

Ignoring the Courts: A Contextual Analysis of Administrative Nonacquiescence

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Increasingly complex environmental challenges reveal the necessity of creative, decisive regulatory solutions. Effective public policy responses to the distributional effects of a changing climate require nuanced analysis and collaborative effort by each branch of government. The analysis supporting the D.C. Circuit’s recent endorsement of the Environmental Protection Agency’s new policy of intercircuit nonacquiescence falls short of the nuance required to address the issues implicated. Specifically, in National Environmental Development Association’s Clean Air Project v. EPA, the D.C. Circuit failed to evaluate the significance of agency nonacquiescence within the context of the ongoing Environmental Federalism debate. Continued debate over whether environmental regulations should be uniform and centrally enforced is the direct result of interdisciplinary efforts to analyze and mitigate human impacts on planetary health. This Note argues that a more prudent analysis of agency nonacquiescence would be context-specific, considering not only mere legal permissibility, but advisability as well.

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INTRODUCTION

Nonacquiescence is defined as the selective refusal of administrative agencies to bring their internal policies into compliance with adverse rulings of the federal courts of appeals.¹ An administrative agency engages in nonacquiescence when it declines to appeal, but refuses to apply, an adverse federal district or circuit court holding resulting from judicial review of the agency's interpretation of its own authorization statute.² Naturally, nonacquiescence can result in agency-manufactured procedural discrepancies between regional circuits—conceptually similar to judicially-manufactured circuit splits which occur when regional courts disagree.

1. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 684 (1989).

2. See, e.g., John L. Radder, *Agency Nonacquiescence Implementation, Justification and Acceptability*, 42 WASH. & LEE L. REV. 1233, 1233 (1985).

According to Professors Estreicher and Revesz, there are four generally accepted benefits of intercourt dialogue, which occurs when circuits split.³ These benefits make intercourt stare decisis an undesirable outcome despite the uncertainty that results when federal circuits disagree. First, appellate courts benefit from the ability to review the legal reasoning of each other's decisions.⁴ Commentators believe that this is likely to result in better informed, more carefully considered jurisprudence.⁵ Second, intercourt dialogue allows appellate courts to observe and learn from the consequences that result from legal rules in other jurisdictions.⁶ Third, circuit splits perform an important signaling function—conflicts between federal circuits alert the Supreme Court to difficult issues, helping the Court make better case selection decisions.⁷ Finally, the Supreme Court arguably also benefits from the cumulative wealth of information about the likely consequences of different legal rules in different regional jurisdictions.⁸ In summary, intercourt dialogue aids in the development of the law. Estreicher and Revesz observe that a policy of intercourt stare decisis would foreclose the possibility of agency nonacquiescence and eliminate the various benefits of intercourt dialogue.⁹ However, despite the broad theoretical benefits of intercourt dialogue, both courts and legal commentators have expressed serious reservations about agency nonacquiescence. Moreover, as I argue in this Note, agency nonacquiescence can implicate complex and far-reaching regulatory issues, which cannot be explained away by reference to the general benefits of intercourt dialogue.

Despite the lack of consensus on this issue, the D.C. Circuit recently relied on these perceived benefits of intercourt dialogue to justify a broad endorsement of EPA's new policy of intercourt nonacquiescence. In *National Environmental Development Association's Clean Air Project v. EPA (NEDACAP II)*,¹⁰ industry groups challenged EPA's amendment of its own regulations to no longer require strict uniformity in Clean Air Act (CAA) permitting standards. Over the industry groups' forcefully argued concerns about competitive balance and fundamental fairness, the D.C. Circuit upheld EPA's amended regulations as a reasonable construction of the CAA.¹¹ The court found that the agency's new policy of nonacquiescence offered "permissible and sensible solutions to issues emanating from intercourt conflicts and agency nonacquiescence."¹² Importantly, *NEDACAP II* was the first nationally applicable endorsement of

3. Estreicher, *supra* note 1, at 735–37.

4. *Id.* at 736.

5. *Id.*

6. *Id.* at 736–37.

7. *Id.* at 737.

8. *Id.*

9. *Id.* at 738.

10. Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA, 891 F.3d 1041, 1044 (D.C. Cir. 2018) (*NEDACAP II*).

11. *Id.*

12. *Id.* at 1045.

nonacquiescence as administrative policy.¹³ This Note examines the various policy rationales and justifications for EPA's newly codified practice of agency nonacquiescence and contextualizes EPA nonacquiescence within the ongoing Environmental Federalism debate. I conclude that the D.C. Circuit was misguided in its belief that the general benefits of intercourt dialogue are applicable to EPA nonacquiescence in the context of environmental regulatory enforcement. Rather, the D.C. Circuit's reliance on the general benefits of intercourt dialogue reduced an immensely complicated policy issue—one which implicates the ongoing, multidisciplinary Environmental Federalism debate—to a question of mere legal permissibility.

Part I introduces the concept of nonacquiescence and explains the different practices that characterize it. It provides an overview of the history of nonacquiescence as administrative policy in American government and the judicial response to it. This Part presents instances of conflict over public policy to introduce more specific arguments for and against the practice.

Part II introduces the concept of Environmental Federalism and explains this framework's utility as an analogy to the conflict over uniform rulemaking and agency nonacquiescence. This Part is the theoretical core of this Note, exploring the relative benefits of centralized and decentralized environmental regulatory decision making and comparing them to arguments surrounding the practice of agency nonacquiescence. This Part explains how the practice of agency nonacquiescence has a significant and direct impact on the enforcement of environmental regulations.

Part III describes the D.C. Circuit's departure from the other circuit courts' wary acceptance of agency nonacquiescence. It describes in detail the D.C. Circuit's nationally applicable affirmation of agency nonacquiescence in *NEDACAP II*.¹⁴ It highlights the major arguments advanced by EPA in defense of its nonacquiescence policy and explores responses from industry stakeholders and legal commentators, criticizing EPA's new policy.

Finally, Part IV brings the arguments and rationales from Part II and III into dialogue with each other to advocate for nuanced, context-specific administrative practice and jurisprudence. It argues that administrative rulemaking and judicial review premised on advisability rather than mere permissibility—in other words, a review that contemplates whether the action should be taken, not just if it legally can be—is ideal in the context of environmental regulatory decision-making. To conclude, the Note offers a brief observation of a better-reasoned view the D.C. Circuit could have adopted.

13. *Id.* at 1044.

14. *Id.* at 1041.

I. HISTORY OF NONACQUIESCENCE

Conflict over agency nonacquiescence is as old as the concept of judicial review itself and often the topic of fiery debate. While some commentators characterize nonacquiescence as a mere “constructive tension,”¹⁵ other scholars have gone so far as to describe these differences as an outright “breakdown of the rule of law.”¹⁶ This lack of consensus amongst the legal community can be attributed in part to the varying degrees of nonacquiescence in which agencies engage. Courts have recognized two distinct categories of nonacquiescence—intercircuit and intracircuit.¹⁷ Intercircuit nonacquiescence is when an agency acknowledges and applies a federal court’s adverse holding *within* that court’s regional circuit but refuses to apply that same holding to similar agency practices *outside* of that reviewing court’s regional jurisdiction.¹⁸ Intracircuit nonacquiescence, on the other hand, occurs when an agency limits the appellate court’s adverse ruling to the parties involved, declining to apply the ruling to all other claimants similarly situated in the same regional circuit.¹⁹ Although intercircuit and intracircuit nonacquiescence are conceptually similar—both involve an agency exercising discretion over where to apply an adverse holding—their effects are dissimilar, and they are thus perceived very differently by reviewing courts and legal commentators.²⁰

The district and circuit courts have expressed distaste for intracircuit agency nonacquiescence as a general practice and do not tolerate naked defiance of judicial rulings within the reviewing court’s regional jurisdiction.²¹ For the purposes of this Note, I group major justifications for agency nonacquiescence into three categories: separation of powers, pragmatism, and a concern for uniformity. Across the board, appellate courts have been hostile to justifications for agency nonacquiescence that appear to use a separation of powers rationale to encroach on judicial authority, undermining rule of law.²² Still, wary but permissive circuit court opinions and the Supreme Court’s silence have left the

15. See Phillip J. Cooper, *Conflict of Constructive Tension: The Changing Relationship of Judges and Administrators*, 45 L. & PUB. AFFAIRS 643, 643 (1985).

16. See Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 802 (1990).

17. *Id.* at 802–03.

18. *Id.*

19. *Id.*

20. Samuel Estreicher & Richard L. Revesz, *The Uneasy Case against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 833 (1990).

21. See *Chee v. Schweiker*, 563 F. Supp. 1362, 1365 (D. Ariz. 1983) (distinguishing Secretary of Health and Human Services’ policy of refusing to adhere to Ninth Circuit rulings within the Ninth Circuit from other agencies’ policies of intercircuit nonacquiescence); see also *Lopez v. Heckler*, 725 F.2d 1489, 1503 n.12 (9th Cir. 1984) (distinguishing intracircuit from intercircuit nonacquiescence and drawing a boundary between the two: “Because conflicts among the circuits are inevitable, the executive clearly cannot be expected always to give nationwide effect to the holdings of a court of appeals”).

22. See *Chee*, 563 F. Supp. at 1465.

door open for intercircuit nonacquiescence in instances where there are concerns for pragmatism or uniformity.²³

Three agencies have been particularly active in their pursuit of nonacquiescence policies: the National Labor Relations Board (NLRB), the Internal Revenue Service (IRS), and the Social Security Administration (SSA).²⁴ A review of these agencies' historical practices best illustrates the role of nonacquiescence in American administrative policy.²⁵

A. *The National Labor Relations Board*

Conflict over agency nonacquiescence has been a feature of American administrative law since the 1940s, when tension between appellate courts and NLRB, fueled by divergent interpretations of the National Labor Relations Act (NLRA), first highlighted the peculiar problem of nonacquiescence.²⁶ Throughout the 1940s and 1950s, NLRB pursued policies meant to foster overall stability of the collective bargaining process, while the appellate courts placed greater importance on employee free choice.²⁷ In the absence of any Supreme Court rulings on these policies, NLRB consistently refused to acquiesce to district and appellate court rulings—a practice which eventually attracted harsh censure from the Seventh Circuit.²⁸ It was a polarizing topic in public discourse—NLRB was criticized for defying judicial authority to press their own interpretive policy, and the appellate courts were criticized for discrediting NLRB's expertise and discretion.²⁹ However, the Supreme Court quietly permitted NLRB to spar with reviewing appellate courts.

