

# The Uneasy Case Against Intracircuit Nonacquiescence: A Reply

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The problem of agency nonacquiescence arises because Congress has charged administrative agencies with policymaking authority and responsibility for a nationally uniform administration of their organic statutes, while at the same time subjecting the agencies' decisions to review by regional courts of appeals. As developed at length in our article, *Nonacquiescence by Federal Administrative Agencies*,<sup>1</sup> we believe that administrative agencies and each of the intermediate appellate courts must be viewed as participants in a process of national law development in which neither set of actors has the final say. Rather, they are both key contributors to a national dialogue designed to improve the decisions of the institutions of government capable of rendering a national resolution on a particular legal issue—whether it be the courts of appeals themselves by coalescing around a uniform approach, the Supreme Court, or Congress.<sup>2</sup>

Because our system has rejected a rule of intercircuit stare decisis in favor of a process of multicircuit consideration of questions of Federal law, there are plainly circumstances in which agencies legitimately may press for national adoption of their policies despite contrary circuit rulings (what we term in our article intercircuit nonacquiescence and nonacquiescence under conditions of venue choice).<sup>3</sup> The charge of illegitimacy has

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1. Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989). Our original article grew out of a report prepared at the request of the Administrative Conference of the United States and submitted in August 1988. The views expressed in that article and this Reply are those of the authors and do not represent the position of the Administrative Conference or any of its committees.

2. This is not to say that the decisions of a regional court of appeals are without legal effect; certainly, they bind the parties to the particular dispute and enjoy precedential weight within that court. Such decisions should be paid respect and may well sow the seeds of a national consensus, but cannot compel an administrative agency exercising delegated congressional authority and responsible for the administration of a statute of national application to alter its internal decision-making processes in a manner contrary to agency policy before the legal system has come to rest in support of a nationally uniform rule.

3. The National Labor Relations Board has been criticized for its nonacquiescence practice, despite the broad venue provision governing judicial review of its decisions. But the criticism has been tempered by the fact that the venue choice available to litigants makes it difficult for any one court of

been levelled where the agency operates under a venue-certain statute and continues to apply its policy at the administrative level despite a contrary ruling of the court of appeals that would review the agency action (what we term intracircuit nonacquiescence).<sup>4</sup> In our view, differences in venue provisions do not alter the functional position of agencies or their contributions to the process of national dialogue. However, intracircuit nonacquiescence does impose certain costs on those challenging agency action as well as on the courts, and these costs warrant some measure of judicial oversight.<sup>5</sup> Under general principles of administrative law, the courts of appeals properly may insist that the agency be embarked on a rational litigation program designed to secure a reasonably prompt national resolution of the question in dispute.<sup>6</sup> The courts may not, however, in the absence of express congressional authorization, act to truncate the dialogue by erecting a per se bar against intracircuit nonacquiescence.

In their Comment<sup>7</sup> on our article, two of the lead counsel representing the plaintiff class in the pending *Stieberger v. Sullivan*<sup>8</sup> litigation against the Social Security Administration (SSA) articulate the view that intracircuit nonacquiescence is per se unlawful and may be routinely subject to court injunctions regardless of the reasonableness of the agency's litigation position or the extent of disagreement among the courts of appeals over the merits of its substantive policy.<sup>9</sup> The commentators' argument rests on two premises that are fundamentally inconsistent with central features of our Federal legal system. Their conception of the regional courts of appeals as independent, essentially unsupervised fiefdoms reflects a flawed understanding of the relationship among the Federal courts of appeals, and between these courts and the Supreme Court. Similarly, their implicit analogy between administrative agencies and district courts ignores the well-established view of agencies as the primary policymakers for the statutes that they are empowered to administer. If the case against nonacquiescence rests on these grounds, it is a building lacking a viable foundation.

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appeals to insist on exclusive superintendence of the agency's orders. See Estreicher & Revesz, *supra* note 1, at 682, 710-12.

4. See *id.* at 682. Intracircuit nonacquiescence can also occur in the face of venue choice, where an agency's position has been rejected in all circuits that can review a particular decision. See *id.* at 717-18; *infra* note 64.

5. See Estreicher & Revesz, *supra* note 1, at 749-52.

6. See *id.* at 753-58.

7. Diller & Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990).

8. No. 84 Civ. 1302 (S.D.N.Y. filed Feb. 24, 1984). For a discussion of the issues raised by the *Stieberger* suit, see Estreicher & Revesz, *supra* note 1, at 701-02.

9. Apparently, the commentators do not take issue with our approach to intercircuit nonacquiescence or to nonacquiescence under conditions of venue choice. See Diller & Morawetz, *supra* note 7, at 802 n.8.

