The Tethered President: Consistency and Contingency in Administrative Law

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Abstract

The law governing administrative agency policy change and checking unjustified inconsistency is rooted in a web of intertwined doctrine. The Supreme Court’s 2016 opinion in Encino Motorcars modestly recast that doctrine to emphasize that the agency pursuing a change cannot leave “unexplained inconsistency” or neglect to address past relevant “underlying facts,” but reaffirmed its central stable precepts. Nonetheless, radically different views about broad, unaccountable, and rapid agency power to make policy change have been articulated by current Supreme Court Justice Neil Gorsuch, when on the appellate bench, and agencies pursuing deregulatory policy shifts under the leadership of President Donald J. Trump. This article analyzes the mutually reinforcing strands of this body of law, shows the errors underpinning these policy change power claims, and explains how the “contingencies” underlying an initial policy action must always be engaged by a later advocate of policy change. Statutory language constrains while usually leaving room for change, but facts and past agency reasoning unavoidably must be engaged to surmount the sturdy core requirements of consistency doctrine. Recent efforts to overcome or recast consistency doctrine seek greater room for politics and presidential influence and downplay agency obligations to provide rational explanation and engage with regulatory contingencies. Due to the balanced interests protected by consistency doctrine, this article argues that such a doctrinal reworking is unlikely and would be unwise.

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Introduction

Indictments of the administrative state vary, but one strain—notably voiced in a pre-Supreme Court opinion of Justice Neil Gorsuch—is that under existing doctrine agencies can abruptly shift policies and even act on “regulatory whim.” Similar concerns about agency policy inconsistency have also been raised by regulatory reform advocates and others troubled by deference to agencies under the influential Chevron case. But not all analysts of agency latitude for change condemn it. New presidential administrations, with the overtly deregulatory administration of President Donald J. Trump being a particularly salient example, at times embrace this alleged power, claiming broad presidential and agency power to reverse agency policies and even direct agency adjudicatory outcomes.

This article unpacks different conceptions and doctrines framing agency power to change policy and the role of consistency-linked doctrine. Under current doctrinal frameworks, these recent claims of agency latitude for abrupt and politicized policy change are in error. Agencies and presidents remain tethered by statutory delegations’ terms, legal doctrine, and past legal actions, but such tethering implies restraint and limitations, not frozen regulation. Presidents can request agency policy reconsideration and agencies usually retain

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2 Justice Gorsuch’s views are reviewed infra at Part I.b.
4 The extent of presidential authority over agencies remains the subject of scholarly ferment. Compare Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 666 (1994) (arguing for expansive presidential control); with Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001) (arguing that presidential regulatory authority should be presumed to be conferred by statute unless explicitly stated otherwise); with Kevin M. Stack, The President’s Statutory Power to Administer the Laws, 106 Colum. L. Rev. 263 (2006) (arguing courts and presidents should respect different congressional choices about delegation to the president versus to an agency); with Peter L. Strauss, Presidential Rulemaking, 72 CHI. KENT L. REV. 965 (1997) (distinguishing among modes of political control and conceptions of discretion with emphasis on powers delegated to agencies by Congress and Constitution’s specified means of presidential control); see also Robert V. Percival, Who's in Charge - Does the President Have Directive Authority over Agency Regulatiry Decisions, 79 Fordham L. Rev. 2487, 2540 (2011) (analyzing this issue both historically and through presidential and agency interactions and revealed views about such power).
5 By “agency policy change,” this article refers to the setting where statutory language remains stable, but an agency changes some regulatory policy previously set forth by the agency. A mere change in stringency, for example, is not a policy change. The forms of agency policy change can be many, but usually involve a change in approach to regulating a risk or a changed claim about the nature of an agency’s power and linked change in regulatory requirements. Such policy changes can be substantially rooted in statutory language, or in empirical observations, or a mix of the two. Policy change examples and linked cases are reviewed in Parts I and II.
room to make policy adjustments. Nonetheless, hurdles exist and can be substantial even though policy changes are not subject to a heightened standard of judicial review. Changes cannot be unjustified, purely political, or unacknowledged.

Claims of broad agency policy change power tend to exaggerate the freedom granted by statutory language and the often applicable deferential *Chevron* judicial review framework. The president’s power to precipitate change also tends to be exaggerated or advocated without attention to how the permissible degree of influence varies in diverse settings. Broad claims of policy change power also tend to downplay the regulatory centrality of science, data and other empirical observations and predictions about the world, as well as linked agency explanations. Agency policy is rarely if ever generated due to statutory language alone; later leadership similarly cannot just point to language or presidential edict to justify a change.

By building off of these intertwined doctrinal strains, the article shows how agencies considering a policy change must engage with the contingencies underlying past and proposed new regulatory actions. Under this analytical frame, anyone evaluating room for a possible agency policy change needs first to assess legal frameworks and powers they confer and, as is true of any power conferral, correlative constraints they state or imply. Always important are the statutory criteria, goals, and procedures that guide the agency’s choices. Then, stakeholders must assess what outside the law’s text—but made legally relevant due to that text--- shaped and explained the earlier agency action and policy that is now proposed for change. And the change advocate must then compare the

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6 Part IV reviews different policy change settings and latitude they provide for change, especially change driven by political considerations.

7 See infra at Part II (reviewing categories of actions and legal doctrine framing and constraining policy change efforts).

8 For two earlier articles analyzing the puzzle of agency consistency, but preceding recent change power claims and case developments, see Yoav Dotan, *Making Consistency Consistent*, 57 Admin. L. Rev. 995 (2005) (focusing upon procedural modes generating old and new policy); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. Rev. 112, 115, 147 (2011) (distinguishing between “expository” policy declarations rooted in language and “prescriptive” reasoning that is based on policy choices and calling for *de novo* review of expository-based changes).

9 For a modern case both articulating the centrality of statutory criteria as a constraint and also emphasizing the agency obligation to engage with underlying facts and science relevant to its task, see *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007). For two cogent critiques of the case, its “expertise-forcing” underpinnings, and its place in the prevalent ongoing tension between the roles of politics and expertise as sources of accountability and legitimacy in regulation, see Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 S. Ct. Rev. 51; David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 Geo. Wash. L. Rev. 1095 (2008).

10 See Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 575-89 (1985) (in article discussing judicial review of deregulatory actions and the *State Farm* decision, analyzing how the Supreme Court in *State Farm* insisted on agency engagement with statutory criteria and rejected an “interest representation” frame or model that would have
old and new policy and, through legally required procedures and accountable public vetting, justify the change, engaging with the old grounds and contingencies and any new variables.

As a shorthand, this article refers to such non-statutory text variables as *contingencies*. They are legally central due to the statutory text since the agency will be justifying a policy choice guided by language, but where that language leaves room for change due to changed empirical assessments or policy rationales. The contingencies will themselves be external to the statutes and be observable. These are reality-based factors, including past legal documentation—history, regulatory experience, health impacts, science, data, models and predictions, and past agency studies and published reason-giving explaining the previous regulatory choice, to name a few such contingencies—that underpin any agency action. As explained below, as a matter of logic and under current doctrine, they unavoidably must remain part of the analysis and justification for future policy shifts.

Contingencies typically will be the social or physical manifestation of decisional criteria explicitly stated in legislation, but not always. Contingencies motivating acceptable agency policy change can, if statutory language leaves such room, involve some mix of trying better means to achieve constant ends, making policy adjustments in light of changing underlying scientific or social phenomena, or expert agency reassessment of the workability or fairness of past approaches. Although broad delegations to New Deal agencies offer little binding linguistic specificity, even those broadly empowered agencies will, through adjudications and other policymaking modes, identify social problems and devise remedial strategies that adjust and are refined over time. Such sequential development of policy will similarly identify and link to specified contingencies.13

Attention to such contingencies, since they involve far more than just word games, also serves to constrain arbitrary agency change and dampen the frequency and magnitude of policy shifts. Sometimes a policy shift will be rooted mainly in mere linguistic analysis, but that rarely happens. And close

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11 *Chevron* itself involved such a setting. See infra at Part II.b..
12 See e.g. POM Wonderful v. Federal Trade Comm’n, 777 F. 3d 478 (D.C. Cir. 2015) (upholding FTC claims of false representations, reviewing genesis of statutory and evolution of agency policy, and also rejecting one remedial claim as beyond agency power in light of facts, constitutional concerns, and past agency precedents); Daniel J. Solove & Woodrow Herzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 586, 589, 648-66 (2014). See also infra at Part IV.c. (discussing permissible bounds of politics and deliberative integrity when agencies with broad delegations adjust policy).
13 For discussion of how the FTC’s privacy law has evolved in a common law-like way, with increasingly specific criteria, see Solove & Herzog, supra note 12.
14 Kozel and Pojanowski call such language-based policy derivation “expository.” *Kozel & Pojanowski*, supra note 8. Trump agency statutory abnegation—a new claim of no statutory
parsing of legislation to assess if Congress anticipated agency policy adjustments necessarily will influence the legality of an agency policy shift. Importantly, the Supreme Court in *Massachusetts v. EPA* rejected an agency policy change and declination to act that neglected statutory criteria and also avoided examination of relevant science.\(^{15}\) Some agency actions will be language dominant, while others will be driven more by science or observations.\(^{16}\) Politics too can and indeed does play a role, but not to the exclusion of other contingency variables and always subject to the need for conformity with statutory requirements.\(^{17}\) Administrative law doctrine also creates some trans-agency and trans-law space for agency policy experimentation, but all policy changes are nonetheless cabined or shaped by what relevant statutory language dictates and past regulatory choices and explanations.\(^{18}\)

The crucial point about consistency doctrine and agency policy change power is that, as a matter of logic and case doctrine, deviations from a past policy choice or approach-- whether to deregulate, adjust strategies, or increase

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\(^{15}\) See *Massachusetts supra* note 9 and sources cited therein. For further discussion of statutory language as a shaper of policy change’s permissible bounds and assessment of deliberative integrity, see *infra* at Part IV.

\(^{16}\) As developed further below *infra* at Part IV, the judicial role when reviewing a policy change will differ if language is broad or a statute requires an assessment of science, data, or (as commonly required) what is “best” among some category of risk creators. See Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 565 (2011) (distinguishing the judicial review task when a statute requires an agency to provide a “factually grounded explanation” versus one grounded in “value judgments”).


\(^{18}\) For example, a new general interpretive presumption is that agencies should consider both regulatory benefits and costs. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (embracing in majority and dissenting opinions a general requirement that agencies assess costs and benefits unless a statute clearly indicates otherwise). The Court has also indicated that agency actions that harness the benefits of market-based regulatory tools and confer regulatory flexibility on states receive what appears akin to a reviewing court bonus. See, *EPA v. EME Homer City Generation*, L.P., 134 S. Ct. 1584, 1601, 1605-07 (2014) (affirming legality of agency program providing states implementation flexibility and harnessing market incentives, and speaking favorably of such designs). See William W. Buzbee, *Federalism-Facilitated Regulatory Innovation and Regression in a Time of Environmental Legislative Gridlock*, 28 GEORGETOWN ENVTL. L. REV. 451 ((2016) (discussing these cases).
regulatory stringency—will rarely, if ever, involve just a language game.\textsuperscript{19} If language requires one particular policy action, then change cannot be made. That is exceedingly rare. Policy change is pursued where language leaves room for adjustment and something about the world is viewed as justifying the change. Scholars and judges debate how much politics can influence agency regulation.\textsuperscript{20} Room for politics and the degree of judicial oversight will hinge on relevant law and the action at issue.\textsuperscript{21} But key governing precedents, whether new or old, always call for some variant of agency engagement with the past action, underlying facts, and earlier rationales or “reason-giving” explanations.

Because facts and experience are a sticky reality that an agency virtually always documents in justifications for past actions, policy shifts cannot be carried out by executive fiat.\textsuperscript{22} As stated in key consistency precedents, including the recent 2016 Encino Motorcars decision, an agency must always supply a “good reason” for a policy revision, cannot leave “unexplained inconsistency,” and must address “underlying facts.”\textsuperscript{23}

The Supreme Court in \textit{Chevron} did allow the United States Environmental Protection Agency (EPA) to redefine a term and even embraced agency reconsideration of policies: agencies “must” do so to engage in “reasoned decision making,” the \textit{Chevron} Court states.\textsuperscript{24} But room for change is separate from satisfying the conditions necessary to achieve it. Neither that case nor any other embraces untethered, erratic, or unjustified reversals or abandonment of statutory missions.\textsuperscript{25}

This theoretical frame’s deep doctrinal foundations have implications for strategies to reduce risks of erratic policy shifts and regulatory reversals. Agencies and others worried about subsequent regulatory backpedaling, ill-

\textsuperscript{19} As discussed below, the deregulatory strategy of agency disavowal of power previously claimed, which this article calls “statutory abnegation,” can involve a claim that language alone justifies a new claim of no power, but also a few variants of rejection of earlier power claims. It is introduced and analyzed at I.e. and IV.f.

\textsuperscript{20} See sources cited \textit{supra} notes 4, 9-10 and accompanying text and \textit{infra} at Part IV.

\textsuperscript{21} See Part IV.

\textsuperscript{22} Kozel and Pojanowski describe agency attempts to establish stable policy as “gam[ing] the system” or “administrative machinations.” \textit{Kozel & Pojanowski, supra} note 8 at 166. As explored below, this article suggests that agency grounding of policy in strong evidence and reasoning will create resistance against change, but does not view this practice as illegitimate or problematic.


\textsuperscript{24} See \textit{Chevron}, 467 U.S. at 863-64.

\textsuperscript{25} See \textit{Chevron}, 467 U.S. at 853-65 (discussing impacts of old and new approaches, economics scholarship, and efforts to allow cost-effective regulation to achieve clean air as rational and consistent with the statute in upholding EPA’s new “bubble” approach); Ronald M. Levin, \textit{The Anatomy of Chevron: Step Two Reconsidered}, 72 CHI.-KENT L. REV. 1253, 1268-69 (1997) (in arguing that \textit{Chevron} Step Two review and “arbitrary and capricious review” should be viewed as calling for the same type of judicial review, noting that although \textit{Chevron}’s influential opinion alludes to the task of “interpretation,” the actual opinion involved assessment of how the record supported the agency’s reasoning).
considered policy shifts, or just plain old judicial reversal can, through diligent engagement with underlying science, data, and rationales for a chosen regulatory course, raise hurdles that subsequent agencies, presidents, and even reviewing courts must overcome. A lightly justified initial action, in contrast, will ease the path for a later policy shift. To succeed in making a policy change, agencies will always need to engage with, and with new persuasive reasoning explain or perhaps explain away, the contingencies that underlay the past agency action.

For a president like Donald J. Trump, who after his 2017 inauguration quickly and aggressively asserted directive power to mandate deregulatory lookback analysis and ordered agencies to revisit specified actions, the constraints of consistency doctrines and regulatory contingency analysis are of critical importance. If legal norms hold, these presidential requests should lead to far less radical agency actions than sought due to the constraints of statutory language and contingencies that must be engaged. Or, if agencies just acquiesce or follow presidential directions, such agency actions should provoke skeptical judicial review. Due to the uniformity of recent policy change power claims and strategies, it is likely that they reveal an intentional effort to recast this body of doctrine to increase room for politicized efforts to revise policy. Or they might reflect a political strategy to push for deregulation that is justified by political gains even if ultimately destined for legal rejection.

Part I introduces standard views about agency policy change authority, reviews recent strong claims about such power by current Justice Gorsuch when an appellate judge, presents prevalent contrary observations about agency tendencies and expectations of the administrative state, and introduces deregulatory actions by President Trump and agencies under his supervisions and the power claims they reveal. Part II then turns to the web of law governing how and when presidents and agencies can seek policy change. Part III assesses the legality of recent major policy shift proposals and actions, distills through a simplified schematic what agencies seeking policy change must do, and offers a normative assessment of consistency doctrine. Part IV then reviews categories of agency actions, how consistency doctrine’s constraints apply, and why apparent efforts to change this body of doctrine should meet with opposition from both those generally concerned with agency overreach and those worried about imprudent deregulation.

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26 See e.g., Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986) (reversing and remanding agency decision to carry out last-minute directive by White House Office of Management and Budget without any apparent justification in the administrative record and requiring agency to utilize its expertise).

27 See e.g., Percival supra note 4 at 2535 (discussing New York v. Reilly, 969 F.2d 1147, 1149 (D.C. Cir. 1992) and underlying regulatory history where political pressure for deregulation likely contributed to insufficiently justified regulatory action).
I. THE REGULATORY WHIM AND POLICY CHANGE POWER CLAIMS

Claims of agency power to change policy range from matter-of-fact descriptions of agency policy flexibility and responsiveness as the norm, to condemnations of such change as evidence of agency arbitrariness and excessive and unaccountable agency authority. Proposals and orders for agencies to make policy changes also reveal change proponents’ claims about such power. This section introduces such normative and manifested claims about room for agency policy change, with special emphasis on broad recent claims. In the parts that follow, the accuracy of these broad claims of agency policy change power is questioned before explaining how a focus on the contingencies underpinning agency actions melds the cross-cutting requirements and interests held in equipoise by consistency doctrine.

a. The congressional expectation of agency policy adjustment

In most writing about rationales for the modern administrative state, room for policy change and reliance on agencies go hand in hand. Policy change is expected.28 Reliance on agencies rather than legislatures or courts to flesh out a body of law is linked to agency expertise and the related need for regulatory learning and adjustment in the development of sound policy.29

Legislatures, in contrast, generally lack particular subject matter expertise and cannot enact laws with details sufficient to anticipate complexities and changing circumstances.30 Courts are even more generalist in focus and poorly suited to develop policy due to lack of knowledge of broader legal and societal context.31 Courts also are often unfamiliar with affected constituencies’ practices and concerns, and lack institutional means to gather and assess data and science relevant to a regulatory goal.32 In addition, how a web of law and

28 See Dotan, supra note 8 at 1031-32 (discussing this expectation).
29 PETER STRAUSS ET AL, GELLHORN & BYSE’S ADMINISTRATIVE LAW Ch. 1 (2011) (presenting materials concerning rationales for reliance on agencies).
30 For judicial exploration of agency policy in the context of an agency adjusting its policies, see Federal Trade Comm’n v. Wynham Worldwide Corp., 799 F. 3d 236, 252 (3rd Cir. 2015) (upholding most of the FTC’s action alleging an “unfair and deceptive trade practice” in the setting of lax cybersecurity and discussing agency’s subject expertise and policy evolution).
31 See Gillian E. Metzger, Embracing Administrative Common Law, 80 GEO. WASH. L. REV. 1293, 1359-1370 (2012) (in discussion of administrative law’s development in a common law-like manner, discussing agencies’ expertise and institutional competence in comparison to courts).
32 For discussion of the relative roles of presidents and agencies in developing policy, but emphasizing congressional delegations to particular agency actors and the expertise-based underpinning of such delegations, see Peter L. Strauss, Overseer or “The Decider”? The President in Administrative Law, 75 GEO. WASH. L. REV. 696, 750-53 (2007).
regulations work together will be known to agencies but seldom understood by legislators or judges.\textsuperscript{33}

Agencies are not directly subject to electoral accountability, but they answer to the president and are often called to account by congressional committees. Agencies are also subject to participatory and reason-giving modes of democratic accountability.\textsuperscript{34} Furthermore, neither courts nor legislatures are institutionally capable of implementing and enforcing laws; these two agency tasks result in at least tacit development and revelation of policy.\textsuperscript{35}

As a result, agencies will become expert in a delegated field.\textsuperscript{36} They will come to know deeply the web of laws that they are delegated to administer or that intersect with their turf, plus subsequent implementing regulations, guidance documents, and court decisions.\textsuperscript{37} As repeat players in frequent political contact with congressional committees, the public, and more directly implicated stakeholders, they will come to know how various regulatory choices work or could be improved.\textsuperscript{38} In this polycentric and dynamic setting, agencies will develop a sensitivity to practical complexities and tradeoffs, the interacting players, and regulatory dynamics.\textsuperscript{39} Agencies over time will see how policy choices ripple through the law, linked markets, and underlying protected amenities such as workplaces, markets, the environment, or educational institutions.\textsuperscript{40}

Due to this experience and these interactions, agencies will regularly adjust policy choices based on gained experience or new science or data, even though underlying statutes will often remain unchanged. Regulating, under these views, should and ordinarily does involve sequential policy adjustments in light of pragmatic learning and efforts to better achieve statutory goals.\textsuperscript{41} And political leanings and changing attitudes about regulations, often due to changes

\textsuperscript{33} Id.; Sidney A. Shapiro, \textit{The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences}, 50 \textit{WAKE FOREST L. REV.} 1097 (2015) (exploring nature of expertise and its underpinning of deference rationales, especially due to pragmatically developed “craft” expertise).

\textsuperscript{34} See Jerry L. Mashaw, \textit{Prodelegation: Why Administrators Should Make Political Decisions}, 1 \textit{J. L. ECON. & ORG.} 81, 96-99 (1985) (identifying ways agencies are more “responsive” and subject to more accountability and obligations to provide reasons than are legislatures).

\textsuperscript{35} Here, the reference to “enforcing” is referring to monitoring and policing compliance with the law, not judicial enforcement of the law via a court decision.

\textsuperscript{36} See generally Shapiro, supra note 33.


\textsuperscript{40} Shapiro, supra note 33.

\textsuperscript{41} \textsc{Sidney A. Shapiro & Robert L. Glicksman, Risk Regulation at Risk: Restoring a Pragmatic Approach} (2003) (exploring the prevalence and benefits of pragmatic learning in regulation).
in presidential administrations, will further influence what political appointees heading agencies will view as “better” or in need of change. What must accompany such attempted changes, however, is a separate issue discussed below.

Analysts of the modern administrative state often divide into two opposed camps who also vary in their sentiments about agency policy change authority. Regulatory skeptics often characterize agencies as tending to engage in overreach and excess in the form of expansive claims of power or too frequent policy shifts. Or, at the other end of the spectrum, other students of regulation see a different problem, with agencies tending more to inertia, neglect of potential or shared regulatory or rulemaking ruts, or craven deregulatory actions due to capture or political pressure. Relatedly, periodic claims of regulatory stringency or excess when an agency takes a regulatory action should not be mistaken for proof or even evidence of overall excessive activity or stringency. These fundamental disagreements about regulatory proclivities lead to clashing policy prescriptions about the need to chill or encourage agency activity.

