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INTRODUCTION

New presidents inevitably arrive with new regulatory priorities. Through their appointments, directives, and work with myriad agencies, those new priorities will eventually lead to new policies. Some initiatives

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will seek to rescind, weaken, or completely recast earlier regulations of the very same agency, but now under different leadership and at a later point in time. These realities of politics leading to regulatory change are neither shocking nor a trigger for some heightened judicial review.[1] Most laws leave some latitude for choice, and with choice comes room for judgment and agency pursuit of new policy directions.[2] Furthermore, even without dramatic vacillations in leaders' attitudes about regulation, agencies do and should reassess past regulatory actions.[3] Some regulatory changes will seek to improve the strategies of the earlier action. Others will simply adjust regulatory stringency or approaches in light of new information and changes in science, business practices, data, or technology (among many possible triggers for change).[4] Such self-directed strategy changes unconnected to partisan vacillations are possible and often desirable.

Past promulgated regulations, however, are not the fruit of mere whim, or offhand gestures to favored constituencies, or just a word-based game. Agencies undergo an arduous process to move a new regulation from genesis, to actual proposal, to massive outreach efforts, and, in only a fraction of instances, to issuance of a final new regulation. That final regulation will also be accompanied by substantial supportive reasoning and materials, including an explanatory Federal Register preamble, responses to comments, and gathering of supportive materials and also salient materials submitted by opponents. The stakes are high, the work intense, and the skirmishing over issues of agency power and the empirical inferences costly and highly scrutinized by all. Many millions and often billions of dollars can be at stake; intense engagement and investment is the norm.

But when a new administration comes into power and decides to try to jettison a past regulation, whether with rescission, or deregulatory or rollback proposal, or perhaps a replacement, the same stakeholders and issues all arise again, with beneficiaries of that regulation and targets again at loggerheads. This time, however, the agency may change sides and attack the

1. *See* William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357 (2018) [hereinafter Buzbee, *The Tethered President*] (discussing room for agency policy change and centrality of requirement agencies engage with contingencies underlying policy).

2. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 482–83 (2011) (discussing why agencies usually have substantive and procedural choices when regulating).

3. Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579 (2014) (analyzing need for regulatory lookback); Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017) (finding several agencies regularly reassessed and revised regulations, contrary to common assumption that regulations are rarely reexamined and adjusted).

4. Wagner et al., *supra* note 3.

validity or wisdom of its own past work.[5] Beneficiaries and regulation-dependent businesses all fear losing protections and unsettling investments made in reliance on the initial regulation. Those targeted by the regulation, in contrast, will seek to avoid regulatory investments. They understandably hope to avoid wasteful compliance costs associated with an initial regulation that is likely to be rescinded or replaced. Similarly, the agency reversing course logically wants to do all it can to ensure that the earlier regulation that it now opposes does not go fully into effect or, if already in effect, that it does not become more entrenched.

This article examines the phenomenon of deregulatory splintering. When agencies wish to reverse course and rescind or replace that earlier regulation, and thereby avoid associated public and private costs, they face an array of choices and quandaries about how to proceed. And courts assessing those actions and requests must respond. The massive deregulatory efforts of the administration of President Donald J. Trump have been accompanied by frequent splintering of this regulatory rollback process. A notable example is found in the string of actions designed to roll back the Clean Water Rule, a lengthy science-intensive regulation that sought to clarify and restore some protections to "waters of the United States" under the Clean Water Act.[6] Because the rule had earlier been stayed during the pendency of litiga-

5. Agencies might actually say both policies are permissible, but explain the new policy as supported by good reasons as well. This might be doctrinally most advantageous, but agencies pursuing deregulatory shifts during 2017 and 2018, under the leadership of President Donald J. Trump, have often claimed that the past policy was blatantly illegal and that the agency had no such claimed power. *See* William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. (forthcoming 2019) (on file with author) [hereinafter Buzbee, *Agency Statutory Abnegation*].