In 1957, NLRB again asserted its perceived right to selectively apply adverse circuit court rulings on NLRB policies. In *Insurance Agents International Union*, NLRB clashed with a Trial Examiner's (now called an Administrative Law Judge (ALJ)) Intermediate Report on union bargaining

23. See Don A. Zimmerman, *Restoring Stability in the Implementation of the National Labor Relations Act*, 1 LABOR LAW 1, 3 (1985) (describing how for nearly half a century neither Congress nor the Supreme Court had commented adversely on NLRB's policy of intercircuit nonacquiescence or the agency's justifications for the practice).

24. See Radder, *supra* note 2, at 1235.

25. *Id.*

26. See *Acme Indus. Police*, 58 N.L.R.B. 1342, 1344–45 (1944) (In which NLRB contended that it has the delegated authority to pursue its understanding of NLRA policy despite conflicting interpretations offered by appellate courts).

27. Charles Craypo, *Bargaining Units and Corporate Merger NLRB Policy in the Intercity Bus Industry*, 1 BERKELEY J. EMP. & LAB. L. 285, 288 (1976).

28. See, e.g., *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576 (7th Cir. 1951); see also *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529 (7th Cir. 1953) (criticizing NLRB for refusing to adhere to an adverse Seventh Circuit ruling upholding an employer's right to lock out employees after bargaining to impasse).

29. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures Recommendations for Change*, 67 F.R.D. 195, 354–58 (1975).

tactics.³⁰ At issue in that case was whether the Union failed to bargain in good faith when it used on-the-job “slowdowns” and other tactics to increase economic pressure on employers during negotiations.³¹ The Trial Examiner’s Intermediate Report sided with the Union, finding that, although the Union’s slowdown tactics were “unprotected” activity, they were not “unlawful.”³² However, a three-member NLRB panel rebuked the Trial Examiner’s report, concluding that the Union had failed to bargain in good faith³³ and that the Union’s “harassing” activities were inconsistent with Section 8(b)(3) of the NLRA’s requirement of “reasoned discussions” for good faith bargaining.³⁴ Ultimately, the D.C. Circuit refused enforcement of NLRB’s order and the Supreme Court affirmed the court’s decision.

Importantly, as a part of its *Insurance Agents* decision and order, NLRB issued a general directive to ALJs which stated that a circuit court decision not to enforce an NLRB order would not immediately cause the agency to abandon its policy, and that ALJs must not acquiesce unless NLRB agreed to accept the adverse ruling.³⁵ The agency articulated three specific justifications for its policy of intercircuit nonacquiescence based on separation of powers and pragmatism. First, NLRB asserted that its congressionally delegated responsibility to enforce its organic statute nationwide gave it the authority to pursue its own vision for administrative policy except where the Supreme Court has announced a different rule.³⁶ Second, NLRB asserted its authority as the primary policymaker under the NLRA and pointed out that the Supreme Court had often sided with NLRB in the face of adverse appellate court decisions.³⁷ Finally, NLRB made the pragmatic argument that the NLRA’s broad venue choice provisions made it impossible to be certain which court of appeals would eventually hear a challenge to NLRB policy.³⁸ NLRB argued that petitioners’ unconstrained ability to forum shop made it impossible to acquiesce to adverse rulings in every circuit without compromising the agency’s ability to pursue its policies deliberately and consistently.³⁹

The judicial reaction NLRB’s separation of powers arguments was scathing. The Seventh Circuit opined that administrative agencies were inherently subordinate to the courts of appeals and subject to direct judicial review, just like the district courts.⁴⁰ The Third Circuit also saw the policy as a clear usurpation

30. *Ins. Agents’ Int’l Union*, 119 N.L.R.B. 768 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff’d*, 361 U.S. 477 (1960).

31. *Id.* at 768–70.

32. *Id.* at 779.

33. *Id.* at 770.

34. *Id.* at 772.

35. *Id.* at 773.

36. *Ins. Agents’ Int’l Union*, 119 N.L.R.B. at 773.

37. Estreicher, *supra* note 1, at 708 n.154.

38. *Id.* at 709; *see also* 29 U.S.C. § 160(f) (1982).

39. *Id.*

40. *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 532 (7th Cir. 1953).

of judicial authority, stating, “[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation.”⁴¹ The courts of appeals were generally unwilling to acknowledge the difference between intracircuit and intercircuit nonacquiescence—they believed that both were “outside the law” and were hostile to the idea that either could be justifiable under any circumstances.⁴² However, after 1947, amid ongoing conflict between the appellate courts and NLRB, the Supreme Court became noticeably less active in accepting cases and issuing opinions that construed the NLRA.⁴³ The Court was content to allow the dueling courts and NLRB to shape labor-management relations policy.

B. *The Internal Revenue Service*

IRS also has a history of engaging in agency nonacquiescence. In 1970, former Chief Counsel Lester R. Uretz described IRS’s informal policy of intercircuit nonacquiescence:

It may be stated as a general rule of thumb, to which exceptions must of necessity be made, that the Service will accept a result reached by two courts of appeals where there are no contrary appellate decisions. However, if the Service has been successful in litigating simultaneously several cases which present the same issue, decisions may result in quick succession from more than two circuits.⁴⁴

In *Taxation with Representation v. IRS*, the D.C. Circuit confronted this policy when it considered whether certain internal agency documents—written to explain to IRS officials the scope and applicability of district court rulings on IRS tax policy—were exempted from public disclosure.⁴⁵ IRS defended its policy of intercircuit nonacquiescence by pointing out the importance of horizontal uniformity among similarly situated taxpayers nationwide: “The policies which guide decisions as to whether to acquiesce reflect the Service’s two major objectives: to handle tax controversies fairly, efficiently, and expeditiously in order to avoid needless litigation; and to achieve the maximum possible uniformity and consistency of treatment among similarly situated taxpayers.”⁴⁶

In that case, the D.C. Circuit affirmed the lower court’s finding that these internal memoranda, which “contain the reasons behind the acquiescence or nonacquiescence of the IRS in court decisions” were not exempt from public disclosure.⁴⁷ Although IRS does not deal with the same venue uncertainty as

41. *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979).

42. *Id.*

43. Estreicher, *supra* note 1, at 742.

44. Lester R. Uretz, *The Chief Counsel’s Policy Regarding Acquiescence and Nonacquiescence in Tax Court Cases*, 44 IND. L.J. 206, 218–19 (1969).

45. *See, e.g.*, *Taxation with Representation Fund v. I.R.S.*, 646 F.2d 666, 668 (D.C. Cir. 1981).

46. Uretz, *supra* note 44, at 216.

47. *Taxation with Representation Fund*, 646 F.2d at 688.

NLRB—challenges to IRS policy may only take place within the one court of appeals where the petitioner resides—IRS’s pragmatic argument emphasized the logistical difficulty of waiting for a multiple-circuit split to attract Supreme Court attention.⁴⁸

Compared to their response to NLRB, appellate courts generally reacted less harshly to IRS intercircuit nonacquiescence.⁴⁹ Still, in *Keasler v. United States*, the Eighth Circuit criticized IRS for assessing an excise tax on a manufacturer of truck hoists using a method that had been expressly disapproved by the Tenth Circuit seven years earlier.⁵⁰ The Eighth Circuit emphasized that it had “long taken the position that uniformity of decision among the circuits is vitally important on issues concerning the administration of the tax laws.”⁵¹ The *Keasler* court awarded attorney’s fees in that case, concluding that IRS had acted unreasonably by pursuing the disapproved tax policy in the Eighth Circuit, hoping that the Tenth Circuit decision would be disregarded.⁵² The Eighth Circuit restated a rule it had announced multiple times before, that “the tax decisions of other circuits should be followed unless they are ‘demonstrably erroneous or there appear cogent reasons for rejecting them.’”⁵³ Importantly, the Eighth Circuit did not state a rule that forbade the practice of agency nonacquiescence outright, acknowledging that it could be a reasonable practice under certain circumstances.

C. The Social Security Administration

SSA has engaged in one of the most aggressive and controversial instances of agency nonacquiescence.⁵⁴ From the 1960s until the mid-1980s, SSA did not acquiesce to courts of appeals decisions that differed from agency policy.⁵⁵ SSA described its nonacquiescence policy in its Office of Hearings and Appeals Handbook: “where a district or circuit court’s decision contains interpretations of the law, regulations, or rulings which are inconsistent with the Secretary’s interpretations, the ALJs should not consider such decisions binding on future cases simply because the case is not appealed.”⁵⁶ Critically, SSA’s nonacquiescence policy permitted the agency to engage in both intercircuit and intracircuit nonacquiescence. Throughout the 1980s, the SSA Secretary defended this policy on the grounds of horizontal uniformity, arguing that nonacquiescence allowed the agency to maintain nationally uniform standards:

48. Estreicher, *supra* note 1, at 742.

49. *Id.*; see also Radder, *supra* note 2, at 1243.

50. *Keasler v. United States*, 766 F.2d 1227, 1223–33 (8th Cir. 1985).

51. *Id.* at 1233 (citing *Goodenow v. Comm’r*, 238 F.2d 20, 22 (8th Cir.1956)).

52. *Id.* at 1234.

53. *Id.* at 1233 (citing *Goodenow*, 238 F.2d at 22).