Thus, despite disagreements about the value of regulation and the administrative state, the reality of at least some agency power to make policy changes should be a source of little consternation. Recent claims and actions, however, reveal dramatically different and changing views about agency policy change power.

b. The Justice Neil Gorsuch “regulatory whim” theory

Newly confirmed United States Supreme Court Justice Neil Gorsuch, when on the Court of the Appeals, was far from sanguine about agency power to change policy. As an appellate judge, he wrote several opinions that, in no uncertain terms, saw agency policy change as an extreme and constitutionally problematic power, especially if that agency shift followed some earlier judicial policy exegesis. And, in his rhetoric, his condemnation of agency power to change policies echoed closely broader condemnations of the administrative

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42 The persistent question of limitations or constraints on such politicized oversight and control is a strain analyzed infra passim, but especially in Parts II.c. and IV.
43 For critical analysis of such claims, see Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 HARV. L. REV. 916, 923-37 (2005)
44 See infra at Part I.c.
45 See Levinson, supra note 43; infra Parts I.b. and I.c.
46 See e.g., Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) (discussed infra); United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (dissenting from denial of rehearing en banc, arguing for a reinvigoration of nondelegation doctrine); De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015) (rejecting retroactive application of agency interpretation because it represented an executive attempt to wield legislative power without traditional limitations on scope of legislative action).
state and regulation heard from anti-regulatory think-tanks and others calling for reform of the world of regulation.\(^{47}\)

Then-Court of Appeals Judge Gorsuch condemned an order of the Board of Immigration Appeals and the underlying policy shift regarding immigrant status it reflected. But he also used the case as a vehicle to condemn more broadly agency policy inconsistency. In his majority opinion, he wrote that an agency can “exploit a gap in the statute to implement its own (continuously revisable) policy-influenced vision of what the law should be.”\(^ {48}\) He alludes to the risk that an agency will retroactively shift policy based on “shifting political winds.”\(^ {49}\) Further, he sees a broad risk that agency latitude to shift policies, even when earlier court precedents exist, means that agencies can “impos[e] uncertainty on an entire class of persons with significant interests at stake.”\(^ {50}\)

In an unusual concurrence in his own opinion, Gorsuch writes in even broader strokes, characterizing the leading deference and consistency cases as permitting agencies to “swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems [hard] to square with the Constitution of the framers’ design.”\(^ {51}\) He suggests it may be time to “face the behemoth.”\(^ {52}\)

After parsing deference doctrine, he makes his strongest assertions about agency power to vacillate, linking that policy change power to risks of agencies “exploit[ing] ambiguous laws . . . for their own prerogative.”\(^ {53}\) He says regulatory stakeholders “must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail.”\(^ {54}\) He says that agencies may do so

\(^{47}\) See, e.g., Raymond M. Kethledge, Ambiguities and Agency Cases: Reflections after (almost) Ten Years on the Bench, 70 VAND. L. REV. EN BANC (Dec. 2017) (in article by federal judge reputedly on short list for Supreme Court appointment by President Trump, reviewing reasons he finds Chevron deference problematic, especially ambiguity claims by agencies to “support the policy result that the agency wants to reach” that are akin to “judicial activism” and “arrogation” of power by agencies and agencies’ “palpable sense of entitlement” due to deferential review); Christopher J. Walker, Attacking Auer and Chevron Deference, 16 Geo. J.L. & Pub. Pol’y 103 (2018) (reviewing jurisprudence and scholarship criticizing deference regimes). For a more journalistic and overtly anti-regulatory critique, see, e.g. Iain Murray, Stopping the Bureaucrats Requires an End to Chevron Deference, National Review [CHECK CITE on Competitive Enterprise Institute site] (May 12, 2016) See also infra at Part I.e. (further citing and discussing such concerns). For a critique focused on the applied indeterminacy and manipulability of Chevron deference, but suggesting a return to pre-Chevron deference regimes, see Jack M. Beerman, End the Failed Chevron Experiment: How Chevron Has Failed and Why it Can and Should be Overruled, 42 CONN. L.REV. 779 (2010).

\(^{48}\) Gutierrez-Brizuela 834 F.3d at 1146 note 1

\(^{49}\) Id. at 1146.

\(^{50}\) Id. at 1147. The court here is parsing the logic and consequences of the intersection of several major cases that together generally give agencies room to choose procedural modes and adjust policy. Those cases are introduced and analyzed below in Part II.b.

\(^{51}\) Id. at 1149 (Gorsuch, J., concurring).

\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Id. at 1152.
based on “their own preferences about optimal public policy when a statute is ambiguous.”\(^{55}\) Or, even more strongly, he says an agency can seek “to pursue whatever policy whim may rule the day.”\(^{56}\)

The claimed risk of day-to-day vacillation is a repeated theme, with Gorsuch stating that “an agency can enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next” and then a few lines later repeats the “reverse itself the next day” claim.\(^{57}\) Later, he returns to the “whim” theme, reading the *Chevron* case as permitting “agencies to upset the settled expectation of the people by changing policy direction depending on the agency’s mood at the moment.”\(^{58}\) He suggests *de novo* judicial review of a law’s meaning as way to provide assurance to the public or those regulated that “the rug will not be pulled out from under them tomorrow, the next day, or after the next election.”\(^{59}\)

In this discussion, Gorsuch relies on cases and case language with little attention to the underlying agency procedural mode or which framework and presumptions apply in which settings.\(^{60}\) Most of his cases and framework discussion err if they reflect an assumption that an agency policy generated via adjudications is ruled by the *Chevron* case. That isn’t impossible, but after the *Mead* decision, quasi-democratic participatory methods are generally the antecedent to agency ability to rely on the *Chevron* deference framework.\(^{61}\)

Still, now-Justice Gorsuch seems to read doctrine to at least tempt agencies to make abrupt, whim-based policy changes and sees agencies as likely to abuse such power. He makes virtually no mention of how statutory choices, facts, or agency reasoning or current doctrine might already check such claimed

\(^{55}\) *Id.*

\(^{56}\) *Id.* Four Supreme Court dissenters articulated somewhat similar concern with policy change based on “regulatory whim,” but argued that it is not permissible and advocated a narrow read of new Court language about such power. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, (2009) (Breyer, J. dissenting) (in disagreeing with majority’s formulation of political factors influencing policy change, asking “[w]here does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?”).

\(^{57}\) Gutierrez-Brizuela at 1154.

\(^{58}\) *Id.* at 1158.

\(^{59}\) *Id.*

\(^{60}\) Dotan correctly suggests that procedural modes do and must shape court review of agency policy changes. See *supra* note 8.

\(^{61}\) *Mead* itself calls for courts to analyze if Congress has given the agency power to act with the “force of law” and identifies legislative requirements of procedural formality and agency use of procedures like notice-and-comment rulemaking as ordinarily a prerequisite for *Chevron* deference. United States v. *Mead Corp.*, 533 U.S. 218, 230-31 (2001). See e.g., Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1172 (2014) (discussing usual procedural prerequisites for agency claims of deference after *Mead*).
agency power. As explained below, this is a major omission that perhaps explains these overly broad claims.

c. The ossification and agency inertia theories

It is hard to reconcile these views about agency power and tendency to act on “whim” and create uncertainty by changing policy day-to-day with the realities of onerous modern notice-and-comment rulemaking. They also run counter to most studies of actual agency behavior and agency proclivities. A prominent opposing normative and empirical claim is that agencies change policy too infrequently. Review any Federal Register notices, especially final rules, and one finds summaries of massive rulemaking records. Major regulations typically follow years of work and include dozens or hundreds of pages of “preamble” explanation plus often additional referenced analysis and comment responses. And because promulgated regulations announcing a policy shift are the subject of notice, a wave of comments, and then agency response, they neither surprise anyone, nor do they emerge in anything remotely resembling a “day” or as a result of “whim.” As noted in recent scholarship, when agencies have failed to utilize participatory deliberative procedures, they have triggered significant Supreme Court rejections even when the actions were linked to presidents’ preferences.

Relatively, the literature on the nature and roots of regulatory “ossification” clashes with Justice Gorsuch’s claims. Due to rigorous

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62 Some of the then-Judge Gorsuch rhetoric seems focused upon National Cable & Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967 (2005) and how it allows an agency to interpret a statute differently than an earlier judicial construction. That case, however, is more about the contours and logic of Chevron deference following an earlier judicial law interpretation than an important precedent about conditions shaping and constraining an agencies’ ability to make a shift in their own policies.

63 Then-Judge Gorsuch’s powerful anti-regulatory and anti-Chevron deference language did garner notice and support among anti-regulatory scholars. See, e.g., Ilya Somin, Gorsuch is Right About Chevron Deference, WASH. POST (March 25, 2017) (op-ed by conservative scholar affiliated with the Federalist Society and Cato Institute noting Gorsuch’s opinion and agreeing with its anti-regulatory underpinnings).

64 For example, EPA’s Clean Power Plan rule was issued with a Federal Register preamble of 459 pages, plus accompanying memoranda on legal issues, empirical studies, and responses to particular comments. Environmental Protection Agency, Final Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (Oct. 23, 2015) (hereinafter “Clean Power Plan” or “CPP”).

65 For Justice Gorsuch’s “whim” and day-to-day change claims, see supra Part I.b.

66 Lisa Schultz Bressman, Defe

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And if one digs deeper, especially into “new governance” and democratic experimentalism literature, but also in literature on regulatory slippage, the regulatory commons, and rulemaking “ruts,” one finds yet more contradiction of the abrupt whim-based change claim. Likewise, calls for agencies to undertake “regulatory lookback” are rooted in concerns, often by anti-regulatory advocates, that old policies live on and on, causing confusion and hindering beneficial societal or market change.

These somewhat overlapping bodies of scholarship document problems of agency inaction, failure to update and improve policy, and agency reluctance to act. Instead of “empire” building, turf expansion, or overly frequent policy shifts, these empirical, historical and sometimes theoretical explorations end up identifying the opposite problem. They identify such problems, then suggest means to overcome pervasive problems of agency inertia, inaction, and frozen law.

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68 McGarity, supra note 67.


71 See Levinson, supra note 43 (discussing and criticizing the “empire building” thesis); see also MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000) (through interview and documentary empirical review of agencies’ actions, questioning “rational actor” theory expectations of self-interested agency official behavior resulting in shirking and budget maximization and observing “hunkering down” and “compliant” and “cooperative” interactions between anti-regulatory political appointees and agencies’ top career officials).
Agency overreach concerns and the “major questions” canon

Nevertheless, in calls for regulatory reform, critics of the administrative state often assert a similar mixed claim of agency overreach, concern with agency actions based on whim or mere political preferences, and regret that deregulatory policy change is not easier.72 Senator Orrin Hatch, for example, supported a regulatory reform bill with claims of regulatory excess and by characterizing Chevron deference as a disappointingly failed strategy to shield “deregulatory efforts” from judicial rejection. He stated that “experience has . . . seriously undermined the conservative case for Chevron deference,” especially hopes that via Chevron a “conservative administration would be able to administratively roll back the federal regulatory burden.”73

Similarly, defenders of the Office of Information and Regulatory Affairs (OIRA) and its supervision of regulatory cost-benefit analyses pursuant to executive orders see OIRA and such analysis as a valuable check on regulatory excess.74 But regulatory power, regulatory rationality, regulatory stringency, and regulatory policy shifts or vacillations are distinct phenomena. They raise different concerns and are subject to somewhat different doctrinal and political constraints.

Still, one doctrinal strain regarding agency change includes rhetoric and underlying concerns that in their normative leaning is fairly consistent with the Justice Gorsuch indictment of agencies and regulation. This discussion is in the line of Supreme Court cases setting forth the “major questions” canon or “power” canon.75 This deference-neutralizing canon of interpretation so far has been triggered by agency actions involving the confluence of a changed or new assertion of regulatory power, major economic impacts, and other statutory signals casting doubt on the logic and legality of the power claim which is usually also a policy shift.76 Justice Scalia’s majority opinion in the UARG case

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72 Some scholars suggest that greater presidential and political involvement could rectify several of these problems. See Levin, supra note 16 at 576 (reading Fox as allowing for greater agency policy latitude after elections and calling this a “salutary” development); see also Watts, supra note 17 (supporting greater acceptance of politics’ place in regulatory decision making, subject to respect for statutory constraints and facts).

73 Comments of Senator Orin Hatch, Hoover Institution (March 16, 2016) (videotape of conference discussions at around 3:40:30).

74 The literature on OIRA and cost-benefit analyses is now massive. For two recent countervailing perspectives, see Cass Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838 (2013) (former head of OIRA explaining and defending OIRA role and importance of cost-benefit analysis) with Frank Ackerman & Lisa Heinzerling, Priceless (2004) (highlighting the manipulability of cost-benefit analysis and questioning its legality and morality).

75 For a recent analysis, see Lisa Heinzerling, The Power Canons, 58 William & Mary L. Rev. 1933 (2017).

76 See e.g., MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (applying Chevron doctrine and finding it “highly unlikely” that Congress would entrust an “essential
reads most like the Gorsuch concurrence essay, especially in its blistering language criticizing EPA as unlawfully “seizing expansive power” by newly claiming authority to regulate thousands of air pollution sources. And UARG was itself substantially constructed on language in the Brown & Williamson decision rejecting the Food and Drug Administration’s new foray into regulation of tobacco products.

However, while these cases often condemn particular agency claims of power to change policy or reach new targets of regulation, these Supreme Court opinions do so en route to rejecting the agency power claims. Thus, while Justice Gorsuch as a judge assumed agencies under existing doctrine could get away with major self-serving policy shifts or actions based on “whim,” the Supreme Court in the “major questions” cases has rejected such shifting agency claims of power and also reduced or eliminated deferential reviewing frames in such settings. Litigants opposed to regulation rely heavily on this line of cases.

e. The Trump administration and embrace of change power

Early proposals and actions by the President Donald J. Trump administration, especially in the environmental law arena, reflect a broad claim of presidential and agency power to reverse course with little constraint. As of mid-2018, policy change orders, directives, proposals or actions have overwhelmingly been in a deregulatory direction. Few have completed the regulatory process or been reviewed in the courts, but the proposals reveal the administration’s view of policy change power.

characteristic” of the statutory scheme to agency discretion); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (declining to afford usual Chevron deference to an FDA interpretation of a regulation to include tobacco as a drug due to the conclusion that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”); Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (declining to defer to the Internal Revenue Service regulation and judicially resolving the question of statutory power due to contextual indications that there was no intent to grant such extensive power to the agency).

79 The Court in UARG stated that “EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ [citing Brown & Williamson] we typically greet its announcement with a measure of skepticism.” 134 S. Ct. at 2442-44.
80 For example, in litigation opposing Obama administration regulation of greenhouse gas emissions, challengers relied heavily on this same blend of the “major questions” canon, claims of abrupt agency changes in statutory interpretation that also resulted in expanded agency power, and claims of massive economic impacts. See Linda Tsang and Alexandra M. Wyatt, Cong. Research Serv., R44480 Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA (2017) (describing the underlying regulation and court challenges).
Most Trump agencies announcing policy change proposals or actions have offered little legal analysis, usually just referring to the result sought or quoting language acknowledging the role of politics in regulation and room for policy change.\(^{81}\) Presidential and executive agency policy shift proposals have reflected little effort satisfy the conditions constraining such change.\(^{82}\) These policy change actions or proposals have included minimal engagement with what this article collectively labels contingencies, namely facts underlying earlier regulatory policies and the earlier actions’ accompanying reasoning. This part merely reviews such power claims. Later parts critique their legal validity under governing doctrine and to illuminate the legal importance of contingencies shaping past actions and proposed changes.\(^{83}\)

The two-for-one deregulatory order: The largest scale action by the Trump Administration calling for agency policy changes was the “two-for-one” executive order. In Executive Order 13,771, President Trump “ordered” agencies, as a “policy of the executive branch,” to accompany any new regulation with identification of “two prior regulations . . . for elimination.”\(^{84}\) The only exception stated was if such elimination is “prohibited by law.”\(^{85}\) In addition, agency actions were ordered to result in no increased regulatory costs and new regulations were to be “offset by the elimination of existing costs associated with at least two prior regulations.”\(^{86}\) Thus, all agencies were directed to make deregulatory policy shifts, but without regard to the net benefits, legislative edicts, and societal conditions that led to the earlier regulatory actions. Nothing in the order’s text, apart from typical executive order boilerplate about respect for other legal requirements and prohibitions, called for rigorous engagement with relevant law, facts and earlier reasoning.

Due to its asymmetry and lack of attention to the benefits of earlier regulation, let alone analysis of net regulatory costs or benefits, a broad coalition filed suit alleging Executive Order 13,771 could never be followed in

\(^{81}\) These key cases and their language are analyzed infra at Part II.c.

\(^{82}\) As discussed below, the Federal Communications Commission, an independent agency, has also embraced and utilized policy change power, but in so doing has been more thorough on issues of law and fact than President Trump or executive agencies in their pursuit of policy change. See infra at notes 96, 100-03 and accompanying text.

\(^{83}\) With both chambers of Congress and the presidency in the same party’s hands, Congress passed and President Trump also signed fifteen Congressional Review Act resolutions invalidating late-Obama administration regulations. See Thomas O. McGarity, The Congressional Review Act: A Damage Assessment, THE AMERICAN PROSPECT (Winter 2018) (reviewing invalidations and their impacts). Because these involved a form of legislative action, they are not discussed here despite their major deregulatory impact.


\(^{85}\) Id. at Section 2. Final Section 5 similarly said that the Order should not “be construed to to impair or otherwise affect: i) the authority granted by law to an executive department or agency” and subsection ii)b) stated that the order “shall be implemented consistent with applicable law.”

\(^{86}\) Id.
compliance with the law and would unavoidably taint all agencies’ actions.\textsuperscript{87} That initial challenge, made before any agency had completed actions in compliance with the Order’s edicts that could be traced to particularized palpable effects, was dismissed on standing grounds despite the deciding judge’s critical comments and observations about the Order’s effects, legality, and logic.\textsuperscript{88} The Office of Information and Regulatory Affairs (OIRA) refined the order’s skewed requirements, but still largely followed the president’s order.\textsuperscript{89}

\textit{The delay two-step sidestep:} Numerous agencies have pursued a two-step process to render inoperative existing regulations, often with a promise of some future replacement.\textsuperscript{90} In agency Federal Register notices and briefs, agencies have referenced some future anticipated or possible policy change, but in the meantime have sought to stay, suspend, not implement or through similar language or strategies, render an already finalized regulation a nullity. Here too, agencies or their attorneys have cited cases mentioning presidential powers and acknowledging that agencies can seek policy change, but without attention to other requirements.\textsuperscript{91} As detailed and analyzed below, because the agencies are not yet replacing the earlier regulation or justifying abandonment of the earlier regulation, yet effectively rendering it a nullity, reviewing courts during 2017 and 2018 uniformly rejected such a strategy.\textsuperscript{92}

\textsuperscript{87} Public Citizen et al. v. Trump, Complaint for Declaratory and Injunctive Relief (D.C.D.Ct.) (filed Feb. 8, 2017) (Civ. Action No. 1:17-cv-00253 RDM). The theory regarding the order’s illegality is detailed in Plaintiffs’ Motion for Summary Judgment, (filed May 15, 2017), and in Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss (filed April 10, 2017).

\textsuperscript{88} Public Citizen et. v. Trump, Memorandum and Order at 6-7, 27-30 (Civ. Action No. 17-253 (RDM) (Feb. 26, 2018) (dismissing due to lack of standing mostly due to inability to trace particular harms to many potential future resulting actions, but also noting delay that will result and pointing out puzzling logic of assessing costs without regard to benefits).

\textsuperscript{89} Dominic J. Mancini, Acting Administrator of [OIRA], Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs” (Feb. 2, 2017) (reviewing the E.O. and providing guidance on agency compliance, but repeatedly mentioning only “costs” without reference to “benefits” or “net benefits”). An OIRA memorandum setting forth agency obligations to prepare their regulatory agenda for the coming year alluded to EO 13771, but in a few places also mentioned costs and benefits, although not in direct reference to that order’s instructions. Neoimi Rao, Administrator of [OIRA], Data Call for the Fall 2017 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions (Aug. 18, 2017) at 1 (quoting “cost” language) and 8 (mentioning agency assessment of both “costs and benefits” but in connection with still applicable EO 12866).

\textsuperscript{90} See Jennifer Dlouhy and Alan Levin, Trump Tests Legal Limits by Delaying Dozens of Obama’s Rules, Bloomberg (July 13, 2017) (identifying rules proposed for delay, stay, or nonenforcement); Lisa Heinzerling, The Legal Problems (So Far) of Trump’s Deregulatory Binge, HARV. L. AND POLICY REV. (forthcoming 2018) (describing array of stay and delay type of actions, judicial rejections, and analyzing such actions’ legality). Several of these actions are introduced and analyzed infra at Part II.h.

\textsuperscript{91} See infra at II.h. (further discussing such postponement and delay actions and judicial rejections); Heinzerling, supra note 90 (discussing and analyzing such actions’ legality).

\textsuperscript{92} These decisions are analyzed infra in Part II.h.
The divide and constrained comment strategy: In other settings, Trump administration agencies have taken initial steps to likely undo a regulation, but both divided up the steps to getting there and, because of this division, sought to limit comments on the legality or overall wisdom of the earlier regulations’ choices or some future change.\(^\text{93}\) It is not yet clear if agencies in future finalized policy shifts will be attentive to the contingencies and antecedent regulatory actions in justifying some new policy.\(^\text{94}\)

The statutory abnegation claim: Numerous agencies’ policy reversals have been quite summary, relying on what this article calls “agency statutory abnegation” claims: the agencies newly claim that they lack power previously asserted, and state that this new read of the law requires a policy reversal. Agencies have occasionally used such a strategy in the past, most famously in the EPA actions during the George W. Bush administration leading to Massachusetts v. EPA, but it also appears in occasional other decisions.\(^\text{95}\) Its use has exploded during 2017 and 2018.\(^\text{96}\) A few examples are reviewed here.