## I.

The commentators urge that intracircuit nonacquiescence can make no contribution to the process of national dialogue. They posit a world in which the courts of appeals function as essentially independent court systems employing a rigid rule of intracircuit stare decisis that renders decisions of three-judge panels largely impervious to developments in other circuits.<sup>10</sup> While acknowledging that disagreements among the circuits occur with some frequency, they maintain that the Supreme Court lacks the decisional capacity to resolve those conflicts.<sup>11</sup> Thus, in their world, intracircuit nonacquiescence cannot play a useful role in promoting the nationally uniform resolution of legal questions.<sup>12</sup>

The commentators' description of the system is unsound as a matter of both theory and practice. If indeed there is no process of national dialogue, there can be no sensible explanation for simultaneously insisting that Federal law is unitary and permitting the courts of appeals to disagree with each other. The commentators' story fails on two levels: first, it does not account for important features of the judicial landscape; second, it offers no credible evidence to support their empirical claims about the behavior of the courts of appeals and the Supreme Court.

On the theoretical level, it cannot be plausibly maintained that the courts of appeals have the status of independent courts representing an authority sovereign over their geographic territories. Rather, they are intermediate courts in a unitary legal system with responsibility over a unitary body of law.<sup>13</sup> This point emerges perhaps most vividly in multidistrict transfer cases. When diversity cases are transferred (on defendant's motion) from one Federal court to another, the transferee court is admonished by the rule of *Van Dusen v. Barrack*<sup>14</sup> to apply the law of the state in which the transferor court sits. However, the rule changes in Federal question cases precisely because no transfer between independent sovereign authorities has occurred: the circuit that receives a case applies its own understanding of Federal law rather than that of the circuit in which the case was initially filed.<sup>15</sup> The very availability of transfer (as opposed

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10. *See id.* at 804-10.

11. *See id.* at 809-11.

12. Although the commentators offer criticism of aspects of our balancing of the costs and benefits of nonacquiescence, *see id.* at 812-17, they do not appear to believe that the issue is subject to balancing at all. The benefits of nonacquiescence in promoting dialogue, as they put it, simply "disappear" once "one recognizes that stare decisis plays a central role in maintaining the stability of law within the circuits." *Id.* at 812. All that remains are costs, to be avoided by branding the agency an outlaw and riding herd over its administrative decisions by means of routine circuit-wide injunctions.

13. *See cases cited infra* note 18.

14. 376 U.S. 612 (1964).

15. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987); *Streicher & Revesz, supra* note 1, at 726 & n.244.

to dismissal and refiling) between courts in different circuits underscores that we are dealing with a unitary legal system.<sup>16</sup>

The commentators are equally wide of the mark when they infer from the premise that the circuits are formally "not bound" to follow the decisions of other circuits that they are "completely free to accept or reject the reasoning of other courts of appeals."<sup>17</sup> They fail to appreciate that the opportunity to engage in an independent, reasoned analysis is accompanied by an obligation to respect the views of other circuits and to attempt to harmonize conflicts.<sup>18</sup>

This obligation flows from the reasons for permitting the courts of appeals to disagree with one another in the first place.<sup>19</sup> The rejection of inter-circuit stare decisis is premised upon—and given the obvious costs in deferring uniformity,<sup>20</sup> is explainable only in terms of—the benefits of dialogue among the circuits.<sup>21</sup> In our article, we identified four major benefits of such dialogue. First, the doctrinal dialogue that takes place when one court of appeals addresses the legal reasoning of another and reaches a different conclusion is likely to yield a more careful and focused consid-

16. See 28 U.S.C. §§ 1404, 1407 (1982).

17. Diller & Morawetz, *supra* note 7, at 805.

18. See, e.g., *Korean Air Lines*, 829 F.2d at 1176 (Ginsburg, R.B., J.) ("The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis."); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (Posner, J.) ("Bearing in mind the interest in maintaining a reasonable uniformity of federal law and in sparing the Supreme Court the burden of taking cases merely to resolve conflicts between circuits, we give most respectful consideration to the decisions of the other courts of appeals and follow them whenever we can."); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) ("As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket."); Revesz, *Specialized Courts and the Administrative Law-making System*, 138 U. PA. L. REV. (forthcoming 1990).

The courts of appeals have often adopted another circuit's position because of the strong interest in national uniformity in the application of Federal law. In addition to the authorities cited above, see, e.g., *Gibraltar Fin. Corp. v. United States*, 825 F.2d 1563, 1572 (Fed. Cir. 1987); *Martin v. Heckler*, 773 F.2d 1145, 1153 (11th Cir. 1985); *Thomas v. Florida Power & Light Co.*, 764 F.2d 768, 770 (11th Cir. 1985); *National Indep. Meat Packers Ass'n v. EPA*, 566 F.2d 41, 43 (8th Cir. 1977); *North Am. Life & Casualty Co. v. Commissioner*, 533 F.2d 1046, 1051 (8th Cir. 1976); *Federal Life Ins. Co. v. United States*, 527 F.2d 1096, 1098-99 (7th Cir. 1975).