54. Estreicher, *supra* note 1, at 694.

55. *Id.*

56. SOC. SECURITY ADMIN., OFFICE OF HEARINGS AND APPEALS HANDBOOK §1-161.

A policy of nonacquiescence is essential to ensure that the agency follow its statutory mandate to administer the Social Security program in a uniform and consistent manner nationwide. In a program of national scope, it would not be equitable to people to subject their claims to differing standards depending on where they reside.⁵⁷

Fundamentally, SSA maintained that nonacquiescence was not illegal and served to preserve the agency's right to ask the courts of appeals, and possibly the Supreme Court, to overrule adverse decisions.⁵⁸

Conflict over SSA's aggressive policy of nonacquiescence came to a head during the Reagan Administration over disability benefits recipients. Controversy arose when SSA directed its officers to disregard Ninth Circuit rulings requiring proof of a change in medical condition before SSA could terminate recipients' benefits.⁵⁹ In *Lopez v. Heckler*, a California district court granted a preliminary injunction to a class of plaintiffs after they attacked the constitutionality of SSA's nonacquiescence policy on both separation of powers and due process grounds.⁶⁰ The court concluded that "for the Secretary to make the general assertion that a decision of the Court of Appeals is not to be followed because she disagrees with it is to operate outside the law."⁶¹ Further, the court observed that SSA's policy of intracircuit nonacquiescence created intolerable vertical disuniformity among similarly situated plaintiffs within the same circuit:

The policy of nonacquiescence announced by the Secretary creates two standards governing claimants whose disability benefits are terminated as a result of such nonacquiescence. If such a claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced in *Patti* and *Finnegan*. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with respect to the types of individuals here concerned, whose resources, health and prospective longevity are, by definition, relatively limited, such a dual system of law is prejudicial and unfair.⁶²

The following year, the Ninth Circuit affirmed the district court's preliminary injunction and examined SSA's policy, which contained elements of both intercircuit and intracircuit nonacquiescence.⁶³ The Ninth Circuit echoed the lower court's sharp criticism of SSA's policy, soundly denouncing the use of

57. *Social Security Disability Reviews: A Costly Constitutional Crisis* Hearing Before the H. Select Comm. on Aging, 98th Cong., 2d Sess. 105-06 (1984).

58. *Lopez v. Heckler*, 572 F. Supp. 26, 28-29 (C.D. Cal. 1983), *aff'd*, 725 F.2d 1489 (9th Cir. 1984), *vacated* 469 U.S. 1082 (1984).

59. See *Patti v. Schweiker*, 669 F.2d 582, 587 (9th Cir. 1982); see also *Finnegan v. Matthews*, 641 F.2d 1340, 1345-47 (9th Cir. 1981).

60. See *Lopez*, 572 F. Supp. at 28.

61. *Id.* at 30.

62. *Id.*

63. *Lopez v. Heckler*, 725 F.2d 1489, 1510 (9th Cir. 1984).

intracircuit nonacquiescence. Invoking *Marbury v. Madison*,⁶⁴ the Ninth Circuit opined “[t]hat the Secretary, as a member of the executive, is required to apply federal law as interpreted by the federal courts cannot seriously be doubted.”⁶⁵ The Ninth Circuit also rejected SSA’s assertion that its and IRS’s nonacquiescence policies were comparable:

IRS nonacquiescence rulings . . . are not applicable within the circuit that rendered the opinion the IRS does not acquiesce in. That is plainly a material difference. Because conflicts among the circuits are inevitable, the executive clearly cannot be expected always to give nationwide effect to the holdings of a court of appeals. But, far from supporting the Secretary’s argument, the IRS’s nonacquiescence policy recognizes that the holdings of a court of appeals must be given effect within that circuit.⁶⁶

Although both the district court and Ninth Circuit concluded that SSA’s intracircuit nonacquiescence was a per se violation of separation of powers doctrine, the Ninth Circuit’s *Lopez* opinion drew a stark boundary between intracircuit and intercircuit nonacquiescence.⁶⁷ Acknowledging the inevitability of conflicts among judicial circuits, the Ninth Circuit did not claim that intercircuit nonacquiescence was a per se violation of the Constitution.⁶⁸ The Supreme Court granted certiorari, but in the end, *Lopez* was vacated and remanded for reconsideration in light of policy changes made as part of the Social Security Disability Benefits Reform Act of 1984.⁶⁹ Critically, the Supreme Court never issued a ruling on the legality of nonacquiescence.

D. Key Learnings from Nonacquiescence Precedents

As the above examples illustrate, appellate courts have been consistently hostile to justifications for agency nonacquiescence that use a separation of powers rationale to assert agency authority to selectively disregard judicial rulings.⁷⁰ NLRB’s and SSA’s assertions that administrative agencies have authority to pursue their own policies in defiance of adverse rulings were met with harsh censure.⁷¹ For this reason, no policy of intracircuit nonacquiescence

64. *Marbury v. Madison*, 5 U.S. 137 (1803).

65. *See Lopez*, 725 F.2d at 1503.

66. *Id.* at 1503 n.12.

67. *Id.*

68. *See id.*

69. *Heckler v. Lopez*, 469 U.S. 1082, 1082 (1984); *see also* Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

70. *See Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 532 (7th Cir. 1953) (finding that administrative agencies were inherently subordinate to the courts of appeals); *see also Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) (finding that agency nonacquiescence is a clear usurpation of judicial authority, stating, “[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation”).

71. *See Lopez v. Heckler*, 572 F. Supp. 26, 30 (C.D. Cal. 1983) (Finding that SSA’s policy of intracircuit nonacquiescence policy created intolerable vertical disuniformity among similarly situated plaintiffs within the same circuit).

has been met with anything but judicial condemnation from the district and circuit courts.

On the other hand, the circuit courts have been more tolerant of justifications for intercircuit nonacquiescence that are based in pragmatism or a specific interest in horizontal uniformity. Although NLRB's general policy of nonacquiescence was broadly criticized by the circuit courts,⁷² the Ninth Circuit was sympathetic to the pragmatic reality of venue uncertainty, which made it difficult for NLRB to commit to a policy of complete acquiescence to local district and circuit court holdings.⁷³ Similarly, the Eighth Circuit was sympathetic to IRS's need to administer a uniform tax code nationwide. It announced a rule that would tolerate intercircuit nonacquiescence under circumstances where there are "cogent reasons" for declining to apply a particular ruling.⁷⁴ Despite the differences in their treatment of the policy, the courts were united in their characterization of intercircuit nonacquiescence as an exception to the rule that agencies are required to apply federal law as interpreted by the federal courts.

Until now, the legal precedents shaping nonacquiescence doctrine were not decided in the context of environmental agency rulemaking. However, the underlying justifications for nonacquiescence—separation of powers, pragmatism, and uniformity—have long played an important role in environmental regulation. To explore the ways in which these concepts underlie environmental agency decisions and problematize nonacquiescence in the environmental field, I turn now to a discussion of Environmental Federalism.

II. ENVIRONMENTAL FEDERALISM AND NONACQUIESCENCE

The concept of Environmental Federalism provides a useful—albeit imperfect—analogy to historical conflict over agency nonacquiescence and the surrounding debate. While the debate over agency nonacquiescence focuses on the balance of power between the executive and judicial branches, Environmental Federalism concerns the appropriate balance of rulemaking

72. See, e.g., *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Beverly Enter. v. NLRB*, 727 F.2d 591, 592–93 (6th Cir. 1984); *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 357 (6th Cir. 1983); *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382–83 (D.C. Cir. 1983); *PPG Indus., Inc. v. NLRB*, 671 F.2d 817, 823 (4th Cir. 1982); *NLRB v. HMO Int'l/Cal. Med. Grp. Health Plan, Inc.*, 678 F.2d 806, 809 (9th Cir. 1982); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969–70 (3d Cir. 1979); *Fed.-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1252 (5th Cir. 1978); *Coletti's Furniture, Inc. v. NLRB*, 550 F.2d 1292, 1293 (1st Cir. 1977); *NLRB v. Gibson Prod. Co.*, 494 F.2d 762, 766 (5th Cir. 1974); *Morand Bros. Beverage Co.*, 204 F.2d 529, 532 (7th Cir. 1953); *Enerhaul, Inc. v. NLRB*, 710 F.2d 748, 751 (11th Cir. 1983).

73. See *Lopez v. Heckler*, 725 F.2d 1489, 1503 n.12 (9th Cir. 1984) (recognizing that "[b]ecause conflicts among the circuits are inevitable, the executive clearly cannot be expected always to give nationwide effect to the holdings of a court of appeals").

74. See *Keasler v. United States*, 766 F.2d 1227, 1233 (8th Cir. 1985).

authority between local, state, and federal government.⁷⁵ In the context of environmental regulation, federalism asks whether state or federal enforcement of environmental regulations will lead to more efficient outcomes.⁷⁶ This is an extremely complicated question; it spans multiple academic disciplines including economics, sociology, and political science.⁷⁷ In addition to being theoretically and empirically complex, Environmental Federalism has become a politically polarizing topic—stark partisan boundaries materialize as the public interest in stringent regulation is pitted against the political power of special interest groups.⁷⁸ Proponents of centralized enforcement highlight the dangers associated with nonuniform application of environmental standards, arguing that uniform, nationally promulgated rulemaking is necessary to safeguard local, national, and global environmental health.⁷⁹ On the other hand, proponents of decentralized enforcement argue that the most efficient local and national outcomes will result from delegating enforcement power to the states.⁸⁰

This Part shows how arguments in favor of uniform, centralized enforcement of environmental statutes are paralleled by arguments against agency nonacquiescence. Likewise, efficiency-based arguments in favor of decentralized enforcement of environmental statutes find their parallel in agency justifications for nonacquiescence based on pragmatism. The similarities between arguments on both sides of the Environmental Federalism and agency nonacquiescence debates are not coincidence. Rather, these parallels illustrate how agency nonacquiescence has significant, direct impacts on the enforcement of environmental regulations.