\(^{93}\) See infra at II.h and III.b.

\(^{94}\) One finalized action delaying the “applicability date” of the Clean Waters Rule still omits such analysis. See infra at Part III.b. (discussing the rule and related divided deregulatory steps).

\(^{95}\) For further discussion of Massachusetts, see supra note 9 and infra notes 194-203 and accompanying text; see also Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 35, 41-43, 45 and n. 18, 50-51 (D.D.C. 2003) (noting agency claims disclaiming power previously asserted, but concluding one such view by department Solicitor was in error but was not adopted in the final agency action, while another claim of no legal power over “unclaimed lands” was in error and required judicial rejection).

\(^{96}\) Agency proposals and actions rooted in whole or in part on a claim of statutory abnegation were many during 2017 and 2018. For additional text examples and discussions of such new claims of no statutory power, see infra at notes 121-32 and accompanying text (discussing the Clean Power Plan and actions taken to repeal it, including a new statutory interpretation and claim of lack of power to regulate as claimed in 2015); Environmental Protection Agency, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Proposed Rule, 82 Fed. Reg. 48035, 48037 (Oct. 16, 2017) (Proposed CPP Repeal); infra at notes 105-20 and accompanying text (discussing several divided steps taken to delay or abandon the Clean Water Rule and proposing to adopt the plurality opinion view of Justice Scalia that would substantially change and limit federal authority). Statutory abnegation was a substantial element of the following policy change actions: see The Regents of the Univ. of Cal. v. United States Department of Homeland Security, slip op. at 6-9 (N.D. Cal. Jan. 9, 2018) (reviewing the history of the repeal of the Deferred Action for Childhood Arrivals (DACA) Program (June 15, 2012) (announced in memorandum of Secretary of Homeland Security Janet Napolitano) further reviewed infra at notes 304-15 and accompanying text); William L. Wehrum, ENVTL. PROT. AGENCY, MEMORANDUM, RECLASSIFICATION OF MAJOR SOURCES AS AREA SOURCES UNDER SECTION 112 OF THE CLEAN AIR ACT (Jan. 25, 2018) (abandoning a twenty-two year old EPA view of when sources are subject to hazardous air pollutant regulation, calling the previous policy “contrary to the plain language” of the statute in using a temporal variable that made the old policy “once in, always in”). For analysis of this shift, see Michelle West, “Once In, Always In” Now Out: How the EPA is Reducing Regulations on Hazardous Air Pollutant Emitters, GEORGETOWN ENVTL. L. J. ONLINE (March 3, 2018). Environmental Protection Agency, Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, Proposed Rule, 82 Fed. Reg. 53442, 53443-46 (Nov. 16, 2017) (reversing earlier policy that regulated air emissions from refurbished trucks and engines known as “gliders” and claiming that EPA had no such authority under language in the Clean Air Act,
For example, in the immigration arena, the Department of Homeland Security ended the Temporary Protected Status of two nations’ citizens.\textsuperscript{97} In those actions, however, the Department of Homeland Security not only changed its longstanding interpretation of the underlying statute to justify the actions, but it failed to acknowledge that shift or to address additional risks to immigrant safety that it had earlier viewed as legally relevant to determining TPS status.\textsuperscript{98} It now states that it “must” return TPS status immigrants when the original triggering condition ends; under previous administrations and even in two early Trump administration actions, the agency considered all of the criteria that can justify but also offering fallback argument that not regulating them would be a permissible statutory interpretation; Department of Labor, Tip Regulations Under the Fair Labor Standards Act, Notice of Proposed Rulemaking, 82 Fed. Reg. 57395, 57396, 57398-99 (Dec. 5, 2017) (proposing to abandon previous regulation regarding tips policy, claiming that the agency had earlier misinterpreted the extent of its statutory authority); Agricultural Marketing Service, National Organic Program (NOP); Organic Livestock and Poultry Practices—Withdrawal, Proposed Rule, 82 Fed. Reg. 59988-90 (Dec. 18, 2017) (proposing to repeal regulation governing animal care practices and claiming the agency lacked authority to issue the regulation). The FCC’s repeal of the Net Neutrality also claimed the earlier policy exceeded the agency’s power under the governing statute. Federal Communications Commission, Restoring Internet Freedom, Proposed Rule, 82 Fed. Reg. 25568 (June 2, 2017) (hereinafter “Restoring Proposal”). It revealed its likely policy change choice and rationale with a Declaratory Ruling, Report and Order, and Order - WC Docket No. 17-108 (Dec. 14, 2017) (hereinafter “Restoring Internet Freedom Ruling”), but that disclosed document does not preclude further comment and FCC adjustment. Id. at 1, note 1. The BLM’s rescission and suspension of a rule about waste and royalties from oil and gas extraction similarly was based on a claim of illegal overreach of statutory authority, although included a fallback claim of discretionary authority to adjust the policy even if the earlier policy did not violate the statute. Bureau of Land Management, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, Proposed Rule, 83 Fed. Reg. 7924 (Feb. 22, 2018) (“BLM Waste Rule Rescission Proposal”); Bureau of Land Management, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, Final Rule, 82 Fed. Reg. 58050 (Dec. 8, 2017) (“BLM Waste Suspension Rule”).

\textsuperscript{97} Compare Department of Homeland Security, Extension of the Designation of El Salvador for Temporary Protected Status [TPS], 81 Fed. Reg. 44645 (July 8, 2016) (extending TPS status due to safety risks from initial TPS-triggering earthquake event but noting other statutorily specified sources of risks to safety to explain extending TPS status) with Secretary of Homeland Security Kirstjen M. Nielsent Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018) (announcing termination of TPS status because “original conditions . . . no longer exist” and stating therefore “under the applicable statute, the current TPS designation must be terminated”); Department of Homeland Security, Termination of Designation of Haiti for Temporary Protected Status, Notice, 83 Fed. Reg. 2648 (Jan. 18, 2018) (terminating status because “the conditions for the designation . . . relating to the 2010 earthquake . . . are no longer met” and limiting analysis to the effects of that one event); with Department of Homeland Security, Extension of the Designation of Haiti for Temporary Protected Status, Notice, 82 Fed. Reg. 23830 (May 24, 2017) (extending TPS and in explanation discussing lingering earthquake effects but other risks to safety, including other storm events, agricultural harvest problems, weak public health system, cholera epidemic, lack of safe water, extreme poverty, corruption, and government instability).

\textsuperscript{98} Id.
TPS designations for a nation and ongoing risks to safety, not just the initial triggering event.  

The Federal Communications Commission (FCC), an independent agency, in 2017 took substantial steps toward abandoning the Net Neutrality regulation promulgated in 2015. This proposal and the later tentative final Order engaged more with the earlier action’s content and rationales and relied heavily on “predictive judgments” about “increase investment.” In the proposal and nominally final order, the FCC also stated that the earlier action was founded on unsound “statutory construction” and claimed the new action is based on a “better reading” of the statute. This Order, in contrast to other actions of Trump administration executive agencies, devotes substantial attention to the underlying regulatory history, identifies relevant case law about the contours of agency authority, and devotes pages to satisfying the cases setting forth both the FCC’s power and the constraints of consistency doctrine. While the substantive policy reversal is major and its ultimate fate uncertain, its approach to the law regarding policy change is much more consistent with the norm over multiple administrations.

_Dodging law, reasoning, and science in environmental regulation:_ A stark contrast is evident in efforts to reverse several high conflict environmental actions by the Obama administration. These actions reveal the new administration’s views about presidents’ and agencies’ power to change policy, simultaneously utilizing several of the change strategies just discussed. Here they are reviewed for the power claims they manifest.

For example, the U.S. EPA and the Army Corps of Engineers in 2015, during the years of the Obama Administration, finalized the Clean Waters Rule, a rule setting forth definitions and tests for determining if a particular “water” is subject to federal jurisdiction as a “water of the United States.” This status is of huge economic and environmental significance: it determines if industrial

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101 Id. at 2-19 (tracing the history and rationales behind the past policies and the new policy), and 91-96 (reviewing consistency doctrine caselaw and explaining basis for its policy change).
102 Id. at 2-19 (tracing the history and rationales behind the past policies and the new policy), and 91-96 (reviewing consistency doctrine caselaw and explaining basis for its policy change).
103 Id. at 2-19 (tracing the history and rationales behind the past policies and the new policy), and 91-96 (reviewing consistency doctrine caselaw and explaining basis for its policy change).
104 Analysis of their legal adequacy is provided later to apply and illuminate these body of doctrine and the contingencies frame. _See infra_ at Part III.
discharge permits are required for pollution (under Section 402 of the Clean Water Act) and if dredging and filling of such waters is subject to a strong prohibitory presumption (under Section 404 of the Clean Water Act). As part of generating this 2015 rule, EPA and the Corps simultaneously sought comment on and finalized a massive document—the Connectivity Report—that summarized all peer-reviewed science regarding the functions of various sorts of waters. The Clean Waters Rule itself followed the Supreme Court’s creation of an increasingly unsettled body of law due to three related decisions. The rule was finalized, but it engendered fierce attacks, an opposition “Ditch the Rule” public relations campaign, and was subsequently stayed by a federal appeals court late in the Obama administration. In early 2018, the Supreme Court entered the fray, ruling that challenges to this rule had to be filed in district court, not a court of appeals.

The Trump administration targeted the Waters Rule shortly after the president’s inauguration. President Trump in an Executive Order specifically referenced the Waters Rule, asking the agencies to “review” the rule to “rescind[]” or “revis[e]” the rule “as appropriate and consistent with law.” But the president’s Order went further than just tilt the agencies in a deregulatory direction. He asked the agencies to “consider interpreting the” underlying statutory language “in a manner consistent with the opinion of Justice Antonin Scalia” in the Rapanos case.

It is the next steps that reveal how consistency doctrine can be embraced—even if distorted—by a president and agencies seeking a major deregulatory shift. EPA, under the leadership of Trump Administrator Scott Pruitt, and the Army Corps in March of 2017 published a Notice of Intent to reconsider the Waters Rule, referencing President Trump’s “direct[ion],” and

107 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (upholding broad definition of navigable waters with focus on unavoidable judgment calls in resolving the border of land and water in a complex hydrological system and the Act’s integrity goals); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (rejecting claim of federal jurisdiction under the CWA over wholly intrastate, isolated waters such as ponds, gravel pits, seasonal waters due to their use as migratory bird habitats); Rapanos v. United States, 547 U.S. 715 (2006) (discussed infra).
111 Because Justice Scalia’s opinion failed to garner a Court majority and two different majorities read the statute and regulatory power differently, it is questionable if the agency could adopt the Scalia approach. Moreover, unlike the agencies that issued the Clean Waters Rule, Justice Scalia’s opinion for the plurality was not grounded in science, hydrology, or the agencies’ expertise, instead derived from his parsing of statutory and dictionary language.
also stating that they would consider adopting the Scalia opinion rationales.\textsuperscript{112} The agencies cite FCC v. Fox and State Farm as confirming agency power to reconsider a past “decision,” then go on to embrace the untethered view of agency policy change power.\textsuperscript{113} This is apparent in both what the agencies say and what they omit. Quoting portions of these cases, they state that “such a revised decision need not be based upon a change of facts or circumstances,” but can be based on “a revaluation of which policy would be better in light of the facts” and a “change in administration brought about by the people casting their votes.”\textsuperscript{114} But the notice grapples with no past science, does not mention the Connectivity Report, does not proffer any analysis of the environmental impacts of dropping the Clean Waters Rule, and does not include any legal analysis of the contours of what the agency thought in the past and in the change proposal thinks is permissible under the law.\textsuperscript{115} In proposing to adopt the Justice Scalia view of what waters are protected, the agencies were engaging in another variant of statutory abnegation, substantially shrinking their claimed regulatory power from that asserted in 2015.\textsuperscript{116}

And in a related solicitation of public comments about pursuing this policy change in two steps, with the first characterized as restoring the law to where it stood before the 2015 Clean Waters Rule, the agencies even sought to limit public comments so comments would not address underlying science or policy impacts.\textsuperscript{117} It too ignored science and environmental impacts. Yet a third notice and then finalized rule added an “applicability date” delaying any implementation of the Clean Waters Rule for two years.\textsuperscript{118}

\textsuperscript{112} Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12532 (March 6, 2017) ("EPA March 6 Notice").

\textsuperscript{113} These are two of the three recent major cases regarding policy consistency doctrine. Federal Communications Comm’n v. Fox Television Stations Inc., 129 S. Ct. 1800 (2009); Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983). They are analyzed further in Part II.c.

\textsuperscript{114} EPA March 6 Notice, supra note 102 (citing National Ass’n of Homebuilders v. EPA, 682 F.3d 1032, 1038 & 1043 (citing Fox at 556 US at 514-15; Rehnquist J. concurrence and dissent in State Farm, 463 U.S. at 59).

\textsuperscript{115} An accompanying draft regulatory impact analysis offers some monetization of the costs and benefits of the policy change, but without analysis of effects on the extent of waters protected, effects on the statute’s integrity goals, or indication if the agencies (EPA and the Army Corps of Engineers) continue to base their analysis on peer reviewed science summarized in the Connectivity Report.

\textsuperscript{116} As discussed further below, supra notes #, the Scalia opinion did not garner a Court majority, and in counting votes and positions, quite clearly was a minority view on the extent of government power to protect waters. If adopted as the final view of agency power, it would disclaim a substantial portion of federal authority earlier stated under in the Clean Waters Rule, federal briefing, and in light of relevant science and the Connectivity Report.

\textsuperscript{117} Proposed rule, Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899, 34903 (July 27, 2017) (in rescission proposal, stating not seeking comment on pre-2015 rules or “scope of the definition of ‘waters of the United States’”).

\textsuperscript{118} Yet another “waters”-linked Federal Register notice and then finalized rule purports to delay the “applicability date” of the Clean Waters Rule for another two years. EPA only sought comments directed at the delay option, not on the overall merits of the rule that would be further
engagement with science, facts, or past reasoning, let alone law regarding agency policy change or judicial rejections of similar stay or postponement strategies. Similar language and advocacy relying on language snippets from *Fox* and *State Farm* appears in several other EPA policy change notices. A similar combination of citation, justification, limiting of comment, and lack of engagement with materials previously viewed as central was evident in the late 2017 EPA proposals to repeal the Obama administration’s Clean Power Plan (CPP). The CPP regulation was finalized in 2015 and designed to limit greenhouse gas emissions (GHGs) from power plants due to their climate impacts. The CPP was issued following three Supreme Court decisions that affirmed EPA authority to regulate GHGs, one of which specifically referenced the Clean Air Act provision—Section 111(d)—as providing EPA authority to regulate existing power plant emissions. Furthermore, EPA had in a separate finalized and judicially upheld rulemaking extensively documented climate science and associated health and environmental “endangerments” resulting from GHG emissions and climate change. That finding, plus the Court’s precedents, had been viewed by EPA as triggering a mandatory duty to regulate due to “shall” language in Section 111(d).

In 2017, however, EPA’s proposed repeal notice proffered a different read of the statute, focused on coal plant hardships and claimed consistency with an earlier EPA “inside the fenceline” approach to sources regulated under Section 111(d). EPA proposed a complete repeal of the CPP, but without committing to any replacement rule. It too cited a few consistency doctrine precedents and, as with the Clean Waters Rule WOTUS repeal proposals, sought to limit public comment. It offered a new power-limiting read of the statute rendered a nullity for at least two years. Proposed Rule, Definition of “Water of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55542 (Nov. 22, 2017); Final Rule, Definition of “Water of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule (Jan. 31, 2018).

119 Id.
120 See infra note 318 (reporting on Federal Register notices relying on a similar foundation).
121 The CPP is cited *supra* at note 64.
122 Id.
124 Id. at 1075 (reviewing the Endangerment Finding) (citation omitted).
125 CPP, *supra* note 64 at 64707-25 (summarizing legal history and basis for the design of the CPP). In the CPP, EPA explained its approach as consistent with past rulemakings that required pollution control in light of each industries’ particular attributes. It emphasized that power plants were already adjusting pollution levels through utilization of the integrated energy grid. Id. at 64723-27, 64758-60, 64768-69.
127 Id. at 48036.
128 Id. at 48036, 48038, 48039 (limiting comments sought); 48039 (citing change power cases).
similar to other agencies’ statutory abnegation rationales referenced earlier, but did not cite other relevant statutory language, cases, and past rulemakings EPA had analyzed in 2015, ignored EPA’s detailed 2014, 2015, and 2017 studies of electricity sector and state regulatory trends and accomplishments, and nowhere considered EPA’s pro-CPP reasoning. EPA did not compare or quantify environmental and health costs flowing from the repeal proposal. While an accompanying Regulatory Impact Statement contained some relevant numbers and comparisons, the agency there also shifted its analytical framework. EPA in 2017 also sidestepped discussion of predicted increases in particulate matter pollution accompanying GHG emissions and thousands of additional predicted deaths, yet where it had previously viewed such impacts as legally relevant to the CPP due to statutory language requiring agency consideration of “health” impacts.

The Clean Waters Rule and CPP rollback proposals and one final rule are the beginning of lengthy legal battles. Nonetheless, they reveal broad change power claims. They engage minimally with previous agency reasoning justifying the preceding actions, limit comments, do not quantify the impacts of their actions, with especially scant information on resulting environmental harms, and divide their regulatory steps. They mention some relevant caselaw, but only to emphasize presidential change power. They altogether neglect the more recent Encino Motorcars case that spoke in a clear single majority opinion and required agencies proposing change to do far more than just point to votes or a view of “better” policy, but provide “good reasons,” address “underlying facts,” and leave no “unexplained inconsistency.” And by fragmenting the undoing of rules and seeking to limit comments, these actions avoid the fundamental regulatory rescission question: should the agencies be abandoning a past finalized regulation and, if so, why and at what costs?

In a significantly different procedural setting, President Trump ordered the Army Corps of Engineers to reverse its previous commitment to undertake additional environmental review prior to deciding on an easement permit needed for the conflict-laden Dakota Access Pipeline. His memorandum directed the Corps to “approve in an expedited manner” the project. The memorandum contained language retaining some role for law and facts—“to the extent

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131 The CPP discussed such avoided deaths. The repeal proposal does not despite CAA Section 111(a)’s mandate of agency consideration of “health . . . impacts”.


permitted by law and as warranted”—but stated clearly the outcome sought.\textsuperscript{134} A couple of weeks later, with a reference to President Trump’s “direction,” the Corps announced it would grant the easement, rely on earlier analyses, and reverse itself and now undertake none of the additional review it had earlier said was needed.\textsuperscript{135} Here, the president was directing an agency outcome in an adjudicatory setting—albeit an informal adjudication—where private stakeholders were in conflict over a wealth-generating, but also a risk-creating, project. As explained below, this sort of direct presidential direction in an adjudicatory setting is problematic and likely unprecedented.\textsuperscript{136} Legal skirmishing over this permit and pipeline continues, but one court ruling, in a mixed opinion, faulted the agency for bypassing analysis required by the National Environmental Policy Act.\textsuperscript{137}

The article now turns to analysis of the most directly governing precedents and bodies of law making up consistency doctrine. It returns later to assess the legality and accuracy of these strong claims of largely unfettered agency change power.

\section*{II. Agencies, Presidents, and Policy Change Conditions}

It is indisputable that the baseline norm is that agencies can over time change their policies as they gain experience.\textsuperscript{138} Nonetheless, the power to adjust policy is separate from the conditions and requirements an agency must satisfy to justify such changes.\textsuperscript{139} This article suggests that the conception of a tethered president, and agencies as well, is an important frame to emphasize that while there is ordinarily room for some policy movement, that movement is always subject to constraints. And under an array of cases and linked doctrine, the obligation of agencies to engage with regulatory contingencies is at the heart of tethering constraints and analysis of the legality of agency policy shifts.

\textsuperscript{134} Id.

\textsuperscript{135} Letters of the Army Corps of Engineers to legislators (Feb. 7, 2017).

\textsuperscript{136} Despite broad agreement that presidents cannot claim directive authority over, or have ex parte contacts in connection with, formal adjudicatory procedures, informal adjudicatory actions are generally viewed as providing more latitude for presidential directions and political nudges, but with risks remaining due to risks of bias and prejudgment in settings of competing interests and very fact and context-specific judgments. For further analysis see infra at Part IV.d.; Percival supra note 4 at 2487-2532 (2011) (tracing assertions of directive authority and regulatory review by presidential administrations from Nixon to Obama).; Strauss, supra note 4.


\textsuperscript{138} See Part I.a.

\textsuperscript{139} See infra Parts II.c.; II.g. (reviewing and quoting cases discussing importance of agency justification for changes).
a. Enabling act constraints

The first and most important constraint is statutory language that authorizes the disputed regulatory act. The most fundamental obligation of a president and executive branch agencies is to “faithfully execute” the thousands of laws they must implement and enforce. Such faithful legal execution includes several necessary elements. First, statutes reflect a congressional choice of delegate. Sometimes they confer authority and obligations on a president, but more often such enabling acts confer authority on a particular department or regulator. The specificity or breadth of that delegation is itself an implicit constraint on the president.