One circuit has even adopted a local rule that prohibits a panel from creating a conflict with another circuit unless the opinion has been circulated to all active judges and a majority does not request an en banc rehearing. See 7TH CIR. R. 40(f). For cases applying this rule, see, e.g., *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 384 n.\* (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985); *United States v. Liparota*, 735 F.2d 1044, 1044 n.\* (7th Cir. 1984), *rev'd on other grounds*, 471 U.S. 419 (1985); *King v. IRS*, 688 F.2d 488, 488 n.\* (7th Cir. 1982). In another circuit, a similar rule is applied as a matter of court policy. See *United States v. Cronn*, 717 F.2d 164, 165 n.\* (5th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).

19. See *Estreicher & Revesz, supra* note 1, at 736 & n.275. There were, however, stirrings toward immediate inter-circuit uniformity in the early decisions following the Evarts Act of 1891, ch. 517, § 2, 26 Stat. 826, which created the courts of appeals. See *Estreicher & Revesz, supra* note 1, at 736 & n.275.

20. The commentators appear to recognize the costs of disuniformity among circuits. See *Diller & Morawetz, supra* note 7, at 812.

21. See *Estreicher & Revesz, supra* note 1, at 736; see also cases cited *supra* note 18 (setting forth strong interest in uniformity of Federal law).

eration of the issues.<sup>22</sup> Second, the courts of appeals can benefit by observing the effects of various legal standards. Third, the conflicts produced by inter-circuit dialogue play a useful role in signalling to the Supreme Court the difficulty of particular legal issues, thereby helping the Court make better case selection decisions. Fourth, the Supreme Court benefits from the doctrinal dialogue among the circuits and from the existence of a store of accumulated experience about the proper formulation and likely consequences of different legal rules.<sup>23</sup> The ultimate goal of such a system of dialogue is a uniform Federal rule—and a better rule than that which would have resulted under a rule of inter-circuit stare decisis.<sup>24</sup>

If the Federal judicial system were to operate as the commentators say it does, the rejection of inter-circuit stare decisis would be inexplicable.<sup>25</sup> The third and fourth benefits of inter-circuit dialogue would largely disappear if the Supreme Court seldom granted certiorari in the face of conflicts among the circuits. As to the first and second, unless a circuit reexamines its positions in light of contrary decisions by other circuits, it will not be able to benefit from later rulings by these circuits. Neither will it be able to provide guidance to circuits that have not yet ruled by explaining either why it is persuaded by the position of the other circuits, or why it chooses to reaffirm its prior position.<sup>26</sup>

What the commentators are advocating is a system which not only can never produce a uniform federal law, absent intervention by the Supreme Court or Congress, but which also skews the law's development in a direction that is always antagonistic to the agency's position. Under their view, an agency whose position has been rejected in a circuit may not relitigate in that circuit. However, opponents of the agency not party to the previous proceeding may continue to press their position in the face of contrary circuit law. By contrast, inter-circuit stare decisis, despite its costs, would ensure uniformity and avoid this one-way ratchet effect.

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22. The commentators assert that most of the benefits of dialogue can be obtained without permitting a circuit to reconsider its prior position. But this view 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.

23. Estreicher & Revesz, *supra* note 1, at 736-37. For further discussion of the benefits of inter-circuit dialogue, see, e.g., S. ESTREICHER & J. SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* 48, 50-52, 73-74 (1986); R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 163 (1985); Revesz, *supra* note 18; Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 929 (1983).

24. See R. POSNER, *supra* note 23, at 163 ("a difficult question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases than if it is answered finally by the first panel to consider it").

25. For an endorsement of the route not taken, see Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 87 YALE L.J. 1219 (1978). The creation of a specialized court to review the decisions of a particular agency, or the adoption of exclusive venue provisions, would have a similar effect. Either alternative, however, would eliminate the benefits of dialogue. See Revesz, *supra* note 18.

26. These benefits do not disappear entirely when a circuit is ruling for the first time on an issue, because it could still benefit from earlier rulings by other circuits.

Given the far-reaching implications of the commentators' contentions, which go to the very core of the rejection of inter-circuit stare decisis, they should have the burden of producing strong evidence for their empirical claims about the functioning of the judicial system—a burden which they simply fail to discharge.