6. Trump Administration regulatory actions intending to suspend, stay, or replace earlier rulemakings defining what are federally protected "waters of the United States" include the following string of actions published in or to be published in the Federal Register. Other statements, actions, or litigation claims are not included in this note, nor are judicial rulings. They are (starting with the first action): Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017) (in "Notice of Intent" stating plan to revisit the 2015 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) [hereinafter 2015 Clean Water Rule] in conformity with executive order, see *infra* note 7, seeking such action); Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (in Proposed Rule, stating the proposal was "the first step in a two-step process intended to review and revise . . . and to rescind" the 2015 Clean Water Rule); Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542, 55,544–45 (proposed Nov. 22, 2017) (proposing applicability date that would de facto make the Obama Administration rule not in effect) [hereinafter Applicability Date Proposal]; Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5202–03 (Feb. 6, 2018) [hereinafter Applicability Date Final Rule] (issuing Final Rule adding the new applicability date); Definition of "Waters of the United States"—Recodification of Preexisting Rule, Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227, 32,241–42 (July 12, 2018) [hereinafter Supplemental Waters Proposal] (providing additional explanation for July 27, 2017 notice, which proposed abandonment of 2015 Clean Water Rule, and claiming to be proposing return to state of law before that regulation); Revised Definition of "Waters of the United

tion challenges, the action was mostly in the White House and through actions by the United States Environmental Protection Agency and the Army Corps of Engineers. President Trump signed an executive order asking the agencies to initiate steps to revoke or rescind the Clean Water Rule, even stating the view that a non-majority Supreme Court opinion of Justice Antonin Scalia should, to the extent legally permissible, provide the substantially reduced view of what waters could be protected.[7] The agencies, however, then took a string of actions, first trying to change the Rule's effective date, then trying to create a new "applicability date," then proposing its repeal, then publishing a supplemental notice, then proposing a replacement.[8] Due to these actions' limited focus and some explicit notice requests, most of these actions were designed to avoid triggering direct comparative comments and revelation of differences and effects of the Rule and the actions proposed. Other agencies have similarly splintered their deregulatory actions both in courts and through regulatory actions.

In such deregulatory splintering, rather than pursuing a direct rule-for-a-rule replacement process, these agencies have taken a string of actions that might in aggregate have the effect of rescinding the earlier regulation, but with no step involving a full and direct comparative analysis of underlying law and fact questions.[9] Some elements of this deregulatory splintering are logical and likely legal, but others reveal agencies either blundering or perhaps showing little respect for the regulatory rule of law. Agencies pursuing a deregulatory splintering strategy have often sought to sidestep engagement with views of those affected, plus dodge underlying facts and science, the track record and changes since promulgation of the initial regulation, and even their own past reasoning.

These recent uses of deregulatory splintering have sometimes met with judicial rejections, but also occasional judicial acceptance due to the seeming inevitability of forthcoming regulatory change. Because no determinate or clear body of law guides agencies about the appropriate sequence of legal analysis and actions that should accompany deregulatory rollbacks, recent

States," (proposed Dec. 12, 2018) [hereinafter Proposed Revised Waters Definition] (proposing to substantially recast categories of protected "waters"). Discussion of these proposals and a judicial ruling rejecting the validity of the "Applicability Date" rule is provided *infra* at notes 76–79 and accompanying text.

7. *See* Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017) (calling for Environmental Protection Agency and Army Corps of Engineer to revise or rescind the 2015 Clean Water Rule, cited *supra* note 6).

8. *See supra* notes 6–7 (citing the various "waters" actions").

9. The "waters" rollback proposals have been particularly numerous and splintered. *See supra* note 6 and *infra* notes 76–80 and accompanying text (further analyzing the substance of such actions and judicial ruling finding the Applicability Date Final Rule, *see supra* note 6, to be invalidly promulgated).

deregulatory splintering has led to some judicial variety in rationales, but with an unusually high percentage of judicial rejections.[10] Even the occasional judicial victories for the government and deregulation advocates have been partial, reluctant, and contingent. This is not to say that no law governs agency obligations and judicial roles when presented with deregulatory splintering. This article argues that several bodies of doctrine and regulatory modal options create a mutually reinforcing body of requirements that—both as a matter of doctrine and as a normative matter—should be heeded by stakeholders, agencies, and the judiciary. Splintering and associated confusion should never be enough to cause a de facto shelving of a valid, final, still standing notice-and-comment regulation.