Second, statutes will state their purposes and in operative provisions the particular tasks, means, and criteria shaping how the agency should achieve statutory goals. And barring an enabling act offering some additional or contrary process, the APA’s notice-and-comment procedures must precede an agency promulgation of a rule that ends up explained in the Federal Register and finally codified in the Code of Federal Regulations. Hence, laws provide goals, criteria, and procedural choices. Any agency making new policy, whether

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140 See, e.g., Massachusetts, 127 S.Ct. 1438 (emphasizing the centrality of statutory criteria in guiding agency action); La. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986) (stating “agency power to act” is shaped by how “Congress confers power upon it”).
141 U.S. Const. art. II, § 3.
142 Metzger, supra note 37 at 1875-78 (discussing president’s role in supervision of agencies and parsing the Take Care clause); Gillian E. Metzger, Embracing Administrative Common Law, 80 GEO. WASH. L. REV. 1293, 1332-42 (2012) (in article discussing administrative law’s common law-like development, discussing the constitutional and structural allocations shaping the roles of the president, agencies, and courts).
143 Stack, supra note 4.
144 Percival, supra note 4; Stack, supra note 4, at 284; cf. Oncale v. Sundowner Offshore Service, Inc., 523 U.S. 75, 79-80 (1998) (cited in Zarda v. Altitude Express, ___F.3d.__(2nd Cir. Feb. 26, 2018) (en banc) slip op. at 27) (stating that broad statutory language provides room for statutory coverage beyond “principal evil to cover reasonably comparable evils” and is not limited by “the principal concerns of our legislators”). Both linguistic breadth and specificity can impose constraints since an agency might claim expansive or limited powers; in either setting, the delegation language would shape the reasonableness of those power claims.
145 Professor Metzger argues that congressional structural, procedural, and agency role allocations should be given more weight by reviewing courts. Metzger, supra note 142 at 1366-69. The Supreme Court in Massachusetts did focus on such factors and rejected agency reliance on other considerations. See supra note 9 (citing Massachusetts and scholarship analyzing its statutory and expertise-based focus); see also Gonzales v. Oregon, 546 U.S. (rejecting authority of interpretive rule issued by Attorney General in light of specificity of allocated and preserved regulatory roles, federal concerns and divisions reflected in the statute, and also rejecting claim of deference due to lack of process preceding the rule’s issuance).
146 Metzger, supra note 142 at 1348-52 (discussing the role of the APA and how it sometimes constrains courts’ ability to develop administrative law doctrine in a common law-like manner).
a new initiative or a change to an existing one, will need to abide by this combination of substantive and procedural constraints.147

One caveat is necessary here. Barring statutory or regulatory language mandating action, a line of cases dating back to the 1970s gives the president and agencies presumptive control over when and how they will implement and enforce the law, especially where that choice involves resource allocation choices left by Congress to the agency.148 A degree of deregulatory impact can be achieved simply through nonenforcement, although citizen suit and other private causes of action, plus enforcement by state and local governments, often ensure the law does not become a dead letter.149 Weak implementation and enforcement of laws and regulations that may remain unchanged is often difficult or even impossible to challenge in court.150 It might, however, be different if an agency overtly adopted a policy of legal “abdication,” as noted in Heckler v. Chaney.151 Such agency and presidential choices about priorities and their regulatory agenda are likely at the apex of room for discretionary choice.152 Nonetheless, as strongly stated in Massachusetts, when an agency does act, it must root its choices in what the underlying statute requires.153

b. Policy change process, deliberative opportunities, and integrity

When agencies seek to change policy, they will ordinarily be subject to stakeholder input either because it is required or to strengthen the agency’s

147 For a case analyzing these linked concepts in a setting of agency policy change, see Bluewater Network v. Salazar, 721 F. Supp. 2d 7, 21-23, 30, 40 (D.D.C. 2010) (analyzing statutory goals guiding National Park Service agency power and discretion to revise policies, but stating “that discretion is ‘bounded by the terms of the Organic Act itself’” and rejecting as inadequate agency’s attention to facts behind old and new actions) (citations omitted).

148 For analysis of agencies’ latitude to choose procedurally how to make policy, see M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383 (2004). For analysis of general unreviewability of agency choices not to enforce or how to allocate resources, see Ronald Levin, Understanding Unreviewability in Administrative Law, 74 Minn. L. Rev. 689 (1990).


150 See, e.g. Heckler v. Chaney, 470 U.S. 821 (1985) (concluding that nonenforcement choices by agencies are presumptively unreviewable in the courts); Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004) (unanimously holding that the APA only allows courts to examine government agencies’ failures to act where the action is required and discrete); see also Levin, supra at 704-05.


152 See Watt, supra note 17 (arguing for legitimacy of political involvement and considerations in setting priorities and allocating resources if not subject to a countervailing or constraining congressional framework).

153 See supra notes 194-203 and accompanying text.
position when reviewed in court. Agencies can change policies under an unchanged enabling act due either to intentional congressional conferral of power that mandates periodic reassessments, or statutory language that confers substantial discretion on agencies, or often due to implicit delegations of authority. Long before modern deference framework cases, courts deferred to agency interpretations of their enabling acts due to their expertise and congressional choice of regulator, even without explicit delegation of agency power to act via rulemaking. Today, which deference framework shapes judicial review generally hinges on the procedural mode through which the agency acts.

An agency’s procedural choices about how to act and make policy, unless constrained by statute or an agency’s own regulations or policy developed over time, have long been viewed as a choice for the agency to make. Agencies can make policy via regulations, usually through a notice-and-comment process, but also can make policy on a case-by-case basis through adjudications or also through guidance and policy documents not vetted in a notice-and-comment process. The authoritativeness of the derived policy, its durability, and deference frames will vary depending on the policymaking mode.

154 See Bressman, supra note 66; Magill, supra note 148.
155 As discussed below, the Chevron case provides the most frequently cited framework for this concept of implied delegations, the authority conferred, and reasons why agencies should be able to change policy and still receive judicial deference.
156 For two foundational pre-APA cases explaining rationales for judicial deference to agencies, but melding law and fact review, see NLRB v. Hearst, 322 U.S. 111 (1944) (stating “it is not the court’s function to substitute its own inferences of fact for the [NLRB’s]” because “Congress entrusted” to the NLRB such determinations); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (explaining why agency views about the law and facts deserve “respect,” “deference,” and “sometimes decisive weight” since the agency will have “more specialized experience” and Congress “create[d]” an agency and imposed “duties” on the administrator and “powers to inform himself of conditions” relevant to his tasks).
157 See infra notes 163-77 (discussing Mead and deference frameworks).
158 Magill, supra note 148 (analyzing these procedural choices).
159 See id. at 1448 (describing and evaluating the process and effects of different modes of policy making); See also e.g., Sec. & Exch. Comm’n v. Chenery Corp., 332 U.S. 194, 203 (1947) (stating that “the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency”); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978) (holding that the APA imposes the maximum procedural requirements that courts can impose on agencies unless more is required by an enabling act or the agency’s own regulations); Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199 (2015) (holding that a federal agency need only utilize notice-and-comment procedures when enacting or changing “force of law” legislative rules, not when altering interpretive rules).
A meta-rule is critical to understanding consistency doctrine: an agency can only change policy through an equal or more formal procedural mode. And in the modern era, when formal agency actions are a rarity, this usually means that regulations generated through a notice-and-comment process stand at the top of the authority hierarchy. To state it more simply, to amend a fully effective rule promulgated through a notice-and-comment process requires another rulemaking; its takes a regulation to displace another regulation. And, as further analyzed below, that basic rule of law proposition involves a requirement that an agency fully engage with the issues, disputes, and past reasoning of the linked earlier agency action.

When an agency is construing substantive provisions of an enabling act, versus choosing procedurally how to act, it will receive deference too. After the Mead and State Farm decisions, agencies hoping to maximize judicial deference generally will act through a notice-and-comment process. Due to the prevalence of statutory gaps, silences, and ambiguities, most agency regulations involving interpretation of statutory language will trigger deference under the advantageous step 2 of the Chevron framework. If the disputed policy and underlying interpretation is generated through some less formal mode, such as in a guidance document, or perhaps in a brief or through other modes lacking an advance participatory vetting process, then review will usually be under the Skidmore case. It provides for “sliding scale” review looking at numerous factors, especially the thoroughness of the agency’s consideration and its persuasiveness. As further developed below, the more thorough the process and agency reasoning accompanying notice-and-comment rulemaking, the more the agency will be helped when subsequently faced with judicial “hard look review” and linked “reasoned decisionmaking” obligations that focus on disputed contentions and agency responsiveness. But the very thoroughness

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161 Perez confirms this basic proposition yet again, although in reversing an opinion calling for notice- and-comment rulemaking before abandoning a policy announced in a guidance interpretive document.

162 See American Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (stating “of course an amendment to a legislative rule must itself be legislative”) (citations omitted); Envtl. Def. Fund v. Gorsuch, 713 F.2d 802, 814-18 (D.C. Cir. 1983) (same, but also rooting and explaining with reference to APA Section 551(5)’s inclusion of “repeal of a rule” as among the forms of rulemaking).

163 See Bressman, supra note 66; Magill, supra note 148.

164 Levin, supra note 25 (explaining Chevron two-step framework in work emphasizing the second step’s overlap with “arbitrary and capricious review”).

165 Perez affirmed this. For non-notice-and-comment rules or other forms of agency action, the judicial reviewing framework is generally that stated in Skidmore v. Swift & Co., 323 U.S. 134 (1944). For exploration of the differences between the logic and analyses required under Chevron and Skidmore, see Peter L. Strauss, “Defe rence is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143 (2012).

166 Skidmore, 323 U.S. at 140.

167 See infra at Part II.e.
of resulting agency process and explanation erects hurdles for later proponents of policy change.

When it comes to consistency and agency latitude for change, *Chevron* and *Skidmore* are in tension in their language. In *Chevron*, a notice-and-comment rulemaking resulted in a major change in policy that was upheld by the Supreme Court. In *Chevron*, a notice-and-comment rulemaking resulted in a major change in policy that was upheld by the Supreme Court. The agency shifted from interpreting “stationary source” to create a stack-by-stack trigger for pollution control upgrade obligations to allowing states to utilize a “bubble” strategy. Under the bubble strategy, polluters could, through internal pollution trading, save money by not triggering heightened pollution control obligations. The agency explained how the stack-by-stack approach could chill new investments and raise costs, but at little or perhaps no environmental benefit since upgrades might not be made.

Instead of viewing the policy change by EPA as a problem, the *Chevron* Court actually saw policy reconsiderations, and especially the EPA shift under review, as laudable. To engage in “informed rulemaking,” the Court declared, an agency “must consider varying interpretations and the wisdom of its policy on a continuing basis.” And this obligation, and accompanying judicial deference, was viewed as especially necessary in “in the context of implementing policy decisions in a technical and complex arena.” But, importantly, the Court also emphasized that, under the statute, the agency unavoidably had to reconcile competing policy goals of economic growth and clean air and found that rulemaking comments, empirical observations, and economic theory supported the agency’s policy shift.

In contrast, the *Skidmore* case retains “consistency” as one of its sliding scale factors weighing in favor of the agency’s policy, and, after *Mead*, the *Skidmore* framework applies to pretty much all modes of agency action other than formal action or notice-and-comment rulemaking. However, despite *Chevron*’s language, judges often still consider consistency when assessing the reasonableness of an agency decision, even in settings that seem to fall into the

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168 *Chevron*, 467 U.S. at 842.
169 Id. at 840-42, 851-59, 863 (reviewing the derivation of the bubble strategy and reasons for its adoption).
170 Id. at 863.
171 Id. at 855-63, with the record and policy rationales emphasized at 863.
172 Id. at 863-64.
173 Id. For discussion of this *Chevron* language, see Kozel & Pojanowski, supra note 8 at 125. This element of *Chevron* has spawned a massive body of scholarship. For a curated sampling, see JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATIONS AND REGULATION (3rd ed. 2017) at 970-92 (reviewing leading scholarly analyses of the case).
174 *Chevron*, 467 U.S. at 863-64.
175 323 U.S. at 140. *Mead* made clear that *Skidmore* provides the scope of review framework when the underlying law or agency’s procedural choices render *Chevron* deference inapplicable. *Mead*, 533 U.S. at 232-33.
heart of *Chevron* deference country.\textsuperscript{176} One recent study found that consistency was a still a prevalent if not dominant factor assessed by reviewing courts.\textsuperscript{177}

c. Inconsistency, politics, and facts

Three major modern Supreme Court decisions contain extended analysis of consistency doctrine and, in particular, the role that politics versus fact-linked contingencies can play in justifying a policy shift. And a fourth, the *Massachusetts* decision, also involved a policy change and discussion of permissible grounds for such a shift, although with less of a focus on consistency doctrine. In ways that are either being overlooked or mischaracterized in the recent change power claims reviewed in Part I, these cases do not embrace politics as a sufficient rationale for a policy shift. They do not permit regulatory shifts based on regulatory whim. Instead, they note that politics can motivate a reexamination of policy, that policy shifts are possible, and basically say that close policy judgment calls go to the agency. But these decisions also emphasize the need for an agency to confront fully its earlier actions, its past reason-giving, and especially facts or circumstances relevant to the old and possible new policy. Agencies cannot ignore the contingencies—which are made relevant by the applicable statutes—underlying initial actions proposed for later policy change.

The foundational modern case is the Supreme Court’s *State Farm* decision.\textsuperscript{178} The case is most known for its embrace of “hard look review” and articulation of the key elements of “reasoned decisionmaking.”\textsuperscript{179} Nonetheless, in its rejection of a Reagan era rescission of promulgated car safety standards, the Court set forth the key elements of consistency doctrine.\textsuperscript{180} The Court was confronted with the National Highway Traffic & Safety Administration’s rejection of Standard 208, a regulation requiring cars to be equipped with either air bags or automatic seatbelts. The agency, however, only offered an

\textsuperscript{176} See e.g., major questions cases discussed supra note 76 and accompanying text; I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (rejecting *Chevron* deference due to change in statutory construction that contradicted clear congressional intent and historically held agency interpretation); Rust v. Sullivan, 500 U.S. 173 (1991) (rejecting consistency-based challenge to deference and upholding new interpretation of FHA regulation); Smiley v. Citibank (S. Dakota), N.A., 517 U.S. 735 (1996) (upholding bank regulation as reasonable under the *Chevron* framework); Gonzales v. Oregon, 546 U.S. 243 (2006) (declining to uphold United State Attorney General’s interpretive regulation in part due to inconsistency with past authority claims, lack of adequate notice and opportunity for comment, and statute’s allocation of particular roles to particular actors) ; UARG, 134 S. Ct. at 2442-45 (rejecting EPA newly claimed authority due to several factors, among them its newness yet under a longstanding law).


\textsuperscript{178} 463 U.S. 29 (1983).

\textsuperscript{179} See id. at 42-44 (analysis embracing and setting forth key elements of “hard look review” and “reasoned decisionmaking”).

\textsuperscript{180} Id. at 41-42.
explanation for one of the regulatory reversals and argued for minimal judicial scrutiny of its deregulatory action.\textsuperscript{181}

The Court rejected this argument for minimal scrutiny, emphasizing the need for an agency to confront its old policy and offer explanation for the change. An agency, the Court stated, when “changing its course” is required to “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”\textsuperscript{182} Half of the agency’s action was easy to find arbitrary and capricious because the agency “apparently gave no consideration whatever” to keeping one of safety strategies.\textsuperscript{183} “Not one sentence of its rulemaking statement discusses the airbags only option,” the Court emphasized.\textsuperscript{184}

The \textit{State Farm} Court explained why it declined to submit a deregulatory policy change to some less rigorous standard of review. First, the APA made no such distinction.\textsuperscript{185} Second, the enabling act language made no distinction between initial regulatory actions and rescissions of past actions.\textsuperscript{186} Third, the Court explained that the usually minimal review of agency declinations to act was “substantially different” from an agency’s “revocation of an extant regulation.”\textsuperscript{187} Such revocation “constitutes a reversal of an agency’s former views as to the proper course.” And, quoting an earlier precedent’s language, the Court stated that a “settled course of behavior embodies the agency’s informed judgment” that the earlier action “will carry out the policies committed to it by Congress.”\textsuperscript{188} This creates “at least a presumption” that “those policies will be carried out best if the settled rule is adhered to.”\textsuperscript{189}

Of course, the Court continued, agencies can seek to change policy.\textsuperscript{190} But even with that language, the Court linked the possibility of change not to politics or just examination of statutory language, but to the need for “ample latitude to ‘adopt their rules and policies to the demands of changing

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\item[\textsuperscript{182}] Id. at 42. The tail clause, stating more is required than “when an agency does not act in the first instance,” is rejecting arguments that a deregulatory act is akin to an agency’s choice not to act or regulate, a setting subject either to no judicial review or deferential review. \textit{See supra} notes 137-40 and accompanying text (discussing \textit{Heckler} and \textit{SUWA} and citing related literature on unreviewability).
\item[\textsuperscript{183}] Id. at 46.
\item[\textsuperscript{184}] Id. at 48. See also id. at 50-51 (stating the “agency submitted no reasons at all”)
\item[\textsuperscript{185}] Id. at 41-42.
\item[\textsuperscript{186}] Id.
\item[\textsuperscript{187}] Id. at 41.
\item[\textsuperscript{188}] Id. at 41-42.
\item[\textsuperscript{189}] Id. For analysis of statutory interpretation and judicial review standards for “longstanding” agency law interpretations, see Anita Krishnakumar, \textit{Longstanding Agency Interpretations}, 83 Fordham L. Rev. 1823 (2015). Krishnakumar calls for more rigorous review of agency change if based on political factors, but deference if rooted in analysis of changing facts, expertise and “experience-based reasons,” and workability. Id. at 1877-79.
\item[\textsuperscript{190}] \textit{State Farm}, 463 U.S. at 42.
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circumstances.”’”\textsuperscript{191} It reiterated the “changing circumstances” language and stated that “the presumption is against changes in current policy that are not justified by the rulemaking record.”\textsuperscript{192} Hence, the \textit{State Farm} Court left room for agency policy change, but emphasized how past agency reasoning, the record, and underlying “circumstances” would need to be engaged and overcome to justify a change.

Chief Justice Rehnquist, in a partial dissent, suggested that a change of administration and policy priorities could be among the grounds for an agency policy shift, although his embrace of politics as a justification for change is actually quite modest. He only stated that they could be a “reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”\textsuperscript{193} This view did not gain majority support.

The Court’s \textit{Massachusetts} decision did not focus on doctrine governing consistency and policy change, but it too involved a policy change grounded in both a new statutory interpretation and presidential priorities and discretion.\textsuperscript{194} A petition sought EPA regulation under the Clean Air Act of greenhouse gas emissions from motor vehicles.\textsuperscript{195} EPA had earlier claimed authority to regulate GHGs as an “air pollutant” in two agency general counsel memoranda and related affirmations to Congress.\textsuperscript{196} Under the new George W. Bush administration, however, EPA reversed itself, grounding this policy change in both a statutory abnegation strategy under which EPA newly disavowed authority it had earlier claimed, as well as variables linked to presidential priorities.\textsuperscript{197}

The Supreme Court rejected EPA’s statutory interpretation as unsound.\textsuperscript{198} It also faulted EPA for justifying that declination with reference to unrelated to the governing statute’s criteria.\textsuperscript{199} The agency had to ground its decision on the statutory criteria and relevant science, not extra-textual considerations and politics. It could not “rest[] on reasoning divorced from the statutory text.”\textsuperscript{200} The Court viewed the statute’s broad reach and specificity regarding criteria for action as “constrain[ing]” the agency and president; this was “the congressional design.”\textsuperscript{201} The agency had to make a “reasoned judgment” based on the science, “ground[ing] its reasons for action or inaction

\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} \textit{Id.}, at 59 (Rehnquist, C.J., concurring in part and dissenting in part) (“As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration”).
\textsuperscript{194} \textit{Massachusetts}, 549 U.S. at 510-14
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id. at 511-14.
\textsuperscript{198} Id. at 528-33.
\textsuperscript{199} Id. at 532-35.
\textsuperscript{200} \textit{Id.} at 532-33.
\textsuperscript{201} Id.
in the statute.” The Court required the agency to ground its choices based on the contingencies made relevant by the Clean Air Act, namely whether the effects of GHGs and climate change caused “endangerment” within the meaning of the statute.

The more recent FCC v. Fox decision and 2016 Encino Motorcars case further flesh out the general framework for the permissible role of politics in agency policy change. In FCC v. Fox, the agency had penalized a broadcaster based on a policy change regarding “fleeting use” of obscenities on television. The splintered opinions in Fox render difficult determination of exactly what views regarding policy change garnered majority support. Change itself was stated not to trigger any heightened standard of judicial scrutiny, but all agreed the agency would have to confront the old policy and explain the changed new policy. The justices differed on what had to be weighed. Politics could play a part, and for Justice Scalia and an apparent majority aligned with him, agencies would have to “show that there are good reasons for the new policy.” All justices appeared to agree on this need for “good reasons.”

The Scalia opinion, ostensibly for a majority but eliciting some pointed differences in the Justice Kennedy concurrence which was needed to make a majority, also stated the following: the agency “need not demonstrate to the court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.” Justice Scalia and concurring Justice Kennedy both also acknowledged that because past policies will tend to change the status quo by engendering reliance interests and often prior agency actions involve “factual findings,” reviewing courts will tend to have to look at more with a policy change than with a policy.