The commentators provide no support for the proposition that the Supreme Court is unwilling or unable to harmonize inter-circuit conflicts on questions of Federal statutory law, at least when these conflicts require a Federal administrative agency to confront different legal rules in different circuits. The only empirical support on which they rely is a recent and comprehensive study of the Supreme Court's exercise of its certiorari jurisdiction. The study's unambiguous and central conclusion is that the small number of conflicts denied review "undermine[s] the claim that docket incapacity prevents the Court from resolving conflicts among the circuits."<sup>27</sup> Moreover, only one of the unresolved conflicts<sup>28</sup> identified by this study involved a statutory provision under which the primary policymaking authority was exercised by an administrative agency.<sup>29</sup>

With respect to the courts of appeals, the commentators insist that the rules for the granting of rehearings en banc do not authorize en banc review in one circuit merely because its case law has been rejected by another circuit, and, moreover, require that the underlying issue must be of "exceptional importance."<sup>30</sup> They rely on Federal Rule of Appellate Procedure 35, which states that a rehearing en banc "is not favored and ordinarily will not be ordered except . . . when the proceeding involves a

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27. S. ESTREICHER & J. SEXTON, *supra* note 23, at 103; *see also id.* at 104, 153-59; Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610 (1987) (assessing and rejecting Justice White's claim that a large number of inter-circuit conflicts are denied certiorari).

28. *See* S. ESTREICHER & J. SEXTON, *supra* note 23, at 153-59. The single conflict was created by *Simpson v. Director, Office of Worker's Compensation Programs*, 681 F.2d 81 (1st Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983), and concerned the Longshoremen's and Harbor Workers' Compensation Act. *Simpson* held that a 20-year-old Supreme Court precedent, *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), applied retroactively to workers who suffered injuries before *Calbeck*. The authors of the Supreme Court study deemed the conflict "tolerable" because, given the passage of time, very few individuals would be affected by the retroactive application of *Calbeck*. *See* S. ESTREICHER & J. SEXTON, *supra* note 23, at 158.

29. The commentators' observation that the Supreme Court's "decisional capacity is small compared to the large number of statutory matters addressed by the courts of appeals," Diller & Morawetz, *supra* note 7, at 810, is simply irrelevant to their argument. What matters is whether the Court lets stand a large number of conflicts involving the interpretation of Federal statutes for which the primary policymaker is a Federal administrative agency.

The commentators' suggestion that there may be significant undercounting because the Estreicher-Sexton study is limited to an analysis of conflicts brought to the Court's attention, Diller & Morawetz, *supra* note 7, at 810 n.38, is difficult to take seriously. Given the prominence of circuit conflicts among the considerations supporting a grant of certiorari, as reflected in the Supreme Court's Rule 17 and any text on Supreme Court practice, the commentators' speculation assumes a high level of incompetence among a significant number of the Court's practitioners. To our knowledge, nobody has seriously maintained that an important reason for unresolved conflicts is that certiorari petitions are failing to identify the presence of conflicts.

30. Diller & Morawetz, *supra* note 7, at 806.

question of exceptional importance."<sup>31</sup> However, it is difficult to understand the suggestion that the harmonization of intercircuit conflicts concerning national regulatory programs is not of such "exceptional importance" as to deserve the attention of the courts of appeals, given that this task is "special and important"<sup>32</sup> enough to command a central place on the Supreme Court's docket.<sup>33</sup> Indeed, contrary to the commentators' speculation, the courts of appeals have made quite clear that the issues on which the circuits are divided ordinarily merit en banc review.<sup>34</sup>

The commentators add that even if the issue on which the circuits are divided is one of "exceptional importance," thereby satisfying their reading of Rule 35, all evidence suggests that the circuits are unlikely to reconsider the issue en banc.<sup>35</sup> The evidence that they offer is a meaningless statistic—the percentage of cases resolved by the courts of appeals without resort to the en banc process.<sup>36</sup> Plainly, the statistic relevant to the commentators' argument is the percentage of cases in which there is a conflict in the circuits over an issue of "exceptional importance" that are not reviewed en banc; on this question, they offer no data at all.

The commentators also claim that under local rules and Rule 35, the

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31. FED. R. APP. P. 35.

32. Rule 17 states that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." SUP. CT. R. 17.1. The rule provides, as the first example of "special and important" reasons, "[w]hen a Federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . ." *Id.*; see R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE § 4.4 (6th ed. 1986).

33. See also Solimine, *Ideology and En Banc Review*, 67 N.C.L. REV. 29, 51 (1988) ("Supreme Court Rule 17 . . . is remarkably similar to Federal Appellate Rule 35.").

