuperscript{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.”).
  \item \textsuperscript{400} G. Gunther, supra note 219, at 457.
  \item \textsuperscript{401} City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441 (1985).
  \item \textsuperscript{402} G. Gunther, supra note 219, at 644.
  \item \textsuperscript{403} Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982).
\end{itemize}
rests on an interest that ranks as "important" or "exceedingly persuasive." Not just any interest will do; in particular, claims of "administrative ease and convenience" typically will fail. Second, the government must show a "direct, substantial relationship" 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. Thus the governmental policy is unconstitutional if there is a "weak congruence" or "unduly tenuous 'fit'" 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. Although one might write the list in different ways, 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. A close examination...
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." The Court has emphasized also the importance of "uniform federal interpretation" of the federal labor laws administered by the NLRB. Agency advocates argue that a policy of intracircuit nonacquiescence is needed to achieve uniformity. 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. 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

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).


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.
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. 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 intercircuit 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

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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 (“intracircuit 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 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.
theoretical 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").
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" 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. 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" 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. 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. 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

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.

438. See supra text following note 430.
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."  

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. 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, 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. 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.

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

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443. See Maranville, supra note 4, at 495-96.
444. See supra notes 39-41 and accompanying text.
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." 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. 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." 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. 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 ("[w]henever 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").
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

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.


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. They urge in particular that intracircuit nonacquiescence is necessary to ensure a proper “percolation” of important legal issues through the federal judicial system. 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. 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. It does not restrict the development of federal law in other circuits in any way.

Critics argue, however, that a prohibition on intracircuit nonacquiescence “is that intracircuit acquiescence “may be costly and burdensome”).

456. See, e.g., Estreicher & Revesz I, supra note 4, at 743-47.
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.\footnote{461} This argument, however, faces a number of difficulties.\footnote{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.\footnote{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.\footnote{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.\footnote{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

\footnote{461. See Lee Letter, supra note 8, reprinted in 130 CONG. REC. at 25,977. Kuhl, supra note 4, at 914-15.}

\footnote{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).}


\footnote{464. See supra note 453 and accompanying text.}

\footnote{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 intercircuit nonacquiescence.\textsuperscript{466} Again, an agency might find this course of action inconvenient to implement, but the avoidance of such inconvenience cannot justify intracircuit nonacquiescence.\textsuperscript{467}

\textsuperscript{466} See supra notes 22-23 and accompanying text.

\textsuperscript{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, 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 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 intracircuit 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

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).
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[jing] 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 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. 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. In light of these practical considerations, any interest in broadly facilitating intracircuit reconsideration of past decisions adverse to an agency seems "dubious" 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. 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. Finally, even if the declaratory-

480. See Judges of the Federal Courts, 923 F.2d vii, vii-xxxi (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.").


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 nonacquiescence 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.\footnote{486}

C. **VINDICATING AGENCY EXPERTISE**

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

\footnote{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.

\footnote{487. 467 U.S. 837 (1984).}

\footnote{488. *Id.* at 843 n.11, 865.}

\footnote{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 Linén 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. 493, 498-500 (1978) (upholding NLRB rule because "nothing in the legislative history . . . indicates a congressional policy inconsistent with Board's general approach").

\footnote{490. *Chevron*, 467 U.S. at 865; accord, *e.g.*, Pension Benefits Guaranty Corp. v. LTV Corp., 110 S. Ct. 2663, 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-

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.


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.
y 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
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., 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 399-98 (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 litiga-
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. 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.

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).

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, 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. 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.

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-

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. The SSA concluded that such retooling was unacceptable.

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. Additionally, the bifurcated approach only perpetuates problems of discrimination between claimants who do and claimants who do not exercise appeal rights. Finally, the SSA’s change of policy had only the most limited “practical consequences,” because the large majority of claimants denied benefits by frontline decisionmakers do not pursue agency appeals to the ALJ level. 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
squaresly 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

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).


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.\textsuperscript{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.\textsuperscript{516} Finally, insistence on agency adherence to circuit court precedent in this setting follows the principle of law that governs federal district court judges.\textsuperscript{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.\textsuperscript{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.\textsuperscript{519} Thus, practical protection of the basic principle prohibiting intracircuit nonacquiescence favors a strict rule that preempts agency use of such self-serving rationalizations.\textsuperscript{520} From the standpoint of authority,

\begin{thebibliography}{9}
\bibitem{} See supra notes 294-98 and accompanying text (discussing “law of the circuit” doctrine).
\bibitem{} See supra note 418 and accompanying text.
\bibitem{} See generally supra notes 299-307 and accompanying text (discussing so-called “district court analogy”).
\bibitem{} 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).
\bibitem{} 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. It follows that reference to the “district court analogy” 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. 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.

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

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.\textsuperscript{525} The basic premises underlying this approach have been challenged elsewhere in this Article.\textsuperscript{526} The central difficulty with this formula, however, lies in its “practical consequences.”\textsuperscript{527} Indeed, the “exception” proposed by Professors Estreicher and Revesz is so broad that it would all but swallow the no-nonacquiescence rule.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{531}

\begin{footnotes}
\item 525. Estreicher \& Revesz I, supra note 4, at 753.
\item 526. In particular, Part VI critiques each of the rationales from which this standard is derived.
\item 527. See supra note 266 and accompanying text.
\item 528. See Kubitschek, supra note 4, at 453 (concluding that result of Estreicher and Revesz rule would be to “continue . . . widespread nonacquiescence”).
\item 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”).
\item 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”).
\item 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
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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." 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." 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. 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. 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." This fact creates the unsettling result that, under the Estreicher and Revesz

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532. Estreicher & Revesz 1, 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." Finally, however tight or loose one intends the "reasonably seeking" requirement to be, it is in the end indeterminate. Considerations of certainty and judicial manageability thus press hard against its adoption.

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. For example, a court may plausibly decide that

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. GUNTER, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{545} The government, it bears emphasis, is required to secure a stay when seeking interim relief from other consequences of a circuit court judgment.\textsuperscript{546} No clear reason suggests why it should not be bound in similar fashion to secure a stay from the obligation

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\item[542] See supra note 418 and accompanying text.
\item[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).
\item[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).
\item[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).
\item[546] See Diller & Morawetz, supra note 4, at 824 n.88.
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to respect such a decision’s precedential force.  

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? 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.  

CONCLUSION  

The structure of American government rests in the end on “postulates which limit and control.” 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.” 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.

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.  