A. Arguments for Centralized Enforcement

A principal argument for centralized environmental regulatory enforcement is that it bypasses concerns for a “race to the bottom” (RTB).⁸¹ Proponents of uniform, nationally promulgated environmental regulations claim that the

75. Kirsten H. Engel, *Environmental Federalism A View from the United States*, ENCYCLOPEDIA OF ENVIRONMENTAL LAW: ENVIRONMENTAL DECISIONMAKING 1 (Robert Glickman et al. eds., 2016).

76. *Id.*

77. See Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1336–37 (1985).

78. See Kirsten H. Engel & Scott R. Saleska, “Facts Are Stubborn Things” *An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 CORNELL J. L. & PUB. POL’Y 55, 64 (1998) (“According to the economic theory of regulation, laws tend to respond to the wants of small, cohesive special interest groups, such as industry, at the expense of the wants of the larger, more diffuse public. The public, which is the intended beneficiary of stringent regulation, is often in a weaker political position than industry, which is the primary beneficiary of less regulation”) (citation omitted).

79. See Engel, *supra* note 75, at 5.

80. See Ackerman & Stewart, *supra* note 77, at 1347.

81. David M. Konisky, *Regulatory Competition and Environmental Enforcement Is There a Race to the Bottom?*, 51 AM. J. POL. SCI., 853, 853 (2007).

individual states are primarily concerned with economic development.⁸² They describe RTB as a dynamic whereby states will relax their environmental regulatory enforcement in order to make their economies more attractive to investors, relative to neighboring states.⁸³ Critics of decentralized regulatory enforcement often point to RTB theory to argue that efficient and positive environmental health outcomes cannot be achieved by allowing individual states to be the primary environmental regulatory authorities.⁸⁴ Early studies of state-level economic activity lent some support to arguments in favor of centralized enforcement, finding some evidence that legislatures' party affiliations affect enforcement.⁸⁵ Although no clear consensus has emerged regarding RTB, researchers have emphasized the importance of paying attention to the particular characteristics of specific environmental acts when determining whether decentralized enforcement is advisable.⁸⁶

Proponents of centralized enforcement of environmental statutes also point out that centralization mitigates the risk of interjurisdictional externalities, or, "pollution spillovers." Like RTB, spillovers are related to nonuniform enforcement of environmental statutes between neighboring states.⁸⁷ Spillovers occur "when lax enforcement in one region leads to poor environmental quality in neighboring regions."⁸⁸ Environmental spillovers occur when states free ride off of neighboring states' investments in clean infrastructure and environmental regulatory enforcement. In the context of air pollution, researchers have observed that states have strong incentives to encourage major polluters to locate their operations near the state's downwind borders.⁸⁹ Free riding vis-à-vis air pollution offers states the benefit of economic development divorced from the resulting environmental and health costs.⁹⁰ In 2015, after lengthy litigation⁹¹ and controversy fueled by competing political interests, a federal program⁹² went into effect, which was designed to reduce the amount of air pollution sent to downwind states from power plants in twenty-seven eastern states plus the

82. Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1655 (2012).

83. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 604 (1996).

84. *Id.*

85. See Konisky, *supra* note 81, at 864.

86. See Eric Sjöberg & Jing Xu, *An Empirical Study of US Environmental Federalism: RCRA Enforcement From 1998 to 2011*, 147 ECOLOGICAL ECON. 253, 260 (2018).

87. Hilary Sigman, *Transboundary Spillovers and Decentralization of Environmental Policies*, 50 J. ENVTL. ECON. & MGMT. 82, 83 (2005).

88. Sjöberg & Xu, *supra* note 86, at 253.

89. Melissa Heeke, *Gone with the Wind: Federalism and the Strategic Location of Air Polluters*, AM. J. OF POL. SCI. BLOG (Nov. 11, 2016), available at <https://ajps.org/2016/11/11/federalism-and-the-strategic-location-of-air-polluters/>.

90. *Id.*

91. See *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014).

92. See *Cross-State Air Pollution Rule: Approval and Promulgation of Implementation Plans*, 40 C.F.R. § 52 (2015).

District of Columbia.⁹³ Still, the solution to environmental free riding remains contentious—even among advocates of centralized authority. There is no consensus regarding whether spillover effects could be sufficiently mitigated by federalized environmental policy.⁹⁴ However, it is generally understood that decentralized policy in the presence of interjurisdictional spillovers is inefficient;⁹⁵ centralized environmental regulatory enforcement is better-suited to account for free rider problems.⁹⁶ EPA operating permits, required under CAA Title V for “major” sources of pollution and for a limited number of smaller “area” or “minor” sources, cover a broad range of polluting activities.⁹⁷ Foundational to arguments in favor of centralized enforcement is a belief that it is better to be overinclusive of emissions that might not cross borders than underinclusive, which would risk unmitigated interjurisdictional externalities.

Finally, proponents of centralized environmental regulatory authority are generally dubious of the ability to meet national climate goals when enforcement is left to the states.⁹⁸ Leaders within EPA have corroborated this concern. In her October 2009 message to the House Transportation and Infrastructure Committee, former EPA Administrator Lisa P. Jackson reported that “[m]any states have strong water quality protection programs and take enforcement to assure compliance. But we’ve seen great variability among the states in enforcement performance.”⁹⁹ Concerns about EPA’s ability to oversee successful attainment of national climate goals in the context of decentralized regulatory enforcement were further validated by a 2011 report from the Office of Inspector General.¹⁰⁰ Urging EPA to improve its oversight of state environmental enforcement, the report proclaimed that “state enforcement programs frequently do not meet national goals, and states do not always take necessary enforcement actions.”¹⁰¹ Succinctly summarizing the primary belief

93. See, e.g., David M. Konisky & Neal D. Woods, *Environmental Policy, Federalism, and the Obama Presidency*, 46 PUBLIUS: J. OF FEDERALISM 366, 384–86 (2016).

94. Hilary Sigman, *Transboundary Spillovers and Decentralization of Environmental Policies*, 50 J. ENVTL. ECON. & MGMT., 82, 96 (2005).

95. Harrison Fell & Daniel T. Kaffine, *Can Decentralized Planning Really Achieve First-Best in the Presence of Environmental Spillovers?*, 68 J. OF ENVTL. ECON. & MGMT. 46, 53 (2014).

96. Sjöberg & Xu, *supra* note 86, at 253.

97. EPA, Title V Operating Permits: Who Has to Obtain a Permit?, <https://www.epa.gov/title-v-operating-permits/who-has-obtain-title-v-permit> (last visited Aug. 29, 2019).

98. Engel, *supra* note 75, at 5 (“Seeking the attainment of scale economies is a potent justification for federal environmental regulation. Scientific research is the best example of the benefits that can accrue from centralized administration of environmental law. Rather than asking each of the fifty states to invest in the researching the maximum pollutant levels consistent with healthy aquatic ecosystems, the federal government can invest in this research and disseminate the results to the states.”); see also Konisky, *supra* note 93, at 348.

99. *Hearing Before the H. Comm. on Transp. and Infrastructure* (2009) (testimony of Lisa P. Jackson, Administrator, EPA).

100. DAN ENGELBERG ET AL., EPA OFFICE OF INSPECTOR GENERAL, EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT 6 (Dec. 9, 2011), available at <https://www.epa.gov/sites/production/files/2015-10/documents/20111209-12-p-0113.pdf>.

101. *Id.* at 6.

held by proponents of centralized environmental enforcement, the report asserted that “[n]ational consistency ensures that all Americans live in states that meet minimum environmental standards.”¹⁰² The Office of Inspector General reported that national uniformity “levels the playing field among regulated entities, ensuring that those regulated facilities that fail to comply with the law do not have an unfair economic advantage over their law-abiding competitors.”¹⁰³

B. Arguments for Decentralized Enforcement

On the other side of the debate are proponents of decentralized enforcement of environmental statutes. Scholars, commentators, and stakeholders in the decentralization camp believe that the most efficient outcomes are achieved when local governments have autonomy to enforce environmental statutes. Some critics of centralized enforcement believe that it is a plain violation of “dual sovereignty” doctrine for the federal government to force a state to enforce federal laws or regulations.¹⁰⁴ Many critics of centralized enforcement have put their support behind further development of dynamic “cooperative-federalism” models, which currently dominate the administration of American labor, healthcare, and environmental programs.¹⁰⁵ In cooperative federalism programs, state agencies take primary responsibility for enforcement of federal laws.¹⁰⁶ In recent years, researchers have observed a trend toward this dynamic model.¹⁰⁷ Indeed, in its strategic plan for 2018 through 2022, EPA identified cooperative federalism as the second of three central goals for that time period.¹⁰⁸ The agency plans to work to “[r]ebalance . . . power between Washington and the states” in order to enhance economic growth and promote shared responsibility and accountability.¹⁰⁹ Notably, under EPA’s stated cooperative federalism plan, the federal role in enforcement of environmental statutes will be limited to compliance monitoring:

EPA principally focuses compliance monitoring activities, such as field inspections, electronic reporting, and data analysis tools, for those programs that are not delegated to states and tribes. The Agency provides monitoring, program evaluations, and capacity building to support and complement authorized state, tribal, and local government programs.¹¹⁰

102. *Id.* at 1.

103. *Id.*

104. Alfred R. Light, *The Myth of the Everglades Settlement*, 11 ST. THOMAS L. REV. 55, 60 n.37 (1998).

105. Krotoszynski, *supra* note 82, at 1629–35.

106. *Id.* at 1602.

107. Engel, *supra* note 75, at 7.

108. EPA, WORKING TOGETHER: DRAFT FY 2018-2022 EPA STRATEGIC PLAN 24 (Feb. 2018), available at: <https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf>.

109. *Id.* at 4.

110. *Id.* at 29.