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202 Id. at 534-35.
203 Id.
204 For review of cases between State Farm and Fox discussing policy change and justification, see Kozel & Pojanowski, supra note 8 at 129-33. Encino post-dates that article’s analysis, as do the recent policy change power claims reviewed here.
205 Fox, 129 S. Ct. at 1805-10 (reviewing this policy history and agency action).
206 See Kozel & Pojanowski, supra note 8 at 129 (highlighting reasons the splintered Fox opinion, especially differences between Justices Scalia and Kennedy’s opinions, leaves doctrinal uncertainty and characterizing the case result as “both thought provoking and deeply enigmatic”).
207 Fox, 556 U.S. at 1810.
208 Id. at 1811.
209 The dissenters would have required more, but indicated no disagreement with the need for “good reasons.”
210 Id. at 1811. This appears to be language garnering majority support, but Justice Kennedy’s concurrence --which was needed to make a Court majority--emphasized more the importance of factual justification and the need to check agencies from exercising “unbridled discretion” or ignoring contrary or “inconvenient” facts, especially since many agency actions are built on “factual findings.” Id. at 1822. Encino did so even more. See infra at notes 213-19 and accompanying text.
Dissenters argued that agencies will always have to explain why the change was made, sharing the expectation that agencies must engage with prior facts and justifications.212

The Encino Motorcars decision, in a majority opinion by Justice Kennedy post-dating the death of Justice Scalia, linked this line of cases into one quite coherent exegesis that also lacked the uncertainty in Fox created by multiple opinions. Agencies making a policy change must, as always, “give adequate reasons” for their decisions.213 And that, as under typical “hard look review” articulated in State Farm, means an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”214 The Court again emphasized the need for assessment of any “reliance interests” and, quoting from Fox, stated that a “‘reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.’”215 And “unexplained inconsistency” is justification for holding a new agency action “arbitrary and capricious.”216 The Encino Court notably did not quote or refine the Fox language about the agency change not needing to be “better” or that an agency “believe[f]” it was better would be enough, leaving its majority stature and exact meaning still uncertain.217

Importantly, all of these cases share the requirement that agencies engage with the “facts and circumstances that underlay an earlier action. Such “underlying facts and circumstances”—which constitute a substantial part of what this article collectively refers to as “contingencies”—will usually be repeatedly stated and linked to relevant law by agencies. These cases hence require substantial engagement with these contingencies by the later agency proposing the policy change. Such underlying facts and linked reasoning and agency choices are virtually always discussed in referenced agency studies, the notice of proposed rulemaking, the preamble explaining the final agency rule choices, and also in agency responses to comments that must be provided to

211 Id. at 1811.
212 Id. at 1832.
214 Id. at 2125.
215 Id. at 2126 (quoting Fox at 515-16).
216 Id at 2125 (quoting Brand X, 545 U.S. at 981).
217 This language, however, is probably best read to embrace a deferential judicial attitude, not permission for unfounded agency action based merely on “belief.” Combining the “good reasons” language and “believe it to be better” language is best read to require something akin to “reasonable belief” in the proffered good reasons for the policy change, not proof that it is “better” than the initial policy. This makes it like most deference regimes, leaving agencies a space within with they can make and remake policy, if they provide adequate justifications. See Ronald M. Levin, Hard Look Review, Policy Change, and Fox Television, 65 U. MIAMI L. REV. 555 (2011) (discussing the case and this language and seeing it as consistent with Chevron, Brand X, and basic requirements of explanation under “arbitrary and capricious” review standards).
satisfy the requirements of reasoned decisionmaking.\textsuperscript{218} They are usually relevant to the assessment of the problem triggering agency regulation and also discussed in the agency’s justification of the ultimate regulatory choice.

Hence, under the Court’s express language, a subsequent agency effort to amend or rollback a previous regulatory policy will require engagement with these materials and related sources of contestation. “Unexplained inconsistency” is not permissible.\textsuperscript{219} As introduced above and analyzed in greater detail below, several major deregulatory proposals emphasize the possibility of policy change and a place for politics, but barely acknowledge the Supreme Court’s persistent doctrinal emphasis over thirty years that an agency must address contingencies, namely underlying facts, science, circumstances, the record, and the agency’s past reasoning.

d. Additional consistency meta-rules

Several other administrative law meta-rules further constrain agencies, especially if they are tempted to deviate from past policy and practices but sidestep contrary evidence, arguments, or try to avoid direct declaration that they are doing so.

Perhaps most important is the agency’s obligation to act consistently with its own commitments and practices. If an agency has in a promulgated regulation made a substantive or procedural choice, then it (along with affected stakeholders and courts as well) will under the Accardi doctrine have to abide by that commitment.\textsuperscript{220} Change, if it is to be made, will need to be done at the same level of procedural formality.\textsuperscript{221} Until changed, the agency and all others will need to follow that rule; it remains governing law until validly changed.\textsuperscript{222}

Even without a promulgated regulatory commitment, agency practices and policies revealed or declared over time via other modes, especially adjudications, create the agency’s working law and will also constrain an agency and require ongoing consistency or rational explanation for change.\textsuperscript{223} Only by confronting and in a reasoned explanation justifying some change of course can

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\textsuperscript{218} In fact, as explained below, during litigation those justifications will be reiterated and likely sharpened. See infra at notes 214-49 and accompanying text.

\textsuperscript{219} Encino at 2125.


\textsuperscript{221} Sierra Club v. Environmental Protection Agency (D.C. Cir. Oct. 24, 2017) (Dkt. No. 16-1097), slip op. at 11; American Mining Cong., 995 F.2d at 1109.

\textsuperscript{222} Judicial rejection of postponement and stay strategies emphasize this point. See infra at Part II.g.

\textsuperscript{223} Atchison, Topeka & Santa Fe Ry. Co., 412 U.S. 800, 807-08 (1973) (stating agency adjudications can “service as vehicles for the formulation of agency policies” and that an agency departing from a policy must “explain its departure from prior norms”) (citations omitted). For analysis of more modern cases involving court scrutiny of agencies changing policy over a series of adjudicatory actions and related policy revelations, see supra notes 12-13 and accompanying text.
an agency deviate. Agencies cannot vacillate all over the map. They must treat similarly situated people alike. Should agencies be erratic, they will usually be held arbitrary in their policies. And, as clarified in the Allentown Mack decision, if an agency has declared one rule but perhaps deviated in practice, the Supreme Court has declared that the governing standard must be what is declared: “the rule announced [must be] the rule applied.”

As further revealed by the Judulang case, erratic agency actions in the form of overall inconsistency, or consistent inconsistency, will also lead to judicial rejection. Agency action must be based on “non-arbitrary, ‘relevant factors’ . . . [and cannot] hang on the fortuity of an individual officials’ decision.” The Court condemned the agency tribunal (the Board of Immigration Appeals) for lacking decisional criteria connected to “the goals of the deportation process or the rational operation of immigration laws,” making it a “‘sport of chance.’” And such agency policy, or really lack of a consistent policy, was hence illegal “arbitrary and capricious” action under the APA.

In addition, a related meta-rule is evident in the practices of government rulemaking itself. Agency rulemakings must give all fair notice of what is proposed. A final rule that differs too much from a proposal can be rejected as not a “logical outgrowth” of the proposal and remanded for more adequate notice-and-comment opportunities. Courts will also decline to defer to an agency’s newly declared policy if it goes beyond what the public would have expected and addressed in comments. This is especially evident in recent preemption case law. Agencies that claim preemptive impact of federal approvals or actions in litigation or possibly regulatory preambles will be ignored or reviewed with no deference if that preemption claim is inconsistent with the earlier noticed commitments. Hence, a vague or conclusory proposal

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224 The Court in Atchison states that there is “at least a presumption that those policies will be carried out best if the settled rule is adhered to” but then identifying permissible grounds for policy change when “adequately . . . explain[ed]”. 412 U.S. at 802, 807-08.
225 Todd D. Rakoff, Shaw’s Supermarkets v. NLRB, 128 HARV. L. REV. 477 (2014) (discussing then Judge Breyer’s opinion in Shaw’s Supermarkets v. NLRB, 884 F.2d 34 (1st Cir. 1989) and its call for agencies to “follow or consciously change[]” policy but not “have one rule for Monday, another for Tuesday”) (citations omitted).
226 Encino at 9-10.
229 Id., 132 S. Ct. at 486.
230 Id. at 487.
231 See Jennifer Nou and Edward H. Stiglitz, Strategic Rulemaking Disclosure, 89 S. CAL. L. REV. 733, 744-46 (2016) (characterizing modern “logical outgrowth” doctrine as requiring that proposals “be detailed and specific enough to alert potential commentators,” including initial disclosure of “key data and studies they relied upon”).
232 See Wyeth v. Levine, 555 U.S. 555 (2009) (rejecting FDA claim that its less stringent FDA actions could preempt stricter state requirements, but in opinion focusing on lack of notice of such a plan); see also Gonzalez v. Oregon, 546 U.S. 243 (2006) (rejecting attorney general’s claim of power without express statutory authority and no preceding notice or deliberation over
to change policy, or major changes between a proposal and final rule, can also lead to rejection of a changed policy. Yet again, courts expect and police for agency consistency with procedural norms and with the agency’s stated commitments or proposals.

e. Reasoned decisionmaking as a constraint

Perhaps most importantly, the long established requirement that agencies engage in “reasoned decisionmaking” provides a brake on erratic or unexplained sudden change, or actions that disregard statutory criteria and process. The obligation of agencies to engage in reasoned decisionmaking is among the most durable of administrative law tenets due to its roots in several overlapping facets of the Administrative Procedure Act (APA) and doctrine framing judicial review of agency action.234 This term and the obligations it imposes involve an overlapping amalgam of statutory interpretation frames, *Chevron* Step 2 “reasonableness” review, the fleshing out of “arbitrary and capricious” review and, relatedly, what “hard look review” requires of courts and agencies subjected to judicial review, especially regarding a policy change.235

First, reasoned decisionmaking law establishes—as do virtually all administrative law doctrines—that all agency decisionmaking must be framed by what governing statutes identify as relevant goals, criteria, and process.236 Any failures to abide by those statutory mandates will flunk. *Overton Park* and *State Farm* both require agencies to base their decisions on the “relevant factors.”237 Likewise, in rejecting the agency’s explanation for turning down a petition, the Supreme Court in *Massachusetts v. EPA* emphasized that the agency had to base its actions (or choices not to act) on assessments called for by statutory criteria.238 By so rejecting reliance on non-statutory political considerations, agency latitude to follow the political winds or expediency was constrained. As others have noted, the case called for a more expertise-based

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234 Much of this doctrine is rooted in judicial constructions of the APA’s judicial review provisions. 5 U.S.C. 701-706.
235 *State Farm*, 463 U.S. at 41-44 (linking these cases and explaining contours of required agency explanation and judicial review).
236 As mentioned *supra* at note 9 and accompanying text, *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) similarly reifies the importance of reasoned decisionmaking by emphasizing the agency obligation to ground its actions in assessment of factors in the statutory text.
237 *State Farm*, 463 U.S. at 43 (linking Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) and other precedents and factors now referred to as heart of “hard look review”)
238 *Massachusetts*, 549 U.S. at 532-33 (stating agency cannot rely on “reasoning divorced from the statutory text” and rejecting political “laundry list of reasons not to regulate”).
mode of decisionmaking that required attention to facts made relevant by the governing statute.239

Second, *Chenery I* requires that agencies provide a reasoned contemporaneous explanation when they act and then consistently stick with that explanation. Agencies in any rulemaking thus cannot strategically adjust their rationales to fend off attacks, but will also have to amplify on the reasonableness of the initial explanation.240 Hence, an agency considering a policy change will not only confront an earlier initial agency choice that necessarily grapples with underlying contested issues and facts, but also additional consistent but likely more fulsome explanation from when that rulemaking was attacked in court.241

Furthermore, *Overton Park* creates similar incentives.242 It authorizes more intrusive judicial review of agency actions, and possibly even court testimony and cross examination of regulators, when an agency does not adequately explain its choices initially or make clear reference to a supportive record.243 To avoid such judicial probing, agencies are usually careful to provide findings or explicitly stated rationales that engage relevant law, comments, and facts.244 Because stakeholders in and out of an agency know the importance of an agency getting its initial choice right, all will make sure that studies, comments, data and supporting submissions to the agency and later courts will weave an additional but still consistent supportive tapestry of rationales and evidence.245

Relatedly, reasoned decisionmaking scrutiny often focuses on how the agency responded not just to disputes over statutory interpretation, but related disputes over on-the-ground realities such as relevant risks, business practices, science, costs, and the like. An agency that ignores salient issues or sweeps away cogent challenges and criticisms faces quick and easy rejection in the courts.246 A well counseled agency, assuming the agency has a firm legal and

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239 Freeman & Vermeule, *supra* note 9; Watts, *supra* note 17.
240 Atchison, 412 U.S. at 807 (stating that courts “must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process”) (citations omitted).
241 Justice Kennedy’s *Fox* concurrence appears to be describing this sort of agency amplification of the factual grounds for an initial action. *Fox*, 129 S. Ct. 1824 (Kennedy, J. concurring) (explaining why the agency record “may be much more developed”).
243 *Overton Park*, 401 U.S. at 419-20.
244 Peter Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992) (discussing the pervasive politics influencing the Overton Park battle and incentives created by the Court’s decision).
245 *Vermont Yankee* goes further, in the National Environmental Policy Act context, by requiring commenters to make clear their views or later be foreclosed. *Vermont Yankee*, 435 U.S. at 554. NEPA-specific “hard look” obligations now overlap in logic and language with “reasoned decisionmaking” requirements and “hard look review” as embraced in *State Farm*.
246 For discussion of lead cases on such rejections in the setting of policy changes, see *infra* at Parts II.g. and II.h.. Judicial rejections of agency actions due to lack of adequate notice or agency failures to respond to salient comments and criticism are legion. For recent decisions, see e.g. American Radio Relay League, Inc. v. Federal Communications Commission, 524 F.3d 227, 236-41 (D.C. Cir. 2008) (rejecting agency action for failure to provide adequate notice regarding
factual basis for its regulatory choice, will therefore directly engage with its challengers’ and supporters’ key claims and issues in dispute and explain why the agency’s action is well justified.\textsuperscript{247} This will occur both within a rulemaking and again in the courts.

This process of contestation and cogent response results in a dialectical, iterative sort of tightening of explanations due to close engagement with contested claims and arguments.\textsuperscript{248} Much as reply briefs often provide the most incisive analysis, fiercely challenged regulations result in ever more cogent agency explanations that virtually always engage and reject the very facts and claims that later change advocates embrace.

This hybrid of substantive and process review of an agency’s initial regulation results in a hefty body of reason-giving and related identification of which studies, facts and related policy predictions matter. When, at a later time, a president or agency seeks to reverse course and jettison the old rule, all of those contingent facts and reasoning will need to be engaged. It is a near certainty that the \textit{Encino} Court’s circumstances will arise that require substantial agency explanation; not only are reliance interests likely, but “facts and circumstances that underlay” the initial action will be many and will have been repeatedly identified, articulated, and sharpened during the regulatory and later adversarial process.

An agency pursing a policy change will thus have to confront outside stakeholders’ submissions but also explain its own rejection of materials, explanations and arguments that it previously identified as justifying a contrary earlier choice.\textsuperscript{249} Even if the agency hopes somehow to avoid such engagement, stakeholders supportive of the initial policy will put the agency’s own earlier words and logic back before it and again later before the courts. With such comments and arguments back before it, the agency will need to respond, leave no “unexplained inconsistency,” and justify its choice with “good reasons” or face judicial rejection.\textsuperscript{250}

Policy change is thus possible, but an agency that proposes a policy change but tries to sidestep science, studies, data and the agency’s own past studies relied on and failure to respond to comments); Owner-Operator Indep. Drivers Assoc. v. Federal Motor Carrier Safety Admin., 494 F. 3d 188, 199-206 (D.C. Cir. 2007) (faulting agency for failing to provide adequate notice, especially for undisclosed change in methodology).

\textsuperscript{247} Scholarship on regulatory ossification links such frozen or slowly changing regulation to the rigor of such review. See \textit{supra} note 67 and accompanying text (citing and discussing such literature).

\textsuperscript{248} For analysis of how sequences of cases over the same or linked agency actions can lead to an agency-court dialog providing deliberative benefits and sharpening of analysis, see Emily Hammond Meazell, \textit{Deference and Dialogue in Administrative Law}, 111 COLUM. L. REV. 1722 (2011).

\textsuperscript{249} Justice Kennedy notes this. \textit{Fox}, 129 S. Ct. at 1824 (Kennedy J., concurring in part and concurring in the judgment) (in discussing the “reasoned explanation” obligation, stating that an “agency cannot simply disregard contrary or inconvenient factual determination it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate”).

\textsuperscript{250} See \textit{supra} Part II.c. (discussing this element of \textit{Fox} and \textit{Encino})
explanations will, due to these linked facets of reasoned decisionmaking’s requirements, be vulnerable to judicial rejection. Because few agencies will set themselves up for failure, cases involving agency policy change and addressing inadequate explanation and engagement are rarer than might be expected. Still, their conclusions are remarkably consistent.251

f. Agency record and deliberative conformity

One sometimes overlooked facet of consistency doctrine is how agencies, in a sequence of deliberations leading to action, will create a constraining set of materials, especially where they are based on conclusions about evidence, data, or science. Much of this law arises out of early administrative law doctrinal development, building on Universal Camera’s declaration of what “substantial evidence” review requires.252 Courts had to devise rules guiding the obligations of agencies and courts where administrative law judges or other subordinate agency officials assess evidence underpinning an action that then moves up the regulatory hierarchy.

Although the nuances of this early law are of little significance to this article, one central tenet remains settled and important: agency officials cannot disregard the evidentiary, science or data-based judgments generated by, and then moving through, the agency’s process and hierarchy.253 Some sorts of determinations may be binding while others may not, but senior regulators cannot wholly disregard what was generated earlier by hierarchical subordinates. Here too, like the requirements of reasoned decisionmaking, agency decisionmakers must engage with what came before.

The Alaska Department of Conservation case is illustrative, although with a state-federal wrinkle.254 The Supreme Court upheld EPA’s power to issue orders declaring that a state air pollution permit was illegally lax, in part because career state regulators and later EPA officials documented better methods of pollution control; state political leadership had embraced a more lax approach with little factual support.255 The Court, like EPA, looked at the underlying regulatory stringency with close attention to the findings of regulatory

251 Representative cases are discussed infra at subsections II.g. and II.h.
252 Universal Camera v. NLRB, 340 U.S. 474 (1951) (clarifying that courts must look at supportive and contrary evidence, and also indicating that reviewing courts need to include subordinate administrative judge’s finding in evidence assessed). For application of this logic to tax court decisions, see Ballard v. CIR, 544 U.S. 40 (2005) (holding that record on appeal must include special tax court judges’ reports).
253 See, e.g., Pollinator Stewardship Council v. US EPA, 806 F.3d 520 (2015) (rejecting EPA licensing use of a pesticide due to failure to reconcile earlier statements about needed additional analysis and final action taken without such data);
255 Id. (contrasting professional staff’s conclusions and contrary lax decision by the heads of the state agency and noting lack of record support for business hardship claim of mine seeking permit in opinion upholding EPA’s powers to reject permit).
subordinates and how senior regulators grappled with that information.\textsuperscript{256} EPA, and the affirming Supreme Court, rejected the unfounded politicized state embrace of laxity.

Similarly, and also in a federalism-laden case, the Supreme Court in \textit{Wyeth v. Levine} rejected FDA’s new claim that its regulatory approvals preempted common law regimes, but without preceding notice of such a plan.\textsuperscript{257} The Court noted the agency’s failure to notify the world of this possible claim of preemptive impact, as well as the agency’s failure to explain what justified the change in policy, failure to engage contrary views, and other lack of factual and reasoned justification.\textsuperscript{258}

\ \ \ \ g. The losing track record of poorly explained policy changes

Several key precedents, in applying these intertwined bodies of doctrine, illuminate both what agencies can and should do in changing policies, but also illuminate grounds for judicial rejection. These precedents also reveal that the rigor with which administrations justify their policy changes shapes the judicial reception. Courts take this body of doctrine seriously.

Both advocates of politically driven policy change and critics of the alleged ease of change, such as Justice Gorsuch, refer to the \textit{Chevron} case to confirm their views. It is true that the Supreme Court in \textit{Chevron} upheld an agency’s (EPA’s) policy change, and even praised agency policy reconsideration as something an agency “must” do.\textsuperscript{259} However, the change at issue—-allowing states regulating “stationary sources” to utilize a facility-wide bubble strategy that allowed internal pollution trading instead of a stack-by-stack regulatory approach—-actually was far from radical and was not justified based on some version of presidential power to rule by fiat.\textsuperscript{260} The agency utilized a notice-and-comment process, still pursued cleaner air, still was regulating the sources, and the agency and later Supreme Court justified the new bubble strategy as appropriately “reconciling” dueling goals of the Clean Air Act, namely clean air and economic growth.\textsuperscript{261} Moreover, the agency and commenters directly engaged with the earlier approach in explaining the new bubble strategy, offered economic analyses and observations about how previous stack-by-stack regulation could deter operational improvements, and explained how such a bubble strategy should lead to more cost-effective regulation.\textsuperscript{262} The case basically involved changed means to achieve a

\textsuperscript{256} \textit{Id.}
\textsuperscript{257} 555 U.S. 555 (2009).
\textsuperscript{258} \textit{Id.}.
\textsuperscript{259} \textit{Chevron}, 467 U.S. at 863-64.
\textsuperscript{260} See \textit{Id.} at 855-66 (reviewing policy rationales, incentives for new investments created by the policy options, economics literature, record support, and legislative history as part of the Court’s upholding of EPA’s bubble rule as reasonable).
\textsuperscript{261} \textit{Id.} at 863-65.
\textsuperscript{262} \textit{Id.} at 863 and notes 24-25 and accompanying text.
consistently defined end, with careful hewing to the statute’s relevant factors and a record and logic basis for the choice. A rule was replaced with another rule.

So as a case upholding a policy change, *Chevron* does provide guidance. But it is rooted in far more than just identification of a linguistic ambiguity or presidential leanings. In upholding the new approach under what today would be called *Chevron* step 2, the Court and agency both examined the rationales for the old and new policy, and looked for and found good reasons for the new policy. Its logic and conclusions neatly fit within the consistency law frameworks set forth years later in *Fox* and *Encino*, although those two cases’ policy shifts met with varied fates due to the inconsistent rigor of their agencies’ change explanations.

*State Farm* is at the other end of the lessons spectrum, illustrating what agencies absolutely cannot do in changing policy. The abandonment by the National Highway Traffic and Safety Administration of the previous regulatory requirement of seatbelts or airbags, but with no explanation for the abandonment of the airbag alternative, was firmly rejected. Similarly, the agency’s illogic in abandoning the requirement of seatbelts also led to rejection.

Agencies still sometimes fail to heed the guidance provided by these cases, seeking to change policy but without full engagement with the earlier rules’ rationales, evidence, and finalized requirements. Courts reject such agency actions. Several appellate cases addressing regulatory policy shifts under several different presidential administrations offer such analysis after *Fox* and even in one case after *Encino* as well.