34. For example, in *United States v. Aguon*, the Ninth Circuit overruled a prior precedent, noting that it had become "persuaded to adopt the reasoning" of an intervening decision of the Second Circuit "in its main points." 851 F.2d 1158, 1166 (9th Cir. 1988) (en banc). Two concurring judges indicated that after the Second Circuit had ruled on the question, "with circuit court decisions on both sides of the issue, it is reasonable for this court to give the matter a closer, more probing examination than we originally did, even if, as a result, we must acknowledge that our prior decision was in error." *Id.* at 1174 (Reinhardt, J., joined by Nelson, J., concurring). Similarly, in *United States v. Missouri Valley Constr. Co.*, a panel referred the case to the en banc court because the precedent in the circuit was inconsistent with the approaches of other circuits. 741 F.2d 1542, 1546 (8th Cir. 1984) (en banc).

Two circuits have adopted rules expressly stating that intercircuit conflicts merit en banc review. In the D.C. Circuit, a suggestion for rehearing en banc "shall set forth the reasons why the case is of exceptional importance or, where applicable, with what decision or decisions of the Supreme Court of the United States, of this Court, or of any other federal appellate court, the panel decision is claimed to be in conflict." D.C. CIR. R. 15(a)(3) (emphasis added). In the Ninth Circuit, "[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc." 9TH CIR. R. 35-1.

There are occasions where there has been ample multi-circuit consideration of an issue and Supreme Court review is imminent. In such circumstances, a court of appeals might properly decline to reconsider its precedent in light of developments elsewhere. See, e.g., *Green v. Santa Fe Indus.*, 533 F.2d 1309, 1310 (2d Cir. 1976) (per curiam).

35. Diller & Morawetz, *supra* note 7, at 806.

36. See *id.* at 806 n.23. The commentators use a similarly irrelevant statistic in their discussion of the Supreme Court's certiorari practice. See *supra* note 29.

courts of appeals can overrule precedent only by resort to en banc review, and that the cumbersome nature of such review makes reconsideration unlikely.<sup>37</sup> But this claim is simply incorrect. For example, in *Trapnell v. United States*,<sup>38</sup> a panel of the Second Circuit overruled a longstanding precedent and removed a conflict among the circuits on the proper standard concerning ineffective assistance of counsel in criminal cases. The court simply noted that the opinion had been circulated to all active members of the court and that none had requested a rehearing en banc.<sup>39</sup> This streamlined procedure is hardly more time-consuming for a judge than reading a slip opinion—which judges do in every case as a matter of course. The courts of appeals routinely resort to this informal procedure to overrule prior precedents in light of the case law of other circuits;<sup>40</sup> sometimes, as in *Trapnell*, the overruling of a precedent by a panel results in the elimination of a conflict.<sup>41</sup>

Finally, the commentators fail to present any convincing evidence that the courts of appeals are, in fact, systematically declining to reconsider their positions in light of contrary rulings by other circuits. Three citations are offered: one to a panel ruling reaffirming the validity of an agency's regulation in the face of intervening contrary rulings of two other circuits;<sup>42</sup> a second to a decision declining to rehear en banc a panel's refusal to permit a local district attorney to intervene as of right to upset a settlement of a class action challenging prison conditions;<sup>43</sup> and a third to a case in which a divided court of appeals decided by an 8-6 vote not to grant a rehearing en banc.<sup>44</sup>

37. See Diller & Morawetz, *supra* note 7, at 805-06.

38. 725 F.2d 149 (2d Cir. 1983).

39. *Id.* at 155. One circuit has enacted a rule codifying this approach:

A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted.

7TH CIR. R. 40(f). In another circuit, a panel apparently can overrule a prior precedent without the need even to circulate the opinion before publication. See *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979).

40. See, e.g., *Oxman v. WLS-TV*, 846 F.2d 448, 456 (7th Cir. 1988); *United States v. Frederick*, 835 F.2d 1211, 1214, n.10 (7th Cir. 1987); *United States v. Reed*, 773 F.2d 477, 485 (2d Cir. 1985); *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305, 311 (5th Cir. 1984); *United States v. Kasto*, 584 F.2d 268, 272 n.4 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); cases cited *infra* note 41. For an excellent survey showing that this practice is prevalent, see Bennett & Pembroke, "Mini" *In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531 (1986).

41. See, e.g., *International Bd. of Elec. Workers, Local 481 v. Sign-Craft, Inc.*, 864 F.2d 499, 502 (7th Cir. 1988); *Dornbusch v. Commissioner*, 860 F.2d 611, 615 (5th Cir. 1988); *Campos v. LeFevre*, 825 F.2d 671, 675-76 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1304 (1988); *Bauzo v. Bowen*, 803 F.2d 917, 920-21 (7th Cir. 1986).