Moreover, advocates for decentralized environmental enforcement typically doubt the extent to which an RTB occurs, arguing that the few empirical studies on the subject have been inconclusive.¹¹¹ Citing the massive complexity of interjurisdictional environmental regulatory competition, some studies have concluded that it is “unclear how strategically U.S. states behave with respect to each other’s environmental regulations.”¹¹² One recent empirical evaluation of state-level enforcement behavior stated, even more strongly, that there is “no evidence that states assuming more enforcement responsibility notably change their enforcement behavior.”¹¹³

The belief that regional governments are able to respond more efficiently and appropriately to local enforcement needs and community preferences is central to arguments for decentralized environmental regulation. Researchers have argued that federal agencies lack essential knowledge about local institutions, businesses, and environmental conditions, and thus cannot efficiently monitor and enforce regulatory compliance.¹¹⁴ Because state-level enforcement efforts can adapt to local needs and preferences through democratic engagement, advocates for decentralization argue that centralized enforcement is likely to respond inappropriately to local preferences.¹¹⁵ Critics of centralized enforcement claim that the federal government is ill-suited to respond to differing compliance costs across regions.¹¹⁶ An economist for the U.S. Census Bureau observed that “[c]ounty-level variation is found to explain 11 to 18 times more of the variation in environmental compliance costs than state-level variation alone, and the range of environmental compliance costs within a state is often large.”¹¹⁷ Further, legal commentators have observed that much innovation in environmental regulatory policy has originated at the state level, including “virtually all innovation in waste volume reduction[.]”¹¹⁸

Moreover, critics of centralized enforcement have cautioned against a “mindless uniformity” which would result in wasted resources.¹¹⁹ Ignoring geographic variation in pollution effects and variations among plants and industries can result in “too much control in some regions, too little in others, and completely missing special problems in still other regions.”¹²⁰ The Fourth

111. Wallace E. Oates, *Environmental Federalism*, RESOURCES (July 20, 2015), available at <http://www.rff.org/blog/2009/environmental-federalism-wallace-e-oates>.

112. Arik Levinson, *Environmental Regulatory Competition: A Status Report and Some New Evidence*, 56 NAT. TAX’N J. 91, 103 (2003).

113. Sjöberg & Xu, *supra* note 86, at 259.

114. Fredrik Carlsson et al., *Do EPA Administrators Recommend Environmental Policies that Citizens Want?*, 87 LAND ECON. 60, 71 (2011).

115. Sjöberg & Xu, *supra* note 86, at 253–54.

116. Randy A. Becker, *On Spatial Heterogeneity in Environmental Compliance Costs*, 87 LAND ECON. 28, 40–42 (2011).

117. *Id.* at 28–29.

118. Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 614 (2001).

119. See Ackerman & Stewart, *supra* note 77, at 1355–56.

120. *Id.* at 1355.

Circuit's review of effluent limitations imposed by the Clean Water Act in *Appalachian Power Company v. EPA* is an oft-cited example of waste resulting from overly-broad, centralized environmental rulemaking.¹²¹ In that case, the Fourth Circuit validated EPA's decision to disregard a polluter's actual impact on water quality when evaluating that polluter's request for a variance from the Clean Water Act's "best practicable control technology" limitations.¹²² Describing the Fourth Circuit's decision as blind to environmental reality, legal commentators argued that it was wasteful and absurd to require the same level of cleanup by all industry polluters "regardless of whether a plant discharges into an ocean or large lake, where the discharges will have little or no effect, or into a pristine river."¹²³ A less centralized system, those authors argued, would allow local governments to "make limited variations in national priorities in the light of their best guesses about the regional realities they confront."¹²⁴

The numerous arguments advanced by legal scholars, researchers, economists, and social scientists regarding the proper allocation of environmental enforcement authority reveal the massive scope and complexity of the Environmental Federalism debate. These arguments, as well as those concerning the need for uniformity in environmental regulation, are directly relevant to EPA's newly codified practice of intercircuit nonacquiescence. Both nonacquiescence and Environmental Federalism implicate specific, well-documented concerns for the promulgation of centrally-enforced, nationally applicable environmental regulations. However, in *NEDACAP II*, the D.C. Circuit engaged in an overly-broad, decontextualized analysis of EPA nonacquiescence, failing to consider the full scope of this complicated issue.

III. NONACQUIESCENCE AND EPA: THE AMENDED REGIONAL CONSISTENCY RULE

A. NEDACAP II *Case Summary*

As shown in Part I, district and circuit courts historically have treated intercircuit agency nonacquiescence as an exception to the rule that agencies are required to apply federal law as interpreted by the federal courts.¹²⁵ In light of the Environmental Federalism debate, it might logically follow that the concerns for uniformity and efficiency unique to the environmental landscape would reinforce careful, case-by-case examination of nonacquiescence. However, in 2018, the D.C. Circuit chose to subordinate the interest in uniformity to the

121. See *Appalachian Power Co. v. EPA*, 671 F.2d 801, 803 (4th Cir. 1982).

122. *Id.* at 808–10.

123. Ackerman & Stewart, *supra* note 77, at 1356.

124. *Id.* at 1357.

125. See *Lopez v. Heckler*, 725 F.2d 1489, 1503 (9th Cir. 1984) (stating "[t]hat the Secretary, as a member of the executive, is required to apply federal law as interpreted by the federal courts cannot seriously be doubted").

interest in pragmatism and legal permissibility.¹²⁶ After EPA amended its own regulations to no longer require strict uniformity in permitting standards, the D.C. Circuit issued a nationally applicable endorsement of intercircuit nonacquiescence—treating it as a feature of our governmental structure and procedure, rather than an exception to it.¹²⁷ Because this line of cases marks a drastic—and I would argue wrong-headed—shift in nonacquiescence jurisprudence, it is worth examining the controversy, arguments, and judicial rulings in detail.

1. *Sixth Circuit's Decision and Summit Directive*

The original controversy arose in 2012 when EPA lost a Sixth Circuit case about the proper method for identifying a “major source” of pollution for CAA permitting purposes.¹²⁸ EPA’s New Source Regulation (NSR) and CAA Title V rules lay out a three-factor test to determine whether multiple *minor* pollutant-emitting sources may be aggregated and considered to be a single *major* source, therefore subject to Title V permitting requirements.¹²⁹ One of those three factors, physical adjacency, was central to EPA’s major source identification procedure.¹³⁰ EPA determined that the physical adjacency factor, rather than referring to mere physical proximity, could be satisfied when multiple minor sources of pollution were so “functionally interrelated” that they could be considered a single major source of pollution.¹³¹ EPA’s functional interrelatedness test was challenged after EPA found that a natural gas plant and its associated wells were all a single major source, since they were so functionally interrelated as to be considered “adjacent.”¹³² Rejecting this characterization of interrelated, the Sixth Circuit held that EPA’s method of aggregating multiple pollutant emitting sources based on functional interrelatedness was “unreasonable and contrary to the plain meaning of the term ‘adjacent.’”¹³³ The Sixth Circuit concluded that, while functional interrelatedness was a permissible factor to consider *along with* physical distance in determining adjacency, it was unreasonable to equate those criteria.¹³⁴

126. See Nat’l Envtl. Dev. Ass’n’s Clean Air Project v. EPA, 891 F.3d 1041, 1044 (D.C. Cir. 2018) (*NEDACAP II*).

127. *Id.*

128. Summit Petrol. Corp. v. EPA, 690 F.3d 733, 744 (6th Cir. 2012).

129. See 40 C.F.R. § 52.21(b)(5)–(6) (2019) (“Stationary source means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant. Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel.”).

130. *Id.*

131. *Summit Petroleum*, 690 F.3d at 735–36.

132. *Id.* at 744.

133. *Id.* at 735.

134. *Id.* at 741.

In response to this decision, in December 2012, the Director of EPA's Office of Air Quality and Standards sent a memorandum (hereinafter the "*Summit Directive*") to the Regional Air Directors of each of the ten EPA regions "to explain the applicability" of the Sixth Circuit's ruling in the other federal districts.¹³⁵ The *Summit Directive* announced EPA's choice not to apply the Sixth Circuit's ruling in other circuits:

[T]he EPA does not intend to change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions. In permitting actions occurring outside of the 6th Circuit, the EPA will continue to make source determinations on a case-by-case basis using the three-factor test in the NSR and title V regulations at 40 CFR 52.21(b)(6)¹³⁶

The *Summit Directive* was an informal—and ultimately impermissible—statement of EPA's intent to engage in intercircuit nonacquiescence by declining to apply elsewhere the Sixth Circuit's rebuke of EPA's permitting procedure.

2. D.C. Circuit Rejection of the *Summit Directive*

Enter the National Environmental Development Association's Clean Air Project (NEDA/CAP), an association of resource extraction and manufacturing companies subject to permitting requirements under the CAA.¹³⁷ In 2014, NEDA/CAP petitioned the D.C. Circuit, asking the court to review the legality of the *Summit Directive*, in *National Environmental Development Association's Clean Air Project v. EPA (NEDACAP I)*.¹³⁸ Petitioners claimed that by instructing Regional Air Directors to continue using "functional interrelatedness" to aggregate minor sources outside of the Sixth Circuit, the *Summit Directive* caused relative harm to NEDA/CAP members outside of that regional jurisdiction.¹³⁹ The lack of uniformity was intolerable, the Petitioner argued, since facilities outside of the Sixth Circuit were placed at a competitive disadvantage, facing additional permitting requirements, ambiguity, and delay.¹⁴⁰ Among other objections, EPA responded that the *Summit Directive* could not have caused injury since it did not change the regulatory burdens imposed on sources outside of the Sixth Circuit.¹⁴¹

135. EPA, Memorandum: Applicability of the Summit Decision to EPA Title V and NSR Source Determinations (Dec. 21, 2012), available at: <https://www.epa.gov/sites/production/files/2015-08/documents/inter2012.pdf>.

136. *Id.*

137. NEDA/CAP, available at: <http://www.nedacap.org/nedacap-issues/> (last visited Sept. 11, 2019) ("NEDA/CAP is a multi-sector manufacturing coalition of companies that operate facilities across the United States. NEDA/CAP was created to address Clean Air Act issues facing all types of manufactures including permitting, compliance and air quality planning requirements.")

138. Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA, 752 F.3d 999, 1002–03 (D.C. Cir. 2014) (*NEDACAP I*).

139. Final Brief for Petitioner at 17–18, *NEDACAP I*, 725 F.3d 999 (D.C. Cir. 2014) (No. 13-1035).

140. *Id.* at 20.

141. *NEDACAP I*, 752 F.3d at 1006.

However, the D.C. Circuit found that EPA's arguments ignored the reality that, even though the regulatory burdens remained unchanged outside of the Sixth Circuit, the *Summit* Directive undeniably created an imbalance in obligations and costs between NEDA/CAP members inside and outside the Sixth Circuit.¹⁴² The court reasoned that EPA's final action adopting a non-uniform enforcement regime violated the plain language of EPA's own Regional Consistency Regulations, which, at the time, stated that it was EPA's policy to:

(a) Assure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the [CAA]; [and] (b) Provide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act¹⁴³

Because NEDA/CAP sought review of an agency action (an administrative delegation via the *Summit* Directive) taken in contradiction of its own regulations, the D.C. Circuit applied the Administrative Procedure Act's "arbitrary and capricious" standard of review and vacated the *Summit* Directive.¹⁴⁴ In doing so, the D.C. Circuit noted that there were several other alternatives available to EPA that would not violate the plain language of the Regional Consistency Regulations or introduce a competitive imbalance.¹⁴⁵ Most notably, the D.C. Circuit pointed out that EPA could simply revise its own uniformity regulations "to account for regional variances created by a judicial decision or circuit splits."¹⁴⁶ In August 2016, EPA did exactly that.

3. EPA's Amended Nonacquiescence Policy and D.C. Circuit Approval

Pursuant to the D.C. Circuit's suggestion in *NEDACAP I*, EPA initiated rulemaking to amend the former Regional Consistency Regulations to allow the agency to engage in intercircuit nonacquiescence. The Amended Regional Consistency Regulations currently state that:

(d) . . . only the decisions of the U.S. Supreme Court and decisions of the U.S. Court of Appeals for the D.C. Circuit Court that arise from challenges to "nationally applicable regulations . . . or final action," as discussed in Clean Air Act section 307(b) (42 U.S.C. § 7607(b)), shall apply uniformly¹⁴⁷

The amended regional consistency regulations boldly codified intercircuit nonacquiescence by stating that EPA would only uniformly apply judicial

142. *Id.*

143. 40 C.F.R. §56.3(a) – (b).

144. *See NEDACAPI*, 752 F.3d at 1009–11.

145. *Id.* at 1010.

146. *Id.*

147. 40 C.F.R. § 56.3(d).

decisions that “arise from challenges to ‘nationally applicable regulations . . . or final action’”¹⁴⁸

Once again, NEDA/CAP petitioned the D.C. Circuit for review, this time challenging EPA’s amended regulations in *NEDACAP II*.¹⁴⁹ Petitioners claimed that under the plain, unambiguous statutory language of the CAA’s uniformity obligations,¹⁵⁰ EPA is required to “assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing [the Act].” Because the amended regulations plainly contradicted this unambiguous language in the CAA, Petitioners argued, EPA’s amended regulations were not entitled to *Chevron* deference.¹⁵¹

However, the D.C. Circuit rejected this argument and drew a sharp distinction between “delegation-created” inconsistencies and “judicially-created” inconsistencies.¹⁵² The CAA’s uniformity obligations, the court explained, do not apply to judicially created inconsistencies—like the one created by EPA’s intercircuit nonacquiescence to the ruling in *Summit Petroleum*.¹⁵³ Rather, the uniformity obligations apply only to regulations governing delegation of the EPA Administrator’s powers.¹⁵⁴ Because EPA’s amended regional consistency regulations have nothing to do with such delegations and “merely acknowledge what the law requires, i.e., obedience to controlling court decisions,” the uniformity obligations in Section 7601(a)(2) do not apply.¹⁵⁵

Further, the court pointed out that the CAA’s judicial review provision was not altogether unambiguous since it clearly permits judicially created inconsistencies for “locally or regionally applicable” agency actions.¹⁵⁶ Mirroring EPA’s amended regulations, the CAA assigns the D.C. Circuit jurisdiction to hear petitions for review of “any . . . nationally applicable regulations promulgated, or final agency action taken” under the Act, as well as any other final agency action that is, *inter alia*, “based on a determination of nationwide scope or effect.”¹⁵⁷ However, importantly, “the [CAA] assigns all other petitions for review—including most challenges to ‘any . . . final action . . . which is locally or regionally applicable’—to ‘the United States Court of

148. *See id.*

149. *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 891 F.3d 1041, 1043 (D.C. Cir. 2018) (*NEDACAP II*).

150. 42 U.S.C. § 7601(a)(2)(A).

151. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 864 (1984). The Supreme Court held that if a statute is silent or ambiguous with respect to a specific issue, the next question for a reviewing court is whether the agency’s action was based on a “permissible construction” of the statute. *Id.* at 843. If so, considerable weight is to be accorded to an agency’s construction of a statutory scheme. *Id.* at 843–44.

152. *NEDACAP II*, 891 F.3d at 1048.

153. *Id.* at 1046.

154. *Id.* at 1049.

155. *Id.* at 1050.

156. *Id.* at 1049; 42 U.S.C. § 7607(b)(1).

157. *NEDACAP II*, 891 F.3d at 1044; 42 U.S.C. § 7607(b)(1).

Appeals for the appropriate circuit.”¹⁵⁸ The court explained that, inevitably, this statutory scheme would result in intercircuit conflicts for local and regional EPA policies.¹⁵⁹

The D.C. Circuit concluded that EPA’s amended regulations were a permissible construction of the CAA and a reasonable way to address the judicially-created, intercircuit inconsistencies permitted by this statutory scheme.¹⁶⁰ Critically, the D.C. Circuit pointed out that the amended regulations did not give the agency the authority to “defy a controlling federal court decision . . . within that court’s jurisdiction”—that would be intolerable intracircuit nonacquiescence.¹⁶¹ However, the D.C. Circuit fully endorsed EPA’s newly codified policy of intercircuit nonacquiescence, describing the amended regulations as “permissible and sensible solutions to issues emanating from intercircuit conflicts and agency nonacquiescence.”¹⁶²

B. Arguments Advanced by The NEDACAP II Parties

Historically, in the context of intercircuit nonacquiescence, circuit courts have been responsive to arguments based on pragmatism and legal permissibility as well as to arguments based on specific interests in horizontal uniformity.¹⁶³ However, in siding with EPA in *NEDACAP II*, the D.C. Circuit chose to subordinate arguments in favor of uniform rulemaking—instead elevating arguments which emphasized legal permissibility and the pragmatic difficulty of administering a nationally applicable regulatory statute. In issuing its broad endorsement of EPA’s policy of intercircuit nonacquiescence, the D.C. Circuit reduced an immensely complicated issue to a question of mere legal permissibility. To fully understand the court’s holding, it is helpful to take a step back to examine the arguments advanced by the parties, public comments, and legal commentators.

1. EPA’s Arguments in Favor of Nonacquiescence

EPA advanced multiple arguments in support of its policy of intercircuit nonacquiescence, newly codified in the Amended Regional Consistency Regulations.¹⁶⁴ Basing its justification for the policy in concerns regarding

158. *NEDACAP II*, 891 F.3d at 1044–45; 42 U.S.C. § 7607(b)(1).

159. *NEDACAP II*, 891 F.3d at 1049–50.

160. *Id.* at 1051.

161. *Id.* at 1048.

162. *Id.* at 1045.

163. See *Lopez v. Heckler*, 725 F.2d 1489, 1503 n.12 (9th Cir. 1984) (recognizing that “[b]ecause conflicts among the circuits are inevitable, the executive clearly cannot be expected always to give nationwide effect to the holdings of a court of appeals”); see also *Keasler v. United States*, 766 F.2d 1227, 1233 (8th Cir. 1985) (finding that intercircuit nonacquiescence is tolerable under circumstances where there are “cogent reasons” for declining to apply a particular ruling).

164. 40 C.F.R. § 56.3(d).

pragmatism and strict legal permissibility, EPA ultimately persuaded the D.C. Circuit and continues to rely on these arguments today.

On its public website, EPA describes the revision to its Regional Consistency regulations conservatively, as creating a “narrow procedural exception . . . to apply where Federal court decisions concerning the CAA have regional or local applicability.”¹⁶⁵ Emphasizing the pragmatic value of the new policy, EPA explains that nonacquiescence gives it the flexibility needed to implement CAA programs on a national scale, and increased agency discretion will result in locally tailored regulatory burden.¹⁶⁶ EPA also claims that the new policy will contribute to judicial efficiency, minimizing delay in implementing court rulings by “eliminating the need for several lengthy, narrow rulemakings or review of a lower court’s decision by the U.S. Supreme Court.”¹⁶⁷ Further, EPA claims that the proposed revisions “will help to foster overall fairness and predictability regarding the scope and impact of judicial decisions under the CAA.”¹⁶⁸

Finally, EPA’s responses to public comments from interested parties reveal the fundamental justification for its new policy of intercircuit nonacquiescence. EPA describes intercircuit nonacquiescence as “consistent with general principles of common law, the judicial review provisions of the CAA, and CAA section 301(a)(2).”¹⁶⁹ This broad justification for the rule change mirrors the D.C. Circuit’s analysis, focusing on the legal permissibility of nonacquiescence, rather than its advisability in the context of environmental regulation.

2. NEDACAP II Arguments Opposing Nonacquiescence

During litigation and in public comments on the Amended Regional Consistency Regulations, Petitioners and various interested industry groups presented multiple arguments against EPA nonacquiescence. Whereas EPA defended its new policy using arguments based on pragmatism and legal permissibility, the arguments against nonacquiescence were primarily grounded in a desire for fundamental fairness and horizontal uniformity. In their opening brief in *NEDACAP II*, Petitioners argued that the plain meaning of the CAA unambiguously requires EPA to “issue regulations that ‘assure fairness and uniformity’ in how EPA regions administer any delegated authority under the CAA.”¹⁷⁰ Petitioners had multiple reasons for urging the D.C. Circuit to require EPA to maintain uniformity in CAA permitting requirements.