For example, in the *North Carolina Growers*’ case, the Fourth Circuit rejected as unlawful an action during the Obama administration by the

263  The Court did identify presidential electoral accountability as among the grounds for deference to the agency’s new policy. *Mead* later emphasized the quasi-democratic accountability of notice-and-comment rulemaking as a usual precondition for *Chevron* deference. See Magill, supra note 148.
264  *Fox* involved a new interpretation of a broad authority grant and involved a “value judgment” about policing of obscenity on television. The Court upheld the policy shift, noting how the FCC had engaged with its past policy and explained its new choice. *Fox* at 129 S. Ct. at 1806-08. *Encino* rejected the Department of Labor’s policy shift, emphasizing the need for full and forthright agency acknowledgment of its past policies and explanation for a policy shift. 136 S. Ct. at 2123-24, 2126-27.
266  Id. at 46-51.
267  Id. at 32-40 (tracing the political and regulatory history); 51-57 (reviewing and rejecting the seatbelt reversal logic and factual basis). For exploration of the internal NHTSA dynamics leading to this poorly pursued policy change, with political appointees pursuing a pre-ordained outcome and failing to allow agency professionals input or opportunity to strengthen the deregulatory shift, see Golden, supra note 71 at Ch. 3.
Department of Labor. The Department sought to suspend regulations and return to earlier regulations, while also trying to restrict comments so they would not focus on the substance of the regulations to be abandoned or the overall regulatory result. The agency lost across the board. First, it made no difference that the agency claimed to be “reinstating” an old rule; a rule change was a rule change and had to surmount the same process to be effective. The court also restricted the agency justification to that offered at the time, as required by *Chenery I*. Of greatest importance to this article, the court in *North Carolina Growers* stated that the agency’s effort to constrain comment content while trying to change a policy violated both the APA’s notice-and-comment provisions and the core “reasoned decisionmaking” requirements set forth by the Supreme Court in the *State Farm* case. Because an agency has to “consider . . . important aspect[s] of the problem” underlying the regulation, it must allow comment on and respond to “relevant, significant issues raised during those proceedings.” The court further faulted the agency for refusing to receive comments on issues “integral” to sorting out the rationales for the actions under reconsideration; this denied commenters the “‘meaningful opportunity’” for comment required by the APA and hence “‘ignored important aspects of the problem.’”

In a concurrence, Judge Harvey Wilkinson offered a concise but powerful essay. He distinguished between an agency’s power to revisit a policy—a “seesaw” he said was permissible since “no one expects agency views to be frozen in time”—and “changes in course” that are “solely a matter of political winds and currents.” A policy “pivot” must be “accomplished with at least some fidelity to law and legal process.” If not, then “whim and caprice” will rule and “business planning” will be disrupted. Agency change must be accompanied by a “measure of deliberation and, hopefully, some fair grounding in statutory text and evidence.” To allow the agency’s sidestepping of comment and engagement with the record would “generate a blueprint for agency unaccountability.” Judge Wilkinson’s formulation closely tracks the logic and requirements of the Supreme Court’s consistency cases,

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269 Id.
270 Id. at 765.
271 Id. at 767-68 (citing to *State Farm* and appellate decisions, but not *Chenery*, for this proposition).
272 Id. (citing *State Farm*).
273 Id. at 769.
274 Id. at 769-70 (citations omitted).
275 Id. at 772 (Wilkinson, J., concurring).
276 Id.
277 Id.
278 Id.
279 Id.
acknowledging the change power but pointing out why policy change must be accompanied by full and adequate process, show engagement with past facts and rationales, and find justification in the law’s text and relevant evidence. Unlike Justice Gorsuch, he prevailing law as not allowing such policy shifts without full participation, engagement, and agency justification.

Similarly, in the Public Citizen ethylene oxide case from the years of the Ronald Reagan administration, the D.C. Circuit firmly rejected an OSHA action for violating several fundamental tenets of consistency doctrine, emphasizing an agency’s obligation to engage with salient issues and choices it or stakeholders raised. The agency had proposed, but ultimately did not issue, a short-term workplace exposure standard for ethylene oxide. In explaining its own precedents as applied to the OSHAct’s “substantial evidence” standard, the Court emphasized the agency obligation to “identify relevant evidence, to explain the logic and the policies underlying any legislative choice, and state candidly any assumptions on which it relies, and to present its reasons for rejecting any contrary evidence and argument.”

Even though the agency choice involved the cutting edge of knowledge and imperfect science and predictive judgment, the changed agency choice had to be rejected because the agency “simply [did] not exercise its expertise.” By failing to engage the key questions and choice, it too had violated the State Farm mandate that agencies cannot “entirely fail[] to consider an important aspect of the problem.”

h. The Trump administration two-step sidestep and judicial rejections

In several of the Trump administration’s earliest regulatory actions, agencies similarly sought to sidestep engagement with evidence and rationales underpinning earlier finalized actions, usually promulgated notice-and-comment regulations. These agencies proposed in one form or another to stay, suspend or postpone these earlier finalized regulations. The administration’s agencies sometimes intimated that they might later issue a new rule. In seeking to undo earlier finalized regulations in this two-step manner, they also sought to limit comment. This appears to be a strategy pursued in over a dozen regulatory settings. By mid-2018, this strategy resulted in numerous judicial rejections similarly concluding that such a two-step sidestepping of earlier regulatory substance, rationales, and basic APA procedures is an illegal circumvention of

281 Id. at 1485 (quoting United Steelworks v. Marshall, 647 F2d 1189, 1207 (D.C. Cir. 1980), cert. denied 453 U.S. 913 (1981)).
282 Id. at 1505.
283 Id. at 1507.
284 These actions are introduced at notes 90-92 and accompanying text.
285 See Dlouhy & Levin, supra note 90. EPA’s 2018 promulgation of an “applicability date” rule suspending the effect of the still valid Clean Waters Rule is a similar strategy but has not yet been reviewed in court. See infra at notes 287-89 and accompanying text.
fundamental administrative law precepts. These cases substantially followed the reasoning of decisions from the Reagan era that rejected several agencies’ efforts to postpone or sidestep the effect of finalized regulations, but without full use of a new notice and comment process. One case presenting a somewhat narrower issue and stay grounds granted an industry stay request joined by an agency.286 A few are summarized here.287

After the Environmental Protection Agency in 2017 granted industry stay and reconsideration petitions regarding a final promulgated rule regulating methane leaks from oil and gas operations, the D.C. Circuit in Clean Air Council found the agency’s action suffered from several illegalities.288 It ran afoul of the particular statutory requirements of the Clean Air Act, the implications of the underlying record, and administrative law tenets.289 The agency could not rely on a special CAA provision authorizing reconsideration and stays for overlooked issues; the issues were both raised and addressed.290 Petitioners and the agency also could not claim some agency final surprise flunking “logical outgrowth” requirements as justification for a stay.291

Furthermore, the Clean Air Council court stuck with long established law that an agency cannot “suspend” a rule’s compliance deadlines or alter the effective date because “such orders are tantamount to amending or revoking a rule.”292 Any such amendment or revocation required a new notice-and-comment process because “an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked” and that would require “notice-and-comment.”293 To allow such a stay of a rule would be contrary to APA consistency and rule of law norms, lacked any other authorizing statutory authority, and could only be upheld on grounds contemporaneously offered by

286 See Envtl. Def. Fund v. Gorsuch, 713 F.2d 802, 808, 814-18 (D.C.Cir. 1983) (rejecting agency’s postponements and deferrals of regulatory obligations under finalized regulation as inconsistent with obligation to change a rule with a rule, and citing and discussing cases addressing the same issue and reaching the same result).
287 Two additional rejections not discussed in the text are Pineros Y Campesinos Unidos Del Noroeste v. Pruitt, slip op. at 5-6 (N.D.Ca. March 21, 2018) (Case No. 17-cv-03434-JSW) (rejecting pesticide application regulation delay as unlawful and emphasizing need to allow comment on a regulatory change to a finalized regulation); Sierra Club v. Pruitt, slip op. at 7-11 (N.D.Ca. Feb. 16, 2018) (Case No. C 17-06293 JSW) (rejecting yearlong delay in implementation of formaldehyde emissions regulation as in violation of the enabling act and the APA). One decision linked to the BLM methane waste prevention rule issued a judicial stay of the rule’s “phase-in-provisions” during the pendency of a timely challenge to that rule and in light of a pending substantive revision expected to be completed “within a period of months.” Wyoming v. United States Dept. of the Interior, slip op. (D.Wy. April 4, 2018) (Case No. 2:16-CV-0285-SWS).
289 Id. at 6-13, 23.
290 Id. 13-17, 19.
291 Id.
the agency.\textsuperscript{294} None were offered that were legally sufficient. The stay was therefore itself arbitrary and capricious. The court acknowledged that policy change remained a possibility, but quoted the Supreme Court’s Fox opinion and its call for “good reasons” for a change.\textsuperscript{295}

A district court opinion, in \textit{Becerra v. United States Department of the Interior}, involved a similar agency attempt to stay and not enforce a final regulation through a “postponement.”\textsuperscript{296} The government’s lawyers heavily relied on APA Section 705, a provision that does in specified settings authorize an agency to “postpone the effective date of an action by it . . . .” But following one earlier decision addressing this argument, the court held that this provision by its terms does not apply to a finalized rule that has “gone into effect.”\textsuperscript{297}

The \textit{Becerra} court, like \textit{Clean Air Council}, drew support from the same rule of law and administrative regularity principles reviewed above: the judge found “no precedent or legislative history to support a Congressional delegation of such broad authority to bypass the APA repeal process for a duly promulgated regulation.”\textsuperscript{298} To allow the Department’s postponement would undercut fundamental tenets about the binding nature of regulations and the need for a new rulemaking to undo an earlier rule.\textsuperscript{299} Otherwise, an agency could with lengthy postponements in effect abandon a rule but without opportunities for “comment on the wisdom of the repeal,” or agency justification of a policy change.\textsuperscript{300}

A third decision similarly faulted a regulatory stay effort by the Bureau of Land Management as an illegal effort to circumvent the binding nature of finalized regulations.\textsuperscript{301} Judge Elizabeth LaPorte’s decision was especially thorough in linking “reasoned decisionmaking” precedents to analysis of when and how an agency can abandon a previous regulation. “New presidential administrations are entitled to change policy decisions, but to meet the requirements of the APA they must give reasoned explanation for those changes and ‘address [the] prior factual findings’ underpinning a prior regulatory regime.”\textsuperscript{302} Failure to do so is “arbitrary and capricious.”\textsuperscript{303}

\textsuperscript{294} Id. at 6-13, 23.
\textsuperscript{295} Id. at 23.
\textsuperscript{298} Id. at 15.
\textsuperscript{300} Id.
\textsuperscript{302} Id., slip op. at 19-20.
\textsuperscript{303} Id. at 20.
Although involving a different sort of regulatory sidestep and hence a different setting for judicial review, the Trump administration in 2017, through a legal opinion of the Attorney General and then action by the Department of Homeland Security (DHS), declared it would abandon the Obama administration’s Deferred Action for Childhood Arrivals (DACA) program.\textsuperscript{304} Unlike the initial regulations underlying the three earlier decisions just reviewed, the DACA program was not a finalized notice-and-comment regulation, but instead a written, factually explained policy of regulatory forbearance.\textsuperscript{305} The Obama administration had justified this program with reference to precedents supporting such agency forbearance and prioritization of activities, as well as statutory language providing this latitude.\textsuperscript{306} And, in explaining itself, it discussed the children’s plight and ways DACA would be sound policy and comply with the law.\textsuperscript{307}

The Trump 2017 DHS policy change, like other stay and postponement actions that sidestepped the usual policy change process, similarly was judicially rejected for flunking consistency doctrine.\textsuperscript{308} Trump’s DHS relied only on a largely conclusory statement rooted substantially on constitutional law views that DACA had violated the law.\textsuperscript{309} Here too, the Trump administration did not engage with the policy and factual underpinnings of the earlier policy.\textsuperscript{310}

Judge William Allsup analyzed the legal underpinnings of the DACA program and found that all were legally sound.\textsuperscript{311} Hence, the claim of illegality was rooted in a “mistake of law” and, because a court cannot supply a rationale not supplied by the agency, the action had to be rejected.\textsuperscript{312} Since the agency had failed to engage with underlying facts and the Obama DHS’s stated policy rationales, the Trump regulatory reversal failed to pass muster under \textit{Encino} and \textit{Fox}.\textsuperscript{313} The judge further noted that an agency action that altogether fails to assess overall benefits and costs, or advantages and disadvantages, also runs afoul of the Supreme Court’s new default rule in \textit{Michigan v. EPA} that agencies

\textsuperscript{305} Deferred Action for Childhood Arrivals Program (June 15, 2012) (announced in memorandum of Secretary of Homeland Security Janet Napolitano), discussed in Regents, slip op. at 6-9.
\textsuperscript{306} Id. at 8-9.
\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} Id. at 12-13 (reviewing the rescission’s stated legal grounds).
\textsuperscript{310} The statutory interpretation and linked constitutional views offered to justified DACA’s abandonment constituted a form of statutory abnegation, since the agency’s new legal view substantially undercut its earlier claimed authority. See supra at notes # and accompanying text and infra at Part IV.f. (introducing and analyzing such statutory abnegation justifications for deregulatory actions).
\textsuperscript{311} Id. at 13-20.
\textsuperscript{312} Id. at 20, 29.
\textsuperscript{313} Id. at 40-41.
must engage in such broader analysis unless it is statutorily precluded. The agency’s failure to engage with the “particular facts” and “administrative record” justifying the earlier policy was fatal to the Trump policy.

III. DEREGULATION AND THE CONSTRAINTS OF AGENCY CONTINGENCY

Consistency doctrine shapes the contours of when and how agencies can pursue policy change, as well as how courts should police such change. As just shown, these legal constraints are derived from a complex, intertwined, but remarkably consistent and mutually reinforcing body of doctrine. Presidents and agencies usually have latitude to pursue policy change, but that change must follow what is substantively and procedurally required by enabling legislation and the APA. Agencies must fully engage with both their own original findings, data, and reasoning and the arguments and data offered by partisans. These intertwined sources of doctrine all call for agencies to confront the contingencies that underlay the initial action, provide opportunity for comment, and provide “good reasons” for a policy change.

That these constraints on erratic or unjustified agency policy change derive from a web of interrelated doctrine has both salutary and challenging effects. On the positive side, this web of mutually reinforcing doctrine makes it unlikely that substantial doctrinal change will suddenly occur and allow the sort of erratic, day-to-day abrupt and unjustified policy shifts that Justice Gorsuch condemned. These rule of law benefits of consistency doctrine in all fields of regulation are unlikely to disappear. To put it more plainly: consistency doctrine is itself deeply rooted, enduring, and likely to remain consistent.

This Part first offers a schematic distilling the workings of consistency doctrine. Then it turns to analysis of a few of the major deregulatory policy shifts proposed by the Trump administration but that have not yet resulted in judicial opinions. This Part concludes with normative discussion of the merits of consistency doctrine before closing the article with assessment of a range of agency settings and the room they leave for political influence.

314 Id. at 42 (citing Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015).
315 Id at 40-41 (applying Encino, Fox, and State Farm). This decision shares attributes with the other three decisions, but because agency actions rooted in forbearance and enforcement discretion are generally open to later changes in regulatory attitude, the ultimate fate of DACA is far from uncertain. If an appellate court or the Supreme Court disagrees with the judge’s “mistake of law” conclusion, the decision could be reversed. Even if the decision is upheld, the Trump DHS on remand could, by offering a correct view of the law and engaging with relevant facts and policy decision and offering “good reasons” for its change, possibly reach the same result.
a. Distilling and diagramming consistency doctrine’s requirements

As shown, these many interrelated doctrinal strains governing agency policy change and consistency obligations share a cross-cutting element that is sometimes neglected, especially in recent deregulatory change proposals: an agency seeking to make a policy change always must address the contingencies it originally addressed en route to offering its reasoned elaboration for its initial policy choice. And it must allow commenters to engage them as well. Similarly, those and later contingencies—perhaps changes in related conditions, the regulatory track record, or reliance interests, for example—will also need to be directly and rationally addressed by the agency proposing change. By recognizing and continuing to enforce this simple but consistent agency obligation—that agencies must forthrightly engage and rationally address past and current contingent factors relevant to the statutorily delegated task—courts substantially reduce the risks of erratic, unjustified action or skirting of science or stakeholders’ arguments. Nonetheless, the views and actions reviewed above in Parts I and II indicate either that this body of law is misunderstood or that administrations are sometimes eager to recast or dodge consistency doctrine. Advocates of policy changes and doctrinal adjustment appear to seek greater room for politics and presidents to shape policy changes. Or perhaps change proponents who skip required and challenging antecedent conditions see political gain in granting regulatory relief to their supporters, even if destined for future judicial rejection.

This agency obligation under current doctrine can be captured by two simple diagrams, one setting forth what is required for ordinary “reasoned decisionmaking” generating an initial policy, and the other analytical obligations of agencies pursuing a later change in policy.

The first diagram illustrates what agencies necessarily engage in setting an Initial Regulatory Policy (IRP). Agencies will always identify what they view as the most relevant Statutory Language (SL1, SL2 etc), linked Policy goals and predictions (P1, P2 etc), and will need to engage with issues that are central to and often contested about the regulatory choice. These are often the focus of stakeholder Comments (C1, C2, C3). The Policy (P) and Comment (C) factors are often what this article calls contingencies. However, because an agency’s legal analytical emphasis often involves judgments melding law and facts, it is in some sense contingent too, but more in the sense that it reflects an agency choice about statutory issues to emphasize. That choice, in turn, will shape the final agency action. And, finally in the regulatory preamble (and often other accompanying memoranda and appendices) the agency will weave its final choice into a Reasoned Decision (RD) that will engage with all of these SL, P, and C factors or risk judicial rejection.
Diagram 1:

*Initial Regulatory Policy (IRP)*

SL1  SL 2  SL 3  
+  
P1  P2 P3 P4  
+  
C1 C2 C3  

⇒ Initial Regulatory Policy Reasoned decision (IRP RD) engaging these factors and setting the Initial Policy (IRP)

Diagram 2 in a simplified construct shows how all of the Diagram 1 elements will necessarily become part of the Regulatory Policy Change Proposal, plus other elements will be added. Those supporting the Initial Regulatory Policy will surely draw on all that explained the IRP including the Reasoned Decision itself, while those advocating change will argue against those factors, supply new facts and arguments, and also question the wisdom of the Reasoned Decision justifying the Initial Policy. So the RD and IRP will themselves become new mandatory analysis elements because they will be contested, as will any intervening change or IRP impacts. And the new agency leadership proposing policy change may focus on new language and likely some new empirical claims about the world, even though it will need to address the old justifications.

Hence, consistency doctrine’s web of law will require the agency to address the following in seeking to make a policy change:

*Regulatory Policy Change Proposal (RPCP)*

SL1  SL2  SL3 plus new SL 4  
+  
P1 P2 P3 plus new P4 P5  
+  
C1 C2 C3 C4 plus new developments, regulatory experience, and reliance interests C 5 C 6  
+ IRP RD and IRP  

⇒ RD for Policy Change

As illustrated by these simple diagrams, the basics of reasoned decisionmaking and consistency doctrine mean that policy changes will require more analysis and justification of an agency. Note that this does not mean that
policy change triggers a different standard of review; instead, an agency proposing a policy shift must engage in more to provide “good reasons” for the change and explain why the choice is reasonable.\textsuperscript{316}

b. Assessing major deregulatory proposals by the Trump Administration

The Trump administration’s many deregulatory actions constitute the most concerted deregulatory shift push since the \textit{State Farm} decision and linked deregulatory efforts of the Reagan administration.\textsuperscript{317} Where agencies and lawyers have addressed policy change law, they have usually relied on near cookie-cutter citation to \textit{State Farm} and \textit{Fox} in deregulatory actions that provide a rationale, often also including some references to \textit{Chevron}.\textsuperscript{318} Administration advocates describe these cases as allowing policy change due to a change in administrations and presidential priorities, but so far provide little effort to satisfy the other legal requirements set forth in these cases. They are correct that change is possible and is not subject to some special heightened, skeptical standard of review.\textsuperscript{319} However, of especial importance, several recent regulatory policy change actions fail to engage with most of the contingencies—especially “underlying facts” and past agency reasoning—-that the same agencies in earlier actions identified to justify their initial actions.

As introduced earlier, the two most significant environmental policy reversal initiatives seek to abandon the Clean Waters Rule, a rule defining what sorts of waters are jurisdictional “Waters of the United States,” and the Clean Power Plan, a rule regulating existing power plants to restrict their emissions of greenhouse gasses.\textsuperscript{320} Both are being pursued without apparent attention to legal

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\textsuperscript{316} This logic illuminates the “more is needed” language in \textit{State Farm}, \textit{Fox}, and \textit{Encino}. See \textit{supra} at Part II.c. (analyzing these cases).

\textsuperscript{317} White House Fact Sheet, President Donald J. Trump is Delivering on Deregulation (Dec. 14, 2017) (stating deregulatory goals and tallying claimed deregulatory progress).

\textsuperscript{318} As of January 2018, a Westlaw search limited to the Trump administration Federal Register notices finds twenty policy change proposals citing to some or all of these cases. The Trump administration has claimed a vast number of deregulatory actions, see \textit{id.}, but early analysis indicates some are quite minor, some are preliminary, and many are merely finalizing policy shifts that had started under earlier administrations. Center for Progressive Reform, The Trump Assault on Our Safeguards (web discussion and compilation providing links to deregulatory actions and related analyses), http://www.progressivereform.org/trumpassault.cfm (site last visiting on Jan. 30, 2018); Neomi Rao, Administrator of OIRA, press briefing (Dec. 14, 2017) (summarizing 2017 deregulatory actions and anticipated 2018 actions, and providing numerical tallies of such action).

\textsuperscript{319} \textit{Fox} and \textit{State Farm} make explicit that the usual standard of review applies, but both also explain why policy change will usually require greater explanation than creation of an initial policy. See discussion Part II.c.

\textsuperscript{320} See \textit{supra} at Part I.e. and II.c. (introducing and analyzing the legality of Clean Waters Rule and Clean Power Plan change proposals).
requirements set forth in key cases setting forth consistency doctrine’s requirements for agencies making a policy change.

For example, the one finalized action of these various proposals is EPA’s creation of a new “applicability date” that would preclude any application of the finalized 2015 Clean Water Rule. Yet despite litigation and regulatory claims of the Clean Water Rule’s opponents that it would impose massive hardship, EPA in this final action claimed that a return to the pre-2015 landscape would result in no costs.321 It identifies no changes in environmental conditions that would result from the 2015 rule going into effect, versus its suspension for two years. It nowhere even mentions the implications of the Connectivity Report it had earlier created that summarized categories of waters and their functions.322 It hence omits any discussion or concession of real world impacts of the two legal choices on the table—application of the Clean Water Rule, or its suspension and possible eventual revocation.