This article presents a cross section of such deregulatory splintering actions, identifies the strategies wielded, and reviews early judicial responses to such strategies. It then attempts to unpack the law governing such deregulatory splintering, identifying stated and likely unstated motivations, and then discussing what is permissible, what is unavoidable, and how the transition from an initial regulation to a possible regulatory shift should be handled. The sweet spot of full legality is easy to identify: a fully reasoned notice-and-comment process to rescind or replace a rule that engages with underlying facts, past reasoning, and offers good reasons for the change would check all of the legal boxes.[11] That option, however, evidently is often politically unpalatable, may run counter to incentives of career and political officials within agencies, or perhaps may be disliked by White House officials interested in visible and rapid credit-claiming opportunities.[12] Much of this article's analysis and judicial responses to deregulatory splintering draws on governing doctrine and positive law requirements set forth in enabling acts and Administrative Procedure Act. However, some of the judicial responses and this article's analysis are, in reality, relying on administrative law common law doctrine wielded and in some cases developed in response to the unusually splintered and often evasive actions of agencies that have pursued deregulatory splintering, especially under President Trump. As with

10. For analysis of this unusual losing record, see Connor Raso, *Trump's deregulatory efforts keep losing in court—and the losses could make it harder for future administrations to deregulate*, BROOKINGS CTR. ON REG. & MKTS. (Oct. 25, 2018), https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/ [https://perma.cc/GE2A-LCQN] (calculating only a five percent win rate for agencies based on a Brookings Institution "deregulation tracker"). *See also infra* note 55 (citing other sources tallying or discussing losing track recording of Trump deregulatory actions).

11. These basic requirements reflect a combination of the Supreme Court's reasoned decisionmaking and consistency doctrine precedents, both of which have been further refined when applied in cases challenging recent lightly justified deregulatory rollbacks. They are reviewed *infra* at Section II.B.

12. I explore political explanations for what are likely to continue to be legally vulnerable deregulatory actions in Buzbee, *Agency Statutory Abnegation*, *supra* note 5.

most case-by-case development of doctrine, especially in the administrative law arena, these cases and this article are both applying doctrine and shaping it in light of normative concerns about political accountability and legitimacy in the administrative state.[13]

This article argues that courts reviewing splintered deregulatory efforts have rightly been troubled and resistant. Regulatory change can and should be possible, but should not be pursued in ways that by design minimize transparency and frustrate stakeholder voice and meaningful judicial oversight. A strategy of divide, befuddle, and avoid has been prevalent, but correctly rejected by most reviewing courts. The principle of process parity and linked idea that finalized regulations remain binding on all until validly changed are central to these judicial outcomes and this article's analysis. The rationales and theories justifying these judicial rejections, however, have been varied and sometimes hard to glean. This article organizes and critiques these rationales, thereby both providing agencies a roadmap for how to seek regulatory change with procedural integrity and legality, while also identifying for stakeholders and courts what is permissible and problematic in deregulatory splintering.

I. REGULATORY PROCESS AND THE DEREGULATORY SPLINTERING STRATEGY

The path leading to deregulatory efforts, and in particular this paper's subject of deregulatory splintering, usually starts with an antecedent agency choice to make some original policy via notice-and-comment rulemaking.[14] Other methods of declaring policy, such as through guidance or policy documents or in the course of agency adjudication, do not require any particular preceding process. To be changed, they also require no additional process.[15] Any doubts about that were resolved in *Perez v. Mortgage Bankers Ass'n*, where the Supreme Court affirmed and applied one of the classic administrative law meta-rules: it takes an action of equal or greater formality to undo an earlier action that generated a policy.[16] Courts cannot, however, improvise

13. *See infra* at Section III.B (reviewing these core administrative law values and sources of legitimacy in analysis of reasons for judicial rejections of agencies' deregulatory actions circumventing procedural and analytical requirements).

14. Agencies could use far more rare formal process to generate policy, but such agency choices are uncommon and formal process is rarely required by law.

15. *See* Jack M. Beerman, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 293–94 (2013) (discussing forms of action, policy change, and procedural requirements).

16. 135 S. Ct. 1199, 1206–07 (2015).

and require more process than required by statute, regulation, or utilized earlier by the agency in the initial action later undergoing change.[17] Even an important or longstanding guidance document can be adjusted by another such guidance document; no notice-and-comment process is required.[18] Nonetheless, the agency must always be aware of its policies, regardless of their form of issuance, and will need to identify and justify a policy change regardless of the forms (or modes) through which the agency revealed or declared these policies.[19] However, the questions of substantive justification and legality versus the question of the adequacy of process generating a policy are separate.