165. See EPA, Fact Sheet for Amendments to Regional Consistency Regulations (July 21, 2016), available at <https://www.epa.gov/title-v-operating-permits/fact-sheet-amendments-regional-consistency-regulations-final-rule>.

166. See *id.*

167. Amendments to Regional Consistency Regulations, 80 Fed. Reg. 50253 (Aug. 19, 2015).

168. *Id.* at 50258.

169. *Id.* at 50250–01.

170. Petitioners’ Opening Brief at 18, Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA, 891 F.3d 1041, 1044 (D.C. Cir. 2018) (No. 16-1345).

First, Petitioners renewed an argument that had influenced the D.C. Circuit in *NEDACAPI*—lack of uniformity creates a regional discrepancy in obligations and introduces an untenable competitive imbalance. Petitioners maintained that the costly, time-consuming permitting process should be administered uniformly in order to avoid placing companies in differing competitive positions depending on where they are located.¹⁷¹ Second, Petitioners argued that it was unreasonable for the D.C. Circuit to allow agency nonacquiescence without any “guiding criteria on what kinds of inconsistencies are allowed and for how long.”¹⁷² This uncertainty, they claimed, created complex regulatory obstacles to future development for companies operating in multiple circuits.¹⁷³ Finally, Petitioners argued that a policy of nonacquiescence directly contradicts the principles of “certainty, predictability, and fairness” espoused by the original Regional Consistency Regulations.¹⁷⁴ Summarizing their argument, Petitioners concluded “[u]npredictability is the hallmark of an arbitrary regulation.”¹⁷⁵

3. Arguments from Public and Legal Commentators

During the public comment period for the Amended Regional Consistency Regulations, representatives of various industry groups also expressed distaste for nonacquiescence. In a comment, the American Petroleum Institute (API) decried EPA’s support of “regulations that would encourage, and codify, inconsistencies in national policies.”¹⁷⁶ Echoing Petitioners’ concern for competitive balance and fundamental fairness, the API comment attacked EPA’s assertion that statutory silence regarding intercircuit nonacquiescence meant the policy was legally permissible.¹⁷⁷ It also took issue with EPA’s claim that the proposed revisions would foster “predictability regarding the scope and impact of judicial decisions under the CAA.”¹⁷⁸ The API argued that the CAA requires consistency, not predictability. However worthy it might be to promote predictability, that goal cannot displace the express legal obligation of consistency.¹⁷⁹

The Amended Regional Consistency Regulations drew criticism from legal commentators and legal news sources as well. In an article summarizing industry opposition to EPA nonacquiescence, legal experts criticized EPA’s desire to exercise discretion:

171. *Id.* at 14.

172. *Id.* at 12.

173. *Id.* at 13.

174. *Id.* at 37.

175. *Id.* at 39.

176. Comment Letter from API & INGAA to EPA (Nov. 2, 2015), Docket ID No. EPA-HQ-OAR-2014-0616.

177. *Id.* at 5–6.

178. *Id.*

179. *Id.* at 7.

Finally, the EPA argues the revisions will allow it to exercise its discretion—the agency can always adopt new national policy in response to particularly persuasive judicial opinions addressing challenges to ‘locally or regionally applicable’ rules or actions. This last point is inconsistent with the principle of fairness.¹⁸⁰

Unmoved by EPA’s various justifications for its policy of intercircuit nonacquiescence, the authors asserted that the stronger argument was that “the final rule is unfair,” and that it “creates an unequal playing field and only benefits EPA.”¹⁸¹

The following Part offers a critical analysis of the D.C. Circuit’s decision to issue a nationally applicable endorsement of agency nonacquiescence in *NEDACAP II*. It argues that judicial review of administrative rulemaking should contemplate whether the action should be taken, not just if it legally can be. This nuanced, context-specific approach is ideal for environmental regulatory decision making.

IV. CRITICAL ANALYSIS OF THE NEW JUDICIAL STANCE ON AGENCY NONACQUIESCENCE

In this Part, I argue that the D.C. Circuit’s analysis in *NEDACAP II* was short-sighted and overly broad. The court’s blanket endorsement of agency nonacquiescence was a massive departure from decades of appellate jurisprudence concerning the practice. Moreover, the D.C. Circuit used general justifications, based on the theoretical benefits of intercircuit dialogue, to override context-specific concerns for horizontal uniformity in environmental regulatory obligations. Perhaps most troubling, the *NEDACAP II* court failed to assess the significance of agency nonacquiescence within the context of the ongoing—and immensely complex—Environmental Federalism debate. Finally, I conclude that a wiser analysis of agency nonacquiescence would be context-specific, considering not only mere legal permissibility, but advisability as well.

A. *The NECADAP II Holding Marks a Drastic Departure from Nonacquiescence Precedent*

After EPA amended its regulations to no longer require strict uniformity for permitting standards, the D.C. Circuit ignored historical precedent by issuing a nationally applicable endorsement of intercircuit nonacquiescence. Both the Seventh and Third Circuits have issued harsh denunciations of the practice. The Seventh Circuit was adamant that administrative agencies are “inferior tribunal[s],” inherently subordinate to circuit courts and subject to direct judicial review like the lower district courts.¹⁸² The Third Circuit’s rebuke of agency

180. Richard Alonso, *EPA’s Regional Consistency Regs Tilt the Playing Field*, LAW360 (Oct. 28, 2016), <https://www.law360.com/articles/855702/epa-s-regional-consistency-regs-tilt-the-playing-field>.

181. *Id.*

182. *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 532 (7th Cir. 1953).

nonacquiescence was similarly scathing, describing it as a clear usurpation of judicial authority.¹⁸³ Neither court acknowledged a meaningful difference between intracircuit and intercourt nonacquiescence—both were outside the law and neither was justifiable.

Later, other circuit courts took more moderate stances on the issue, but none went as far as the D.C. Circuit. The Ninth Circuit's *Lopez* opinion acknowledged a functional difference between intracircuit and intercourt nonacquiescence, conceding that intercourt nonacquiescence was not a per se violation of the Constitution.¹⁸⁴ Importantly, the Ninth Circuit's decision acknowledged that because conflicts between circuits are inevitable, agencies cannot be expected to immediately give nationwide effect to appellate court holdings.¹⁸⁵ Although this footnoted observation was certainly permissive of agency nonacquiescence, it is a far cry from the blanket endorsement issued by the D.C. Circuit in *NEDACAP II*. The Ninth Circuit ultimately issued no ruling on the propriety of intercourt nonacquiescence as a general agency practice.

The next year, the Eighth Circuit went one step further, acknowledging that intercourt nonacquiescence could be a reasonable practice in certain circumstances.¹⁸⁶ Specifically, the Eighth Circuit opined that decisions of other circuits were to be followed unless those decisions were “demonstrably erroneous or there appear cogent reasons for rejecting them.”¹⁸⁷ Critically, the Eighth Circuit's decision still characterized agency nonacquiescence as a narrow exception given the vital importance of horizontal uniformity in the administration of tax code.¹⁸⁸ The D.C. Circuit's characterization of agency nonacquiescence as a feature of our judicial structure was a stark departure from district and circuit courts' consistent characterization of intercourt agency nonacquiescence as a narrow exception to the rule that agencies are required to apply federal law as interpreted by the federal courts.¹⁸⁹ Sharp departures from historical precedent are not necessarily inadvisable, but they smack of arbitrariness when divorced from thorough, context-specific analysis of impacts and likely consequences.

B. The NEDACAP II Court Used Justifications Based on Theoretical Benefits of Intercircuit Dialogue to Override Specific Concerns for Horizontal Uniformity

Despite forceful arguments based on a specific interest in horizontal uniformity, the D.C. Circuit chose to side with EPA's claim that nonacquiescence was legally permissible and, in fact, beneficial to the Judicial

183. *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979).

184. *See Lopez v. Heckler*, 725 F.2d 1489, 1503 n.12 (9th Cir. 1984).

185. *Id.*

186. *Keasler v. United States*, 766 F.2d 1227, 1228 (8th Cir. 1985).

187. *Id.*

188. *See id.* at 1233.

189. *See Lopez*, 725 F.2d at 1510.

Branch. The D.C. Circuit believed that the multiple benefits of intercourt dialogue justified its broad endorsement of agency nonacquiescence.

Notably, the D.C. Circuit rejected the claim—made by the Petitioners, industry groups, and legal experts—that intercourt nonacquiescence is inherently bad:

Petitioners' arguments seem to imply that EPA's construction of § 7601(a) cannot be credited because intercourt conflicts are inherently bad and, therefore, we should not assume that Congress meant to enact such a statutory scheme. On this point, it is sufficient to say that Petitioners' views on the values of intercourt conflicts are shortsighted. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679, 735–36 (1989) (contending that “[g]iven the lack of intercourt stare decisis, and the reasons underlying our system of intercourt dialogue, an agency's ability to engage in intercourt nonacquiescence should not be constrained”).¹⁹⁰

Referencing the multiple “values of intercourt conflicts,” the Court departed from the circuit courts' characterization of nonacquiescence as a narrow exception, permissible only under particularized circumstances.¹⁹¹

Here, we see that a reliance on the four general benefits of intercourt dialogue, described by Estreicher and Revesz and referenced in this Note's introduction, is at the heart of the D.C. Circuit's endorsement of EPA nonacquiescence. The authors argued that “[g]iven the lack of intercourt stare decisis, and the reasons underlying our system of intercourt dialogue, an agency's ability to engage in intercourt nonacquiescence should not be constrained.”¹⁹² The D.C. Circuit leaned heavily on this argument to support its finding that EPA intercourt nonacquiescence reasonably filled the statutory gaps in the CAA and was thus entitled to deference.¹⁹³

Ultimately, it was misguided and short-sighted for the D.C. Circuit to use the benefits of intercourt dialogue to justify its decision to ignore concerns about horizontal uniformity. None of the four general benefits do anything to resolve the specific concerns raised by industry groups and legal commentators after EPA amended its regional consistency regulations. Intercourt dialogue cannot resolve the competitive imbalance and unpredictability caused by a discrepancy in permitting obligations between judicial regions. Critics of agency nonacquiescence during *NEDACAP II* were understandably concerned by the complex regulatory obstacles created by EPA's new policy. Their concerns about future development for companies with holdings in multiple circuits will persist and are unlikely to be assuaged by the D.C. Circuit's references to the general, theoretical benefits of intercourt dialogue.