42. See *Salmi v. Secretary of HHS*, 774 F.2d 685, 689 & n.3 (6th Cir. 1985), *cited in* Diller & Morawetz, *supra* note 7, at 806 n.21.

43. See *Harris v. Pernsley*, 820 F.2d 592, 611, 612 n.1 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987), *cited in* Diller & Morawetz, *supra* note 7, at 806 n.22.

44. See *Uviedo v. Steves Sash & Door Co.*, 760 F.2d 87 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), *cited in* Morawetz & Diller, *supra* note 7, at 806 n.22. In *Uviedo*, six judges voted to rehear the case en banc and to depart from the panel's opinion, indicating a willingness of a large



The empirical support marshalled by the commentators is problematic for a number of reasons. First, it is unclear from these examples whether the circuit is unwilling to reconsider precedent because of the constraints of intracircuit stare decisis or the cumbersome nature of the en banc process, rather than because it agrees on the merits with the prior approach of the circuit. Only instances of the former lend support to the claim that intercircuit dialogue does not occur. Second, because the legitimacy of intracircuit nonacquiescence turns on the responsibility of a Federal administrative agency to maintain a nationally uniform administration of its statute, for a case to count at all it should be one in which some agency of the Federal government is a party—the district attorney example is therefore wholly inapposite. We also believe, although the point is somewhat closer, that cases in support of the commentators' position should also be ones in which a circuit declines to reconsider a prior ruling rejecting an agency's position that has been upheld in other circuits. Only in such instances is the circuit forced to choose between precedent and agency policy. Third, although we are certain that the commentators could find somewhat better examples if they were pressed to do so, isolated examples hardly establish a principle, particularly in light of the contrary evidence.<sup>45</sup> Finally, even if the commentators could carry the burden of showing that the courts of appeals are not reconsidering precedent in light of contrary decisions in other circuits, this would argue, at most (on the assumption that the commentators do not desire intercircuit stare decisis), for encouraging the courts to engage in such reconsideration through procedures less cumbersome than en banc review.<sup>46</sup>

## II.

The commentators' position is also based on an implicit analogy between administrative agencies and district courts. They believe that the rules of precedent make the decisions of a court of appeals as binding on administrative agencies (at least with respect to agency decisions that will be reviewed in that circuit) as they are on the district courts. They state that the lower Federal courts, like the Supreme Court, "do[] not simply issue narrowly framed orders which bind the parties to a case, but also

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group within the circuit to depart from precedent. See 760 F.2d at 88. The eight judges that voted against the rehearing may well have done so because they believed that the precedent was correct and therefore that en banc review would serve no purpose. Moreover, the Supreme Court eventually resolved the conflict at issue in that case. See *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486 (1989).

45. See cases cited *supra* notes 18, 34.

46. For an example of such procedures, see *supra* notes 39-41; Bennett & Pembroke, *supra* note 40. The strategy of the commentators is to leave all elements of the legal system fixed, however flawed, save the rules governing intracircuit nonacquiescence. Such a strategy may be proper for lawyers advocating the cause of clients. But if the world is as the commentators believe it to be, they should be advocating either (i) easier en banc procedures or (ii) intercircuit stare decisis. Perpetual balkanization of Federal regulatory statutes simply makes no sense as a policy matter.

announce[] declarations of law binding on the executive branch through precedential effect."<sup>47</sup>

As we develop further in our article, it is a fundamental error to conceive of the relationship between an agency and its reviewing court in the same hierarchical terms as the relationship between a district court and its appellate court.<sup>48</sup> Administrative agencies are not merely factfinders that apply the law developed by the courts of appeals. In the administrative state ushered in by the New Deal, agencies have been delegated authority by Congress to develop coherent, nationally uniform policies under their statutes. They are more a part of the policymaking, politically accountable branches of government than they are a part of the system of adjudication.

Justice Frankfurter put the point well in his opinion for the Court in *FCC v. Pottsville Broadcasting Co.*:<sup>49</sup>

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of Federal courts *inter se*—a relationship largely defined by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. . . . The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.<sup>50</sup>

Justice Frankfurter added:

But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.<sup>51</sup>

The commentators do not squarely address our rejection of the district

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47. Diller & Morawetz, *supra* note 7, at 822.

48. See Estreicher & Revesz, *supra* note 1, at 723-25.

49. 309 U.S. 134 (1940).

50. *Id.* at 141.