Hence, if an initial agency action generating a policy did not involve notice-and-comment or formal process, then deregulating or in some other form changing that agency policy will not require any splintering or antecedent process apart from the requirement that the agency acknowledge the original policy, identify the change, and offer good reasons for it.[20] But if a notice-and-comment promulgated regulation is to be changed, it will take another notice-and-comment process.[21] Language in the Administrative Procedure Act makes this choice, including "repeals of rules" as among its definitions of rulemaking.[22] Abundant caselaw confirms this basic agency obligation. I will allude to this symmetry of required process to make and change policy the principle of "*process parity*."

Because agencies today rarely rely on formal agency procedures, this article's focus on deregulatory splintering will therefore focus primarily on

17. This is reiterated by *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (holding that federal agencies need to utilize notice-and-comment procedures only when enacting or changing "force of law" legislative rules, not when altering interpretive rules), but largely established by the earlier *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 520 (1978) (holding that APA imposes maximum procedural requirements that courts can impose on agencies unless more is required by enabling act or agency's own regulations), and the foundational *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), which stated 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."

18. *Perez*, 135 S. Ct. at 1206.

19. Public Citizen v. Steed, 733 F.2d 93, 99 (D.C. Cir. 1984) (calling for agency awareness of policy and confronting of that policy when making a change); NAACP v. FCC, 682 F.2d 993, 998 (D.C. Cir. 1982) (same).

20. *See* Beerman, *supra* note 15. *See infra* notes 91–121 (reviewing law governing agency policy change and comparative explanation obligations of agencies).

21. Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017) (discussing binding effects of rules and need for same process to undo it).

22. *See* NRDC v. EPA, 683 F.2d 752, 761–62 n.21 (3d Cir. 1982) (parsing APA language, 5 U.S.C. § 551(4)–(5), and how it "provides that the repeal of a rule is rulemaking subject to rulemaking procedures"). *See also* Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 16 (2018) (discussing the "legal nature" of effective dates, APA language, and court decisions). Abundant law finds that effective date changes require new notice-and-comment process. Heinzerling, *supra*, at 18 n.29 (citing cases).

how an agency can seek to change or abandon that disliked initial (or original, or baseline) Code of Federal Regulations regulation originally generated through a notice-and-comment process. This article will sometimes for brevity allude to that baseline original regulation as Reg1, and a proposed new regulation as proposed RegNew. However, as discussed throughout, between Reg1 and RegNew, agencies can and have been acting through an array of splintered regulatory and litigation steps. These splintered interim steps and their use, power, and propriety are the subject of this article.

A. Generating the Original Baseline Regulation (Reg1)

The notice-and-comment process leading to an initial agency regulation—Reg1—is likely known to most readers, but is nonetheless briefly summarized here to provide analytical symmetry in discussing the path to a possible RegNew and agency use of deregulatory splintering. The path to a fully finalized notice-and-comment regulation often begins years before a regulation comes into effect.[23] Agencies considering a regulation will typically do much of the analytical work and consideration of best regulatory means to address a social challenge long before the regulatory proposal appears in the Federal Register. Through speeches, informal meetings, targeted outreach, participation in conferences and the like, agencies will alert the world to the regulatory project under consideration.[24] Sometimes they will now even issue a pre-proposal "advanced notice" to inform the world that the anticipated action's consideration is underway.[25] Because this pre-notice stage is a free-for-all, unhindered by any procedural requirements, deliberations and exchanges can be direct and involve whatever modes of inquiry and persuasion the agency and stakeholders prefer and view as advantageous.[26]

At some point, this unstructured consideration begins to move towards action that does trigger procedural requirements. Agencies will need to get

23. *See* Wagner et al., *supra* note 3, at 185, 194–98 (summarizing process to promulgate a regulation).

24. For example, the Clean Power Plan, the Obama administration's major new regulation of greenhouse gas emission from existing power plants, was issued in final form after receipt of millions of comments, many stakeholder meetings, and consultation with other agencies. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,633, 64,672–73, 64,937–39 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter CPP] (describing outreach, numbers of comments, and specific meetings and participants).