190. *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1049 (D.C. Cir. 2018) (*NEDACAP II*).

191. *See id.*

192. Estreicher, *supra* note 1, at 736–37.

193. *NEDACAP II*, 891 F.3d at 1050.

C. *The NEDACAP II Court Wrongfully Ignored Environmental Federalism Concerns When Articulating its Nonacquiescence Position*

Failing to acknowledge or analyze the significance of EPA nonacquiescence within the context of an ongoing, contentious debate over centralized versus decentralized environmental regulatory enforcement was a major analytical oversight.

Petitioners' interest in the uniform enforcement of CAA permitting requirements was based on three specific concerns. First, industry groups and legal commentators described the competitive imbalance likely to result from nonuniform regulatory standards.¹⁹⁴ Petitioners were concerned that plants located in regions with more stringent Title V permitting requirements would suffer.¹⁹⁵ This argument mirrors the RTB arguments advanced by proponents of centralized enforcement of environmental regulations.¹⁹⁶ Because both industry groups and legal commentators have expressed forceful concern for the economic consequences of nonuniform environmental regulations, scholarship surrounding RTB is salient to the issue of agency nonacquiescence. New information about the extent to which RTB occurs continues to emerge.¹⁹⁷ Although there is no consensus on the RTB argument's legitimacy, researchers have emphasized the importance of considering the particular characteristics of specific environmental acts when determining whether nonuniform enforcement is advisable.¹⁹⁸ In its ruling, the D.C. Circuit engaged in no analysis of how agency nonacquiescence in the context of the CAA may be distinct from nonacquiescence in the context of other statutes.

Petitioners also argued that a lack of uniformity directly contradicted the principles of "certainty, predictability, and fairness" espoused by EPA's original Regional Consistency Regulations.¹⁹⁹ Industry groups were concerned by the increased difficulty of regulatory compliance which would result from allowing EPA discretion to selectively enforce circuit court opinions about permitting requirements.²⁰⁰ Petitioners' claim that nonacquiescence was unreasonable public policy was based on a belief that "[u]npredictability is the hallmark of an arbitrary regulation."²⁰¹

This concern echoes arguments advanced by proponents of centralized enforcement of environmental regulations who have argued that consistent, predictable regulations are essential to successful attainment of national climate goals. Disregarding these concerns as well, the D.C. Circuit made no mention of the continued underperformance of state environmental enforcement programs,

194. Final Brief for Petitioner in *NEDACAP I*, *supra* note 139, at 20.

195. *Id.*

196. See Konisky, *supra* note 81, at 868–69.

197. See *id.* at 864.

198. See Sjöberg & Xu, *supra* note 86, at 260.

199. Final Brief for Petitioner in *NEDACAP I*, *supra* note 139, at 37.

200. *Id.* at 39.

201. *Id.*

despite well-documented and ongoing noncompliance. Instead, the court opted to grant EPA more discretion divorced from any analysis of current issues with EPA oversight of state environmental enforcement actions.

Finally, Petitioners and legal commentators argued that EPA's policy of discretionary intercircuit nonacquiescence offended fundamental principles of fairness.²⁰² Critics were unmoved by EPA's justifications for its policy, claiming that the Amended Regional Consistency Regulations are fundamentally unfair.²⁰³ Legal commentators argued that permitting EPA to selectively not acquiesce to adverse circuit court rulings "creates an unequal playing field and only benefits the EPA."²⁰⁴

These concerns for fairness also find their analogue in arguments in favor of centralized, uniform enforcement of environmental regulations. The Office of Inspector General reported that national uniformity "levels the playing field among regulated entities, ensuring that those regulated facilities that fail to comply with the law do not have an unfair economic advantage over their law-abiding competitors."²⁰⁵ Echoing the Petitioners' concern for fundamental fairness, the report also asserted that "[n]ational consistency ensures that all Americans live in states that meet minimum environmental standards."²⁰⁶

By using general, decontextualized justifications for the practice of agency nonacquiescence to support its ruling, the D.C. Circuit overlooked the complicated reality of nonacquiescence in the context of EPA enforcement of environmental statutes.

D. A Context-Specific Inquiry into Legal Permissibility and Advisability Would Have Been a More Reasonable Stance

The D.C. Circuit's holding rested heavily on the broad legal permissibility of the practice given the structure of our federal court system and the multiple benefits of intercircuit dialogue. However, in the specific context of EPA enforcement of the CAA, the D.C. Circuit's analysis does little to resolve the ongoing debate surrounding the need for horizontal uniformity in environmental rulemaking. A more responsible, nuanced jurisprudence would be context-specific—considering not only the legal permissibility of an agency practice, but its advisability.

The D.C. Circuit's overly broad analysis of EPA nonacquiescence fell short of the case-specific, contextualized analysis used by previous courts. The Eighth Circuit determined that agency nonacquiescence was acceptable only after a context-specific analysis during which the agency demonstrates there is a good reason for the practice. This type of contextualized analysis contrasts starkly with

202. See Petitioners' Opening Brief in *NEDACAP II*, *supra* note 170, at 18.

203. *Id.*

204. Alonso, *supra* note 180.

205. See ENGELBERG ET AL., *supra* note 100, at 1.

206. *Id.*

the D.C. Circuit's decision in *NEDACAP II*. The D.C. Circuit disregarded particularized concerns for horizontal uniformity, instead issuing a broad endorsement of agency nonacquiescence. In *NEDACAP I*, the D.C. Circuit previewed its preference for arguments based on judicial efficiency and legal permissibility over arguments based on specific concerns for horizontal uniformity.²⁰⁷ In its ruling the court acknowledged Petitioners' claim that EPA nonacquiescence to the Sixth Circuit's ruling in *Summit Petroleum*²⁰⁸ could create an untenable competitive imbalance.²⁰⁹ However, it is important to note that the D.C. Circuit's holding in that case was based on the statutory impermissibility of EPA nonacquiescence rather than on any conclusion regarding the substantive advisability of the practice. The D.C. Circuit held that it was impermissible for EPA to "ignore the plain language of its own regulations" and advised the agency to amend its own Regional Consistency statute to resolve the conflict.²¹⁰

In *NEDACAP II*, after EPA amended its own regulations pursuant to the D.C. Circuit's suggestion, the court issued its controversial but predictable endorsement of intercircuit nonacquiescence. Focusing on the legal permissibility of agency nonacquiescence rather than its contextual advisability, the D.C. Circuit affirmed that EPA's amended regulations were "permissible under the statute" and found that Petitioners' arguments offered "no good reason to compel a different approach."²¹¹ This decision reduced an immensely complicated issue—one which implicates the ongoing, multidisciplinary Environmental Federalism debate—to a question of mere legal permissibility.

As legal scholars have observed, "[t]he propriety of utilizing nonacquiescence varies with the differing nature of each agency and the nonacquiescence policy the agency employs."²¹² The D.C. Circuit was unwise to depart so drastically from previous courts' treatment of intercircuit nonacquiescence without considering what it would mean for EPA, specifically, to engage in that practice amidst ongoing debate about the administration of environmental regulations. In the future, when addressing broad questions of administrative policy, it would be prudent for the D.C. Circuit to take cues from both the Eighth and Ninth Circuits. The D.C. Circuit should place the burden on the enforcing agency to show cogent reasons for deviating from a uniform national standard, rather than issuing a "blank check" to disregard any adverse circuit court holding.

207. See Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA, 752 F.3d 999, 1003 (D.C. Cir. 2014) (*NEDACAP I*).

208. See *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 744 (6th Cir. 2012).

209. *NEDACAP I*, 752 F.3d at 1007.

210. *Id.* at 1011.

211. Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA, 891 F.3d 1041, 1052 (D.C. Cir. 2018) (*NEDACAP II*).

212. Radder, *supra* note 2, at 1235.

CONCLUSION

At the local and regional scales, as well as at the global scale, the distributional consequences of air pollution accrue disproportionately to marginalized communities. As a function of their limited political agency, low-income communities of color continue to face increased exposure and health risk relative to other sociodemographic population subgroups. Attainment of climate justice through effective public policy requires nuanced analysis and collaborative effort by each branch of government.

The D.C. Circuit's analysis in *NEDACAP II* falls short of the nuance necessary to effectively address an issue as complex as environmental regulation in the face of environmental challenges like climate change. Our ability to meaningfully respond to local environmental challenges, particularly in the context of global climate change, relies on interdisciplinary, collaborative policy efforts. These efforts must ultimately be guided and supported by responsible, context-specific jurisprudence.

In addition to the ongoing debate over whether environmental regulations should be uniform and centrally-enforced, a more thorough analysis could have considered a number of related and salient issues. The D.C. Circuit could have examined the propriety of permitting EPA to promulgate different environmental standards in different regional circuits, given the fact that circuit boundaries do not follow rational geographic boundaries. The D.C. Circuit could also have discussed the likely political consequences of endorsing such a broad exercise of agency discretion, given the current executive administration's deregulatory stance and explicit disinterest in pursuing local, national, and international climate health goals.

Ultimately, as humanity faces the existential crisis of climate change, an argument in favor of nuanced jurisprudence to support equitable public policy is an argument in favor of the continued existence of the vast, diverse, and infinitely adaptable human organism.