51. *Id.* at 144.

court analogy even though this analogy is the unstated governing premise of their invocation of supposed Article III limitations on intracircuit nonacquiescence. Instead, they resort to mischaracterizing our reliance on *Chevron v. NRDC*.<sup>52</sup> *Chevron* does reflect the broad principle, on which our analysis is based, that agencies are in a position fundamentally different from district courts because they have been delegated policymaking responsibility by Congress and because they derive their legitimacy, at least in part, from their accountability to the political process.<sup>53</sup>

*Chevron* also states that broad deference should be accorded to an agency's constructions of its governing statute.<sup>54</sup> In our rejection of the district court analogy, however, we refer to *Chevron* deference only as an example of the different legal requirements that apply to district courts and administrative agencies.<sup>55</sup> 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. Indeed, such a position would be inconsistent with our conclusion that intracircuit nonacquiescence is permissible only for the limited time in which Federal law on the subject is in flux and the agency is making reasonable attempts to persuade the courts to validate its position.<sup>56</sup> Instead, in our view, the legitimacy of intracircuit nonacquiescence flows from the congressional choice of administrative government and from the judicial system's commitment to intercircuit dialogue.

The commentators also maintain that we allow "agencies to double dip on their *Chevron* rights to deference . . . [because] even after a court has granted an agency the deference owed under *Chevron*, it must further stay its hand in enjoining what the court has found to be an unwarranted exercise of agency power."<sup>57</sup> The problem that the commentators do not recog-

52. 467 U.S. 837 (1984). For the commentators' characterization, see Diller & Morawetz, *supra* note 7, at 818-21.

53. See Estreicher & Revesz, *supra* note 1, at 723-25. The commentators mistakenly assert that *Chevron* deference is premised exclusively on agency expertise. See Diller & Morawetz, *supra* note 7, at 818-19. As Justice Stevens stated in *Chevron*:

Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

467 U.S. at 865-66; see Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989). Given the fact that SSA is in the executive branch, it is clearly covered by the ruling in *Chevron*. Independent agencies also display a measure of responsiveness to the political process that justifies *Chevron*-like deference.

54. 467 U.S. at 842-44.

55. See Estreicher & Revesz, *supra* note 1, at 723-25.

56. See *id.* at 753.

57. Diller & Morawetz, *supra* note 7, at 821.

nize is that a single administrative agency, charged with nationwide responsibility, comes into contact with many regional courts, which can and do disagree on the question of the permissibility of the agency's statutory construction. While a single court of appeals can settle the rights of parties to a lawsuit, it should not be able to unilaterally stymie the prospects for uniformity in administration of Federal law while an agency is reasonably attempting to obtain the nationwide validation of its position.

This brings us to the commentators' rather breezy assertion that intracircuit nonacquiescence is destructive of "the Article III function of issuing binding declarations of law."<sup>58</sup> At times, they appear to be arguing that the ordinary rules of statutory construction should be suspended, and that intracircuit nonacquiescence requires "express" congressional authorization.<sup>59</sup> At other times, they appear to state that intracircuit nonacquiescence would be unconstitutional regardless of congressional authorization.<sup>60</sup> One searches in vain, however, for a proper Article III predicate supporting either invocation of the clear statement technique<sup>61</sup> or an outright declaration of constitutional invalidity.

Ultimately, their constitutional claim, however formulated, rests on the very same premises that bracketed their dismissal of the policy justifications for intracircuit nonacquiescence—that the courts of appeals may legitimately function as insular judicial systems and that administrative agencies occupy a subordinate position in the regional hierarchy of legal authority headed by these courts. Because those premises are flawed, the commentators have presented no case for constitutional invalidation.<sup>62</sup>

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58. *Id.* at 823.

59. *See id.* at 822, 824.

60. *See id.* at 823.

61. For an application of the clear statement technique, see *Kent v. Dulles*, 357 U.S. 116 (1958). *See also Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

62. Professor Joshua Schwartz' recent article, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989), attempts to root a qualified bar to intracircuit nonacquiescence in a "judicial review theory" based on Article III. The article suggests that administrative adjudication can be reconciled with the constitutional allocation of "the judicial Power of the United States" to Article III courts only by ensuring that such courts are available to review agency factfinding and to ensure conformity with governing law, and that in the case of "routine intracircuit nonacquiescence, conventional judicial review is not an adequate safeguard for the integrity of the judicial power." *Id.* at 1851. This is not the place for a full-dress response to Professor Schwartz' effort; however, there are some obvious difficulties with the position. First, the argument is based on a reading of *Crowell v. Benson*, 285 U.S. 22 (1932), that requires a rejection of the *Crowell* Court's recognition of an exception for "public rights" claims—claims defined as those that "arise between the government and persons subject to its authority in connection with the performance of constitutional functions of the executive or legislative departments." *Id.* at 50. Our argument does not depend on the "public rights" doctrine, but a theory based on *Crowell*, such as Schwartz', must account for the case's central distinction between public and private rights. Second, even if it is assumed that Article III requires some review by Federal judges with life tenure of all adjudications under Federal law—a proposition much debated in the literature but which we endorse—Professor Schwartz has difficulty explaining why this residual Article III check is not satisfied by the availability of Supreme Court review. Certainly, the state courts adjudicate questions of Federal law without superintendence by the Federal courts of appeals. Under our view, of course, Federal courts would retain their authority to render binding resolutions in individual cases and to enjoin unjustified nonacquiescence. Third, the