Clean Power Plan change proposals by the Trump administration similarly do not provide any discussion of clean energy trends or impacts of abandonment.323 EPA’s 2017 initial explanation for preferring its “inside the fenceline” approach nowhere provides textual and fact-based analysis of how this interpretation, in the setting of power plants integrated into the grid, satisfies the statutory requirement that pollution limitations be set based on the “best system of emissions reduction . . . adequately demonstrated.”324 Hence, with this rule change too, the earliest documents indicate a declination to engage with salient contingencies and, by limiting comment and fracturing the change proposals and offering no replacement, squelch commenters from raising them.325 None of these splintered proposals in their texts address the fundamental questions and tasks called for by consistency doctrine: are there “good reasons” for the change, what is the current agency’s view of “underlying facts” that justified the initial action, are there any changes in conditions or reliance interests, and has the agency made sure there are no “unexplained inconsistencies” between the new and old policy.

In fact, by trying to effect change without required legal and factual engagement, these several actions linked to these two major environmental rules are much like the circumstances underlying the 2017 judicial rejections of agency stays and postponements that had in effect sought to render finalized

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321 Final Applicability Rule, supra note 118 at 12 (stating that there are “no economic costs and unquantifiable benefits associated with this action”).
322 The Connectivity Report is introduced supra note 106 and accompanying text.
323 EPA under the Trump administration appears to have removed from its own active public databases studies and analytical memoranda that accompanied and explained the final CPP. Those materials can be found either in EPA web archives or in externally saved copies of EPA’s former web site.
324 CAA, Section 111(a) (providing definitional language that ties into Section 111(d)).
325 Three recent decisions on other regulatory policy shifts in the form of postponements or stays reject similar sidestepping of agency obligations to directly confront and explain a policy shift. See supra at Part II.h.
regulations ineffective;\textsuperscript{326} EPA has sought to accelerate regulatory change by abandoning the old rules, but without required engagement with the contingencies that justified the earlier actions and might be difficult to overcome.\textsuperscript{327} These larger impact policy shifts hence also seem vulnerable to judicial rejection.\textsuperscript{328} Other agencies’ deregulatory actions have also triggered criticism for agency dodging of studies that contradict their claimed benefits.\textsuperscript{329} One agency, however, the independent Federal Energy Regulatory Commission (FERC), unanimously declined a request by the Department of Energy to change policies to support the coal industry, finding it legally and factually without merit.\textsuperscript{330}

In later, final agency rules and linked court briefing, agencies and their lawyers may engage more fully with the contingencies addressed earlier.\textsuperscript{331} However, when an agency constrains and limits its actions, sidesteps or cherry-picks relevant studies and constrains comment, the agency has likely already doomed the actions to judicial rejection due to an agency’s obligations at the notice stage to disclose its planned action and rationale.\textsuperscript{332}

c. Consistency doctrine’s policy merits

The question remains, of course, whether this body of consistency doctrine and the agency obligation to address policy contingencies add up to a sound policy result. This article argues that the very consistency of consistency doctrine over many years, especially its many mutually reinforcing elements, reflects its soundness and deep rule of law roots. It also reflects the compromises

\textsuperscript{326} See supra at Part II.h.
\textsuperscript{327} In particular, both initial actions were accompanied by massive empirical studies that would be hard to controvert. See supra at notes 105-32 and accompanying text.
\textsuperscript{328} See supra parts II.b and c (reviewing two-step deregulatory efforts by the Trump administration and earlier administrations’ unsuccessful efforts to shift policy but without full engagement with relevant facts and past reasoning).
\textsuperscript{329} See, e.g., Ben Penn, Labor Dept. Ditches Data on Worker Tips Retained by Businesses, BLOOMBERG BNA DAILY LABOR REPORT (Feb. 1, 2018) (reporting the Labor Department “scrubbed an unfavorable internal analysis” showing that change to tip retention regulations would result in employees “losing billions . . . in gratuities). The regulatory proposal was Tip Regulations Under the Fair Labor Standards Act (FLSA), Notice of Proposed Rulemaking, 82 Fed. Reg. 57395 (Dec. 5, 2017). The proposal traces the earlier regulation’s history, but provides little detail on impacts of the old rule or under the new rule. Id. at 57396-57401 (reviewing the history); at 57396 (stating the department “lacks data to quantify possible reallocations of tips” and hence presents a “primarily qualitative approach”). This regulatory skirmish was ultimately resolved with a legislative deal. CITATION FORTHCOMING.
\textsuperscript{330} Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC Par. 61,012 (Jan. 8, 2018).
\textsuperscript{331} For example, the FCC’s Restoring Internet Freedom action is near final and more carefully addresses legal requirements regarding policy change. See supra notes 96-101 and accompanying text.
\textsuperscript{332} See cases and scholarship discussed supra Parts I.b., I.h. and note 232 and accompanying text (discussing “logical outgrowth” obligations and policy change).
and balancing acts that pervade administrative law. Congress can set policies leaving room for policy adjustments by agencies, and presidents can in array of ways seek to nudge agencies in a particular direction. (Analysis of diverse settings and room they leave for political input is addressed in Part IV below.) But congressional delegations regarding chosen actors, procedures, and criteria for action must be respected by presidents, agencies, and later reviewing courts whether the agency is setting an initial policy or seeking change. Current doctrine balances stability and responsiveness, plus provides comfort to both those worried about overregulation and unwarranted deregulation.

Further, by prohibiting erratic or abrupt policy shifts and requiring agency engagement with facts, this body of doctrine checks sloppy, corrupt, or opportunistic regulatory capitulation to powerful stakeholders.\(^{333}\) Congressional goals and means set forth in statutes are protected and enforced by consistency doctrine. It is rooted in respect for legislative supremacy. By compelling agencies to engage with underlying facts, science and points of contestation that are the relevant contingencies underlying a choice, be it an initial choice or a later change proposal, this body of law also buttresses the quasi-democratic virtues of stakeholder voice, agency explanation obligations, and linked accountability and rule of law virtues as well.\(^{334}\) If an agency cannot confront data or science and justify a regulatory change under relevant law, then the proposed change should be abandoned. By requiring agencies to engage with “circumstances” and “the record” and provide a “reasoned analysis for the change,”\(^ {335}\) consistency doctrine largely prevents an agency from ignoring or sweeping under the rug a salient and potent criticism or contrary study.\(^{336}\) Or, if the agency makes the change but with full and adequate explanation, then all facets of political accountability are reinforced: the agency would be subject to political accountability via fealty to legislatively set priorities, would engage with relevant data or science, and would have to take political responsibility for its own regulatory choices.

Similarly, when Fox and Encino state that agencies must offer “good reasons” for a change, and must address “facts and circumstances that underlay or were engendered by the prior policy” and address “findings that contradict” the prior policy, the Court also is precluding agencies hoping to dodge reality.\(^ {337}\) And in stating that “unexplained inconsistency” is grounds for rejection, the Encino Court (drawing on the Brand X case’s language and logic) is necessarily

\(^{333}\) See Short, supra note 17 (exploring how rational public explanation serves to discipline agencies).

\(^{334}\) Cf., Bressman, supra note 66 (noting how the Supreme Court values political accountability both in the form of electoral accountability and by quasi-democratic participatory opportunities and agency responsiveness to input and criticisms).

\(^{335}\) Id. at 41-42.

\(^{336}\) See supra Part II.c. (discussing such law).

\(^{337}\) Fox, 556 U.S. at 1811; Encino, 136 S. Ct. at 2125-26.
stating that the agency proposing a policy change must engage with the previous action and its rationales and explain the later change.  

Could agencies and departments substantially revise the many rules that are now subject to delay proposals, proposed for rescission, or under reconsideration? Probably so. Neither agencies nor presidents are obligated to stick with earlier administrations’ regulatory choices if they lean in a different direction. But they must satisfy other prerequisites for a change. Even if the president weighs in, the agencies would need to fully confront the earlier rationales, science, disputes, and allow full ventilation of comments, usually in a notice-and-comment process. Some degree of change is almost always possible because statutes and regulatory design choices rarely point only to one acceptable action. But as emphasized in these cases, especially Massachusetts v. EPA, agencies need to ground their policy choices or changes in what the statutes set forth as criteria for action. By requiring “fidelity” to underlying statutory requirements, plus requiring open and reasoned deliberation and justification, consistency doctrine reinforces the three types of political accountability that underpin regulatory legitimacy: legislative supremacy; responsiveness to presidential leadership; and open and transparent process and reasoning that itself constitutes a form of responsive and quasi-democratic action.

Hence, to be done legally and satisfy judicial statements about policy change, agencies must avoid gamesmanship and show frank and accountable engagement. They must engage in reasoned decisionmaking that fully and frankly addresses supportive and contrary evidence and views, shaped as always by what statutes allow. Political predilections of a president and his leadership can at the margins shape choices, and often will have major latitude to shape general agency directions and priorities. No cases or laws, however, allow an agency to shortcircuit the regulatory process or dodge salient contingencies. In requiring agencies and presidents too to make policy with integrity and respect for what law allows and data and science indicate, plus provide “good reasons” for a change, this body of law creates sound incentives. Properly understood, and if followed, this body of law should address fears of both critics focused on overregulation and arbitrariness as the primary risk, and those fearing political overreach or unjustified deregulation.

339 For discussion of Massachusetts, see supra notes 9, 194-203 and accompanying text.
340 See Garland, supra note 10 (describing State Farm’s requirements as designed to ensure agency “fidelity” in the sense of prioritizing legislative policy choices set forth in statutes over mere political responsiveness to presidential or agency views).
341 For a similar emphasis on integrity, see Kozel & Pojanowski, supra note 8 at 148-49 (emphasizing need for agency “sincerity,” “fidelity” and “candid reason-giving”).
342 See note 17 and accompanying text (citing Watts, Seidenfeld, and Short regarding balance of politics and rationality in shaping agency actions).
IV. DELIBERATIVE INTEGRITY AND TETHERING’S DEGREES

Despite the clear collective import of consistency doctrine’s multiple facets, a remaining task is to identify policy change contexts and the degree of associated tethering constraints likely to be faced by agencies, political appointee leadership, and presidents. The degree of tethering generally will link to the obligation of agencies to pursue policy change in ways reflecting what this Part will, as a shorthand, refer to as “deliberative integrity.” These elements of deliberative integrity are drawn from the cases collectively creating consistency doctrine and the linked enduring requirements of reasoned decisionmaking. Deliberative integrity in the setting of a policy change involves three central elements: the action must be congruent with the underlying statute; it must fairly address the import, factual underpinnings, and reasoning behind the earlier policy action and justify the new action with “good reasons”; and it must provide meaningful opportunities for engagement of all affected by the earlier and proposed new policy. The following subsections start with the least constrained settings and move to contexts where agencies and presidents face the greatest hurdles in making changes in policy.

a. The presidential nudge and enforcement prioritization

Scholars and doctrine share the view that agencies can appropriately be subject to presidential nudging and politicized input when selecting among priorities for action, especially in the sense of setting a regulatory agenda. Few laws set priorities among the many assigned agency tasks. Even rarer are laws that instruct agencies how to juggle tasks delegated under multiple laws. And since most agencies have hundreds of finalized regulations on the books, typically those agencies and the president too face no statutory constraint in deciding which are most in need of reexamination.

Justice Kagan (when Professor Kagan) noted and applauded presidential involvement is rulemaking rollouts and agency initiatives. Similarly, agenda setting and agenda oversight by the president, nowadays through OIRA, is also generally unproblematic. On the other hand, where a statute sets a deadline, an

343 They are set forth in Part II.
344 See supra note 4 and accompanying text.
345 One exception is the common setting of sequentially enacted public laws that, as codified, are integrated into a single named statute and hence can set integrated tasks and establish priorities. Sometimes the result is a mess. For example, the 1990 Clean Air Act amendments created a priority conundrum for EPA and reviewing courts about clashing deadlines and priorities for action in nonattainment areas. See Whitman v. American Trucking Ass’n, 531 U.S. 457, 477-86 (2001) (discussing and resolving the conflict).
346 See Kagan, supra note 4.
agency cannot disregard it due to an administration’s anti-regulatory leanings or due to cost-benefit analysis delays or hurdles.\textsuperscript{347}

A tougher question concerns prioritization of cost-benefit analysis in driving regulatory revisions.\textsuperscript{348} For almost forty years, presidents of both parties have ordered agencies to weigh costs and benefits of major rulemakings and subjected rulemakings to OIRA’s oversight. Such considerations and oversight are not necessarily or blatantly illegal, but their legality is critically reliant on their stated and actually applied subservience to statutory requirements.\textsuperscript{349} Whether OIRA, agencies and presidents respect this primacy of statutory choices is far from clear.\textsuperscript{350} Presidents clearly can indicate their personal priority of cost-benefit justified regulations and minimization of regulatory costs, and with little constraint provide input on regulatory actions to undertake. In addition, \textit{Michigan v. EPA} has created a default rule that broad delegations to agencies should be read to leave room for balanced assessment of both regulatory benefits and costs, providing agency leaders and presidents with enhanced latitude to nudge agencies at least to consider such effects.\textsuperscript{351} Within each action, however, such orders can only be interpreted as requests due to the stated primacy of statutory criteria and procedures.\textsuperscript{352} Through appointments and perhaps also appropriations requests, the president also can legitimately stack an agency with personnel sharing such leanings. Similarly, a president’s request for agencies to report on their work is a constitutionally rooted power, as Professor Strauss observes.\textsuperscript{353}

But to avoid questionable assertions of power, a president and agency political appointees must still respect the congressional choices of delegate for assigned tasks and the criteria for those tasks.\textsuperscript{354} They must allow action based on that delegate’s application of those criteria, through congressionally devised procedures, applying the contingent factors and in light of contingent facts made relevant by law.\textsuperscript{355} The more the statutory language sets forth specifics about


\textsuperscript{348} President Trump’s two-for-one deregulatory order raises this issue. \textit{See supra} at notes 84-89 and accompanying text.

\textsuperscript{349} See Executive Order 12866 at sections 1(b); 9 (stating that the order’s requirements do not apply if contrary to other law).

\textsuperscript{350} For analysis questioning the legality of OIRA’s oversight as actually applied, see Lisa Heinzerling, \textit{Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House}, 31 PACE ENVTL. L. REV. 325 (2014).

\textsuperscript{351} Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015).

\textsuperscript{352} \textit{But see} Heinzerling, \textit{supra} note 350 (questioning legality of OIRA’s actual work).

\textsuperscript{353} \textit{See Strauss, supra} note 4.

\textsuperscript{354} \textit{See supra} Parts I.d. and II.a. (discussing this issue).

\textsuperscript{355} \textit{See supra} notes # and accompanying text (discussing \textit{Massachusetts}) and \textit{supra} Part II.a. (discussing engabling act constraints on agencies).
what is required, the less agency leadership or the president (perhaps through OIRA) can seek to change the agency action.  

One common setting involving political considerations that are generally permissible is agency decisions to accelerate or delay discretionary regulatory actions that are underway, but not yet finalized or in effect.  The APA, in Section 705, allows agencies to take such action before rules take effect.  And many agencies start, but never finish, regulatory proceedings. It is, of course, quite different if a statute sets deadlines for required actions; courts will enforce such mandates. One caveat remains: agencies that generate data, studies, and reasoning, even if resulting in an abandoned action, could later need to engage with those materials if taking a related action where they remain relevant.

b. Turf conflicts

Agencies and presidents can broadly engage in politicized direction when agencies come into conflict over particular actions, or perhaps conflict over who has primacy over a regulatory turf.  Such settings of uncertain and potential overlapping turf are quite common.  They can create problems of conflicting mandates and inefficient duplication of work.  Regulatory obligations can accrete over time.  Such overlaps can also result in “regulatory commons” dynamics, where stakeholders and potential regulators fail to act either out of fear of waste, free riding incentives, or because the magnitude of need for action may not be apparent to any single actor.  Statutes may create rules of decision for how to handle conflicts.  But if such regulatory overlaps and collisions are not anticipated by the statutes, then White House leadership provides one of the few means to sort things out.  No statutory language would guide and hence constrain the presidents or affected agencies in resolving turf conflicts.  And, as with agenda setting and determination of priorities, this reality

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356 Since EO 12866, even if followed as written, adds a decisionmaker not empowered by Congress in the enabling act, changes the criteria for decision (or at least adds a final additional cost-benefit filter), and changes congressionally set process, a strong argument exists that OIRA’s work is inherently illegal whenever it goes beyond calls for analysis.

357 APA Section 705.  For discussion of agencies relying on this section and judicial responses, see supra at II.h.

358 Envtl. Def. Fund v. Gorsuch, supra note # (discussing and enforcing deadlines and rejecting claimed postponements that had the effect of undoing valid regulations but without required process).

359 See e.g., Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505-07 (D.C. Cir. 1986) (requiring agency engagement with earlier studies in changed agency action).

360 See Bijal Shah, Interagency Disruption of the Executive Hierarchy, (draft paper of December 2017) (cited with permission) (identifying many settings of overlap but also congressional awareness and rules for resolving conflict).

361 Id. at notes 67, 69 (citing other overlap literature).


363 Buzbee, Recognizing the Regulatory Commons, supra note 69.
means turf conflicts are often legitimately subject to a degree of politicized presidential and agency problem solving that is subject to few constraints, provided that each agency’s congressionally delegated role is respected.

c. Broad New Deal delegations

Many agencies, often in the form of commissions dating back to the New Deal, have long acted under statutes with remarkably broad delegations. Such laws often do little more than empower an agency with broad regulatory goals, such as to act in the public interest, or protect the integrity of markets, or police unfair marketing, or provide a safe workplace. At first blush, one might think that broad delegations would automatically imply broad latitude for politicized redirection of policy. However, agencies pursuing policy change are constrained both by the tasks assigned by legislation and by the line of preceding policies and actions taken by an agency, as well as possible linked judicial precedents. Such agencies often engage in technical and context-sensitive making of policy about, for example, what workplace actions are veiled threats and hence unfair labor practices, or which market actions are legitimate aggressive competition or illegal unfair or anticompetitive behavior.

Policy devised sequentially through a sequence of adjudicatory actions and resulting opinions, usually with some additional guidance documents and perhaps linked notice-and-comment rulemaking, can create a complex web of policy with diverse policy rationale contingencies. As a result, such an agency seeking to break in a new direction may face little constraint from broad statutory language, but that does not mean lack of tethering. Constraining contingencies may be many and hard to overcome. Even if each such preceding policy step is fairly modest and clear, in their sequential accumulation they can create a formidable hurdle to any large-scale abrupt policy change. And due to the development of reliance interests, stakeholders will rarely sit out a possible regulatory upheaval. As a result, the agency pursuing change will be forced to engage stakeholders’ advocacy about the implications of retaining or changing a policy.

364 American Trucking’s rejection of a delegation doctrine challenge includes a string citation to such broad delegation and cases upholding their constitutionality. Whitman v. American Trucking Ass’n, 531 U.S. 457, 474-75 (2001); see also Solove & Hartzog, supra note 12 (reviewing FTC policy development under broad language); Magill, supra note 148 at 1400-02 (reviewing broad delegation language and its implications for agency choice).

365 See Solove & Hartzog, supra note 12 (discussing FTC’s policy evolution); see, e.g., Shaw’s Supermarkets, Inc. v. NLRB, 884 F.2d. 34 (1st Cir. 1989) (op. by Breyer, J) (discussing NLRB’s policy evolution regarding “bargaining from scratch” threats but requiring agency to “follow[] or consciously change” policy with explanation).

366 See generally Solove & Hartzog, supra note 12 (analyzing such policy development).

367 This is part of the dynamic leading to regulatory accretion. See Ruhl & Salzman, supra note 362.
d. Science-based judgments and the “best”

Since the late 1960s, many statutes have, at great length and detail, regulated risks to safety, health and the environment. In contrast to broad New Deal delegations, modern risk regulation laws often include micro-managing instructions about the assigned task, triggers to justify action, and criteria for the agency to apply in regulating. Moreover, many such laws, especially in the environmental area, require agencies to set performance standards benchmarked against what the “best” in some category can achieve, often to meet some health or endangerment-based target. Because such standard setting is data-based and often fiercely contested, policy revision efforts are laden with every imaginable constraint. The actor is usually specified, the criteria for action chosen by Congress, and the data about the risk intensively gathered and distilled to meet the inevitable judicial challenge faced by any high stakes economic regulation. Such legal criteria are unlike laws that call for broad value judgments, such as the FCC’s changing views of obscenity on television in FCC v. Fox, or laws calling for agencies to juggle many potentially clashing mandates.

In the setting of science and data-based “best” determinations, nothing is likely to present clean questions of law interpretation untethered to a raft of contingencies and stated agency rationales. Agencies draw on their knowledge of the regulatory regime’s interconnections, affected stakeholders’ interests, relevant science and data, and the results of different choices. Little is left to political discretion in its broadest sense.

Deliberative integrity in such settings will involve respect for congressional choices of delegate, procedures for action, compliance with often highly reticulated criteria for action, and grappling with contingent data. Agencies cannot helter skelter put procedures and substantive choices all back in play, especially if at the direction of the president or a political appointee.

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370 See, e.g., Clean Air Act Sections 109, 111 and 112, 42 U.S.C. 7409, 7411 and 7412 (setting up such “best” achievable benchmarked regulation for different sorts of pollution, sources, and contexts).
371 For discussion of FCC v. Fox, see supra at notes 204-11 and accompanying text; see also Antonin Scalia, The Role of the Judiciary in Deregulation, 55 ANTITRUST L.J. 191, 196 (1986) (discussing prevalence of laws requiring agencies to “weigh . . . competing policies” and latitude they provide for regulatory changes).
372 See supra at Part I.a.
373 See Stuck, supra note 4; Strauss, supra note 4.
without raising warning flags for later reviewing courts. Of course, some change at the margins will seldom present a problem. But pre-judging, or political pressures, or dodging of comment on a de-facto regulatory abandonment, or ignoring of a body of science or data previously viewed as determinative, all will raise concerns about lack of deliberative integrity and reasoned decisionmaking and increase the odds of judicial rejection.