## III.

The commentators are driven to their conclusion, to a great extent, by their mistaken belief that SSA is “essentially unique”<sup>63</sup> in engaging in intracircuit nonacquiescence. This assertion ignores the fact that other agencies, notably the Internal Revenue Service, also operate under a statutory scheme in which there is essentially no venue choice, and have engaged in similar practices.<sup>64</sup> Admittedly, most statutes provide a degree of venue choice that makes less prominent the disagreements of agencies with their reviewing courts.<sup>65</sup> But it is the invariable move of opponents of intracircuit nonacquiescence to endow venue provisions—which as far as we can discern are placed in statutes to promote litigation convenience<sup>66</sup>—with profound structural significance. The commentators’ repeated appeal to the “rule of law” would dissolve were the Social Security Act amended to provide for the range of venue choice characteristic of modern regulatory statutes. As discussed in our article, we advocate the elimination of venue choice under many statutory schemes, in part because we believe that the restraining influence of judicial review of administrative action should not depend on the nature of the venue provision.<sup>67</sup> If Congress heeds our recommendation, a proper understanding of the legitimacy of intracircuit nonacquiescence will become even more important than it is now.

Even the commentators concede that the cost-benefit calculus concerning nonacquiescence is different outside of the Social Security context.<sup>68</sup> It is thus misleading to make general pronouncements about intracircuit nonacquiescence, as the commentators do, based simply upon an analysis of SSA. And, absent an explicit statutory directive, we do not see how intracircuit nonacquiescence can be per se illegal for SSA if it is not for other agencies as well. As we state in our article, however, if the statutory scheme or the Supreme Court’s due process and equal protection jurispru-

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argument applies by its terms only to agencies that utilize formal adjudication as a mode of decision-making, for only such agencies can be said to operate as “judicial assistants” to Article III tribunals. It seems perverse that agencies functioning through informal processes, lacking trial-type safeguards, escape both the Article III checking mechanism and the qualified prohibition of intracircuit nonacquiescence. Finally, the argument belies a conception of administrative agencies as surrogate factfinders for courts that flies in the face of established understandings of the role of agencies in the modern regulatory state.

63. Diller & Morawetz, *supra* note 7, at 801 n.1.

64. See Estreicher & Revesz, *supra* note 1, at 713. We state in our article that the IRS engages in *intercircuit* nonacquiescence as a matter of course, and that it engages in *intracircuit* nonacquiescence “less frequently.” *Id.* Moreover, intracircuit nonacquiescence is not limited to agencies that operate under venue-certain schemes. When there is venue choice, an agency nonetheless engages in intracircuit nonacquiescence when it reaffirms a position that has been rejected in all circuits in which review of the agency decision is possible. Our survey of Federal agencies indicates that several agencies engage in such conduct. See *id.* at 717-18.

65. See *id.* at 764, 770.

66. See *id.* at 767-68.

67. See *id.* at 764-70.

68. See Diller & Morawetz, *supra* note 7, at 816-17.

dence evinces a particularly strong concern over distributional effects, as might be the case for SSA, the process of intracircuit nonacquiescence can be truncated more rapidly than might otherwise be the case.<sup>69</sup>

Notwithstanding the commentators' description of the special characteristics of SSA disability claimants, Congress in 1984, after extensive consideration of the question, declined to prohibit SSA nonacquiescence policies.<sup>70</sup> The courts of appeals lack the authority to erect an absolute proscription simply because SSA administers a venue-certain statute.

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Questions about the proper institutional relationships between agencies and reviewing courts should not be resolved in terms of the specific problems that SSA claimants faced in the early 1980's. A feature of our administrative state is that agencies tend to be more responsive to the preferences of current majorities, while judges, most of whom were appointed during previous administrations, tend to hold views more consonant with past majorities. In the 1930's, administrative agencies were viewed as engines of populist social change; the courts represented the vanguard of a conservative reaction. In the current political climate, the roles are somewhat reversed. Litigators, like the commentators, find themselves in combat with budget-sensitive, market-oriented agency decisionmakers, and hope to obtain relief from more liberal judges. In time, the political pendulum will swing again, and we may well find activist agencies bridled by conservative judges. The rules governing agency nonacquiescence should not change with the political winds.

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69. See Estreicher & Revesz, *supra* note 1, at 757.

70. See *id.* at 703-04.