For this reason, the highest stakes first efforts by the Trump administration to abandon environmental regulations have foundered and are likely to continue to do so. Most such actions do not directly engage the merits of earlier policy choices. Deliberative comment has been constrained. Agencies have avoided comment on the fundamental issue of whether an agency can or should abandon an earlier regulatory choice. Or the agency has proposed a fundamental new limiting construction of statutory language, yet without explaining why this new read is better or even required.

e. Presidential adjudicatory interventions

Not all presidential nudges or agency weighing of politicized considerations are unproblematic. Most policy shifts discussed in this article involve policies developed through rulemakings or over a series of regulatory actions. These are settings where some degree of presidential or political appointee involvement is typical. However, presidential interventions can occur in adjudicatory settings. As mentioned above, President Trump issued a legal memorandum that indicated the outcome he sought in a highly publicized battle over a pipeline threatening Native American lands and waters. The Army Corps subsequently complied, even referring the president’s memorandum as constituting a presidential “direction,” but the Army Corps’ minimal regulatory analysis and explanation were later found lacking in a court.

This disputed Dakota Access Pipeline permit did not involve a formal adjudicatory action. Due to the APA’s protections against ex parte communication, bias and prejudgment, an agency action driven by politicized variables or presidential pressures in such a formal setting would have clearly

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374 Judulang’s scathing commentary on an agency’s failure to create some order and regularity is instructive. See supra notes 228-31 and accompanying text (discussing the case).
376 See discussion supra at Parts I.e., II.h., and III.b.
377 Id.
378 Id.
379 Id. This strategy is further analyzed infra at Part IV.f.
380 See Percival, supra note 4 (discussing settings where presidential influence is acceptable and problematic).
381 See supra notes 122-26 and accompanying text.
382 Id.
been illegal. Still, even in an informal adjudicatory setting involving diverse, numerous opportunities for input, a presidential directive is problematic. After all, the deciding agency will, as with the Pipeline, face competing interests with substantial localized and personalized stakes hanging in the balance. A president is exceedingly unlikely to know what factors on the ground about risks, choices, and competing interests are in play. A president is similarly unlikely to have any exposure to record materials that a delegated, responsible agency would have before it. A presidential directive about the desired outcome in such settings could, if obeyed, taint the regulatory action by introducing risks of bias or prejudgment violating the obligation of agencies to maintain an “open mind.”

This action by President Trump—seeking to direct an outcome in a contentious informal adjudicatory setting over a permit—may have been without modern precedent. Other than a possible intervention in a formal proceeding, it is at the most problematic end of the spectrum, involving a micro-scale politicized intervention raising questions about legal fealty and attention to facts.

f. Statutory abnegation and dodged facts

Whether problematic policy change efforts reviewed above reflect well counseled strategic choices or blundering is hard to know. At least a few misguided or poorly justified policy change efforts are found during almost all recent administrations’ terms; all have met with a harsh judicial reception. But when a series of policy change proposals over a short period and under the same leadership reveal a fairly uniform series of justifications and strategies, then they may reflect a considered, intentional effort to move the law in a new doctrinal direction.

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383 See e.g., Portland Audubon Society v. Endangered Species Comm’n, 984 F.2d 1534, 1536 (9th Cir. 1993) (holding illegal White House interference with formal procedures required for deliberations of the Endangered Species Committee).

384 Courts generally accept the informal politicized give and take involved in notice-and-comment informal rulemaking setting, declining to hold such communications illegal ex parte contacts. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

385 “Open mind” and anti-bias constraints exist even in informal agency settings. See, e.g., Rural Cellular Ass’n v. FCC, 588 F.3d 1095, 1101 (D.C. Cir. 2009); Ass’n of Nat’l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

386 See Percival, supra note 4 at 2509-10, 2536-37 and note 395 (discussing and citing literature on risks of presidential involvement in adjudications, facts as a constraint, and discussing differences in formal and informal proceedings).

387 See supra at Parts II.g. and II.h.

share a fairly uniform set of justifications and even often the same citations. As discussed above, *State Farm*, and *Fox* are often cited, with emphasis on the power of a president to push a new attitude about regulation, and then the somewhat questionable citation to the disputed *Fox* language from the Justice Scalia opinion about an agency not needing to show “better” reasons for the action. Some actions include the “underlying facts” language from *Fox*, but only one agency thus far works with the Court’s formulation of consistency doctrine in *Encino*; that *Encino* clear majority opinion did not focus on the “better” language, but on the more standard need for agencies to provide “good reasons” for a change, leave no “unexplained inconsistency,” and engage with “facts . . . underlying” the initial action. None consider the implications of *Massachusetts*, or the implications of the majority’s rejection of the policy change at issue in *State Farm*.

In these proposals and actions, however, agencies proposing change only glancingly engage with the extensive documentation of facts and rationales provided by the very same agencies under the leadership of previous administrations. Instead, in a substantial number of major deregulatory actions, the agencies engage in statutory self-abnegation, claiming either limited power due to a new statutory interpretation, or sometimes claiming they completely lack earlier claimed power. In positing such new constraining legal reads, but then not engaging previously central facts and agency reasoning, these agencies implicitly seem to be manifesting the following belief (or perhaps doctrinal shift hopes): that if an agency claims new limits its own power through a new statutory interpretation, then it can avoid engagement with the empirical and science data earlier gathered and relied upon, the earlier reason-giving by the agency, and assessment of the effects of the different regulatory choices.

Such a strategy is unlikely to succeed, although in one highly unlikely narrow setting might be found acceptable despite its apparent violation of consistency doctrine precedents. The strength or vulnerability of this revealed new strategy hinges on both the reasonableness of the agency’s statutory view as well as ongoing judicial fealty to Supreme Court precedents requiring agencies proposing a policy change to engage with “underlying facts” and leave no “unexplained inconsistency.”

If both the old and new statutory interpretation are tenable, then under the consistency-linked doctrines above, the agency cannot just embrace a new

389 *Encino*’s more recent clear majority opinion omitted this language and focused on need for explanations and attention to underlying facts, elements that in all four major Supreme Court consistency precedents have been embraced by majorities. See *Encino*, 136 S. Ct. at 2125-26.
390 See supra at Part II.c.
391 See supra at Parts I.e. and II.h. (discussing Trump policy reversals and frequent claim of lack of statutory authority).
392 That one possible narrow successful use of such a strategy is set forth infra at notes 400-403 and accompanying text.
393 See supra Part II.c. (reviewing cases setting forth these obligations).
statutory view and policy yet not explain why that it has done so. All of the consistency doctrine cases require the agency to provide a reasoned comparative analysis. The obligation to provide “good reasons” will require assessment of the rationales for and consequences of the new read and explanation why it is congruent with what the statute sets forth. The will need to offer “good reasons” for the change despite previous agency embrace of a different policy. A claim about a new “better” or “belie[ved] to be better” policy provides some policy space for agency judgment, but is requiring agency discussion of comparisons of the old and new approaches. None of these cases state that an agency’s reliance on a changed view of statutory powers excuses the need for such analysis; they insist upon it.

Furthermore, if an agency errs about the nature of its authority, including an erroneous claim of lack of statutory ambiguity or erroneously narrow view of its own power, that is itself grounds for judicial rejection. A close judgment call will always go to the agency, but even such an agency victory requires correct statutory analysis, engagement with earlier actions, and persuasive explanation.

It is important to note that EPA’s statutory abnegation in Massachusetts v. EPA was a claim of no power to act at all regarding greenhouse gases as an air pollutant, coupled with arguments rooted in agency and presidential discretion regarding policy priorities and even foreign policy. EPA basically constructed an argument, built off of the Brown & Williamson decision, that due to the breadth of the regulatory impacts, the generality of the statutory language, and the specificity of a few climate-related legislative authorizations, that the collective legislative signal was that the agency had no power at all to regulate greenhouse gas emissions, as sought in the state and environmentalists’ petition. The Court, however, rejected the read as erroneous, saw no space for

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394 Id.
395 Id. and at notes 210-12 (discussing this language in Fox).
396 See NextEra Desert Center Blythe v. FERC, 852 F.3d 1118, 1120-21 (D.C. Cir. 2017) (finding agency erred regarding its own statutory authority and hence remand necessary) (citing Cajun Electric Pwr. Coop. v. FERC, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (rejecting agency action and remanding due to erroneous agency claim of lack of statutory ambiguity governing action); Daniel J. Hemel & Aaron L. Nielson, Chevron Step One-and-a-Half, 84 U. Chi. L. Rev. 757 (2017) (analyzing cases holding that agency errors about the nature of their own authority must be rejected and subject to remand).
397 See supra notes 194-203 and accompanying text (discussing the actions leading to Massachusetts and the Court’s decision).
398 Fed. Reg. at . (EPA explanation of petition denial later challenged in Massachusetts). This sort of interpretive move under the “major questions” or “power” canon is sometimes characterized as a conclusion of no power under Chevron step one, but in others as a setting that leads to “no power” or “no deference” conclusions, basically bypassing the Chevron framework altogether. See Heinzerling, supra note 75 (discussing what she calls “the power canon”).
the other claimed political factors to excuse inaction. The Court insisted that the agency ground its decision in a correct application of the statute’s criteria. 399

The only possible doctrinal space for a successful statutory abnegation move that neglects earlier contingencies is if the agency and eventual reviewing court agree that the abnegating agency was correct as a step one *Chevron* matter, or maybe even a “major questions” canon matter, that the agency never had any power to act in any way as it earlier claimed and did. 400 Perhaps in that setting of a complete regulatory turf disavowal a later reviewing court would, despite the actual contrary Supreme Court consistency doctrine case language, allow the policy change without full provision of “good reasons,” or full engagement with “underlying facts” and possible reliance interests. The argument would likely be that such context-specific contingency analyses were always legally irrelevant or illegal. And were the abnegating agency and a reviewing court later to agree that the agency, in taking its earlier actions, had no such power to act in the first place, perhaps that limited rationale and reasoning would suffice. But it is important to note that none of the consistency cases create even such a narrow loophole from policy change justification obligations.

The very circumstance of such agreement is unlikely, however. After all, the agency would need to claim successfully, contrary to its own earlier fully explicated view, that only a single contrary read of the law is tenable. Moreover, if the abnegation is in any way factually contingent, or is a claim of past overreach in a particular application, that is actually far from a power disavowal that might arguably excuse a lack of agency justification. A later agency claim of initial illegal excess is actually, at most, either a new slightly different read of the agency’s power, or a mere professing of past arbitrary and capricious action. Or, most likely, it would actually involve a *Chevron* step 2 interpretation proffering a new and (allegedly) better read and policy. If such statutory abnegation is rooted in mere claims of agency excess or a new choice among several options, then the agency would still need to fully explain and justify itself. Such actions would involve an agency choice to change policy, not mere compliance with what statutorily must be. As stated in the major consistency doctrine cases, the agency in a setting of a choice to change policy must provide “good reasons” for the change. 401 Such policy changes would really not be driven by language, but by claims about what choices are legally allowed or best.

And when one considers the “major questions” or “power” canon’s foundations and logic, even that rationale for abnegation would, upon closer examination, not necessarily or logically excuse an agency’s lack of engagement with key contingencies and past reasoning. Much of that canon’s reasoning is

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399 *Massachusetts*, supra note 9.
400 For discussion of *Chevron* and its implication for policy change, see supra at notes 163-77 and accompanying text; for discussion of the “major questions” or “power canon,” see notes 75-76 and accompanying text.
401 *FCC v. Fox; Encino*
based on claims of massive regulatory consequences.\textsuperscript{402} If a new agency action is designed to mitigate claimed regulatory excess, then there too the apparent claim of “no power” might actually just involve a degree of agency forbearance or pullback. To draw that line between illegal excess or prudent self-limitation in asserting regulatory authority would logically, under the consistency cases, call for the agency and reviewing courts to engage fully with relevant contingencies and ensure “good reasons” for the change exist. Hence, a complete later disavowal of agency power to act is highly unlikely to thread this needle whereby the agency could declare the policy change and dodge the full agency engagement and justifications required by consistency and reasoned decisionmaking precedents.

Where the relevant statutory language mandates agency “best” achievable analysis, an agency abnegation claim is highly unlikely to succeed. The nature of the statutory requirement creates substantial constraint.\textsuperscript{403} Undoubtedly some judgment calls shape agency definition of the relevant category for comparison.\textsuperscript{404} But leapfrogging back to some claimed consistency with a distant “best” benchmarking while ignoring an intervening agency interpretation, justifications, and reasoning would seem to flunk all of consistency doctrine’s requirements.\textsuperscript{405} An agency explaining what is “best” to achieve a statutory goal will, in a policy change setting, necessarily require comparative assessments.

Moreover, in major recent opinions the Supreme Court has increasingly been emphasizing the need to read key language with attention to surrounding context.\textsuperscript{406} These cases also reflect a focus on the consequences of interpretive choices and whether they can be reconciled with all statutory signals about a statute’s meaning and stated purposes.\textsuperscript{407} The Court has castigated agencies for “interpretive gerrymanders,” where an agency strategically and unnecessarily refuses to consider all costs and benefits—also referred to as “advantages” and

\textsuperscript{402} For discussion of this canon, see supra at notes 75-76 and accompanying text.
\textsuperscript{403} See supra Part IV.d.
\textsuperscript{404} Battles over the Clean Power Plan and consideration of capabilities “inside the fenceline,” as advocated by the Trump administration, or of how power plants and their owners already achieve substantial GHG reductions through trading and other shifts that may physically occur off-site (the Obama EPA view) involves just such questions about comparators under regulatory benchmarking.
\textsuperscript{405} Both the Clean Power Plan and Waters of the United States deregulatory actions so far never grapple with empirical and peer reviewed studies previously documented at great length. See supra Part III.b.
\textsuperscript{406} See, e.g., King v. Burwell, 135 S. Ct. 2480 (2015) (working with language from Brown & Williamson, 529 U.S. at 132, about attention to context, but looking more broadly and functionality and impacts); UARG, 134 S. Ct. at 2425-27 (looking at context, structure and impacts to conclude EPA lacked power to regulate small emitters despite literal language reaching them).
\textsuperscript{407} See id. (citing cases with such analysis).
“disadvantages”—that result from a regulatory choice. An agency cannot keep “parts of statutory context it likes while throwing away parts it does not.”

Recent scholarship investigating appellate judges interpretive practices reveals similar broad pluralistic and pragmatic inquiry and little actual use of a purely textualist approach as espoused by Justice Antonin Scalia. Thus, both under consistency precedents and a related line of statutory interpretation opinions, for an agency to show deliberative integrity will require the following: the agency will have to engage with all salient language, plus the on-the-ground effects of choices permitted by the law’s relevant operative text and surrounding contextual language and other clues as to permissible meanings.

With the Clean Power Plan’s proposed abandonment or change under the Trump administration, for example, the agency will need to justify its proposed new fenceline-bound statutory reading as legally appropriate where the relevant emission standard requires identifying what is the a) best b) system (not technology) of c) emissions reduction that has d) been adequately demonstrated. The linked language provides numerous levels of tethering, as do past EPA studies and reason-giving that discussed what is actually happening in the states and pollution control and clean energy trends. So far, however, we do not know why EPA thinks the inside-the-fenceline approach satisfies these criteria for setting of a performance standard, how it is “best” to reduce emissions, let alone “good reasons” for the change. Regulatory materials so far leave “unexplained inconsistency” and minimal acknowledgement of changed views of “underlying facts.”

Under the very different CWA “Waters of the United States” regulation, the statutory language is, viewed alone, both broad in its reach and quite indeterminate. But the 2015 Clean Waters Rule was woven out of close attention to three decades of regulatory experience, three major Supreme Court decisions, the Connectivity Report’s survey of peer reviewed science about waters, and the Clean Waters Rule’s explanation for its line-drawing choices

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408 See Michigan v. EPA, 138 S. Ct. 2699, 2707-11 (2015) (rejecting EPA claim of no power also to consider costs associated with its regulation to reduce risks of mercury pollution from power plants). The dissent, by Justice Kagan and joined by 3 other justices, agreed with a general default rule that reasonable agency action requires considering of costs unless precluded by the statute. Id. at 2716 (Kagan, J., dissenting). Hence, the whole Court appears to have embraced this new substantive canon regarding consideration of both benefits and costs of agency actions.

409 Id. at 2708.


411 See Clean Air Act Sections 111(d); 111(a)(1) (operative and definitional provisions underpinning the CPP and guiding any policy change).

412 Both 2015 and 2017 studies and agency actions will need to be engaged. See supra at notes 121-31 and accompanying text.

413 For discussion of this rulemaking’s history, see id..

414 For discussion of this rulemaking’s history, see notes 105-20 and accompanying text.
about what waters should be protected.\textsuperscript{415} They collectively created a substantial body of contingent analysis that under current consistency doctrine must be engaged en route to any revised policies. So far, however, the agency has through its divided steps and notice choices, plus limiting of comment, avoided discussion of any of these issues. So far it implies something illegal in the past approach. It also, in compliance with a presidential order, has proposed adopting Justice Scalia non-majority view of federal power. It has not provided explanation for how these approaches would be permissible under the law.

Finding the correct answer to these particular policy shifts is beyond the scope of this article, not least because the finality and legality of most of these actions and subsequent litigation will not be resolved for years. However, they reveal questionable self-constraining reads of statutory power to justify lack of engagement with the heart of the statutory tasks, goals, and regulatory protections that these actions involve.

If courts accept this new statutory abnegation strategy to achieve policy change—a new agency-proffered self-limiting statutory read, then minimal engagement with underlying facts and past reason-giving-- then agencies would have broad newfound ability to sidestep the many facets of consistency doctrine and usual mandate for agencies to engage in reasoned decisionmaking. Statutory abnegation, in particular, would become the new means to deregulate or achieve major policy changes. If accepted by reviewing courts, agencies could ignore on-the-ground repercussions of the choice, their own past reason-giving, and also the agencies’ earlier explanations for why different more broadly empowering reads were embraced. Courts would have to abandon a vast body of longstanding administrative law doctrine.

Furthermore, such an embrace of this policy change strategy as legal would exacerbate Judge Gorsuch’s concerns—although he overstated agency change power—with agency power to shift policy day-to-day and based on regulatory “whim.”\textsuperscript{416} Such a change would also undercut the values of stability and the judicially enforced norm that agency policymaking should be rigorous, offer publicly accessible and rational explanation, and be based on the best data and science.\textsuperscript{417} Administrative law doctrine generally tries to hold in equipoise room for political responsiveness while also looking for expert, fact-based agency policymaking guided by congressional criteria. If such a shift in doctrine were permitted, it would decidedly skew agencies in a politicized direction and allow more rapid and unpredictable policy change. A focus on language and

\textsuperscript{415} Id.

\textsuperscript{416} See supra Part I.b. (reviewing these views).

\textsuperscript{417} Although many laws do not mandate reliance on such best available science or data, the rigor of “hard look review” and linked reasoned decisionmaking expectations will generally lead agencies in high stakes policymaking settings to relay on best available data to avoid later judicial rejection.
power disavowal could be used to avoid expertise-based analysis of choices and their effects.

But consistency doctrine’s many facets make such doctrinal upheaval unlikely. To embrace such agency power to disavow power and thereby avoid justification obligations would involve at least the following major doctrinal adjustments. *Chevron* deference would be substantially expanded, with step 2 reasonableness oversight weakened. The whole line of “hard look review” and “reasoned decisionmaking” precedents would be substantially weakened and susceptible to strategic agency sidestepping of criticisms and engagement with data and past agency policy explanation. The still uncertain middle of consistency doctrine’s major cases—how much can a president’s or political appointees’ regulatory predilections shape an agency’s actions—would expand; agencies and presidents would have broadened latitude to follow their preference for laxity or stringency. Agency obligations to look both backwards and forwards to explain fully and frankly a policy shift would be weakened. The key lessons of *Massachusetts v. EPA* and *State Farm* about fealty to statutory criteria over statutorily untethered political preferences would be subject to a new gaping exclusion. “Unexplained inconsistency,” which is now prohibited, would become common. Abrupt statutory interpretation shifts would become more frequent, and agencies could disregard more of their past work, others’ views, and what the facts show.

Even if judges assessing these deregulatory justifications shared a preference for less regulation, the long term systemic costs of freeing agencies and presidents to make more abrupt and politically driven policy changes under the guise of power disavowals would—or should—give them pause. Such a doctrinal shift would create associated increases in discretionary agency power, heighten legal instability, and reduce political accountability to affected stakeholders. It would also undercut rule of law virtues like stability, predictability, and reasoned explanation by lawmakers.

For these reasons, jettisoning of consistency doctrine through embrace of this apparent new strategy of agency statutory abnegation is unlikely. It might work in the rare and unlikely setting of agency and court agreement that the agency never had any authority to act at all in a setting where it previously claimed power. But any narrower and contingent forms of abnegation should not excuse full agency engagement with contingencies and bypassing of burdens of justification. Broader embrace of this strategy would destroy the stability-responsiveness equipoise of current consistency doctrine. And several decades of case law governing agency consistency, plus the first judicial opinions assessing the 2017 and 2018 deregulatory wave of actions, consistently hew to these longstanding requirements.

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418 Encino, 136 S. Ct. at 2126.
Conclusion

The law shaping agency power to change policy is built on a web of legal doctrine that shares common expectations and requirements. Contrary to recent claims of broad agency and presidential power to change policy with little constraint—claims that were stated with condemnation by now-Justice Gorsuch but embraced by administration agencies during the early years of the Trump administration—policy change is subject to numerous hurdles. Agencies cannot run from underlying facts, contested issues, or past statutory interpretations and associated reasoning explaining past policy choices. Agencies must engage with these statutorily shaped contingencies. This body of doctrine tethers both presidents and agencies, but leaves substantial room for improved regulation and adjustment to new circumstances. If broad recent assertions about unfettered change power meet with success, that will likely mean a substantial change in the contours of consistency doctrine. Many of the current checks on agency lawlessness and arbitrariness would be weakened. The web of doctrines making up consistency law are well founded, however, and should endure, checking unjustified and unaccountable agency policy shifts.