25. O'Connell, *supra* note 2, at 476–79.

26. Even post-notice and post notice-and-comment stages can involve politicized interventions; the process of promulgating regulations is in part a product of political give and take. Prohibitions on ex parte communications do not apply, although an agency action still must reflect and be justified based on the underlying record. *See* Sierra Club v. Costle, 657 F.2d 298, 397–410 (D.C. Cir. 1981).

their anticipated Reg1 onto the Regulatory Agenda that is coordinated by the Office for Information and Regulatory Affairs, or OIRA.[27] OIRA, often alluded to as the regulatory czar, can be rigid in enforcing this procedural hurdle or waive it; the Order's procedures are actually just an internal executive branch hurdle enforced or at times given little weight.[28] Only when an agency is confident in the legal, factual, and political viability of its planned proposal will Reg1 be reduced to writing for broader review and dissemination. Even then, it goes through extensive intra- and sometimes interagency consultation, plus White House and OIRA review.[29] And, for decades, agencies at the proposal stage have also had to respond to an array of additional analytical hurdles, some imposed by executive orders and others by statute. They will prepare cost-benefit analyses (usually now in the form of "regula-tory impact analyses"). They also will prepare at least short additional analyses that often less rigorously address federalism and small business impacts, paperwork obligations, and environmental justice implications.[30]

Although proposed rules can and do undergo some change during the comment process leading to a possible final regulation, agencies must strive to issue proposals that will remain substantially the same when finalized. With too much change, the agency will either need to start over or, if it plows ahead anyway, stakeholders might get judicial relief under "logical outgrowth" doctrine.[31] A final regulation must be a logical outgrowth of the proposal so all stakeholders know what is under consideration and can,

27. This has been required for decades now by Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

28. *See id.* § 1, 9, 10 (stating that the EO does not create enforceable rights outside of the executive branch and also should not be applied if it would violate other legal requirements).

29. *See, e.g.*, Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1872 (2013) (emphasizing OIRA role in facilitating interagency consultation); Wagner et al., *supra* note 3, at 197 n.45 (discussing this OIRA role and citing Sunstein, *supra*).

30. *See, e.g.*, CPP, *supra* note 24, at 64,933–41 (describing and providing analysis required by specified statutes and executive orders).

31. *See, e.g.*, Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985) (discussing this doctrine); Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 274–83 (2017) (discussing and questioning vacatur as usual remedy for violations of "logical outgrowth" requirements); Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 744–46 (2016) (describing "logical outgrowth" doctrine and its requirement that proposals are specific enough to "alert potential commentators," and provide "key data and studies" the agency relied upon). For a recent rejection on grounds linked to lack of agency "fair notice," which the court views as largely overlapping with "logical outgrowth" requirements, see Citizen Telecomms. Co. v. FCC, 901 F.3d 991, 1004–05, n.11 (8th Cir. 2018) (finding FCC notice insufficient due to failure to provide advance notice it might end "*ex ante* regulation of transport services" and hence denied stakeholders opportunity to "offer informed criticism and comments") (citations omitted).

through comments and submissions, address what the agency made salient in its proposal.

Between the proposal stage and possible final regulation issuance, agencies often do additional outreach and meetings, plus receive an avalanche of written submissions.[32] Importantly for this paper's subject of deregulatory splintering, regardless of the proposed regulation's importance, no enforceable or actionable obligations are created yet. Whatever the legal baseline preceding Reg1 (or, as discussed below, a RegNew), it remains intact and the governing law until the proposed regulation is finalized and becomes effective. A proposed regulation midstream in the process of promulgation is of no legal effect except in relation to its own future fate; its own claims, data, and choices can and will be drawn on and debated before that agency during a rulemaking, plus their legal adequacy will of course influence any finalized regulation's fate when challenged in court.[33] But a proposed regulation in itself imposes no new obligations or rights on the outside world. Many proposals simply disappear with no explanation. Unless a statute mandates issuance of a regulation or some post-deliberation announcement, an agency choice whether to pursue or shelve a regulation will generally be for the agency alone, often subject to no judicial review.[34]

But before the regulation can become final, the hardest agency work occurs. The agency must grapple with all salient comments, including often dense business, data, science, and other risk-related information submitted by clashing stakeholders in support of or opposition to the rule. The agency then must address all such issues and justify its final rule with abundant and often massive written materials.[35] That will include the "preamble" that explains the final rule and will be published in the Federal Register, plus additional public documents such as the agency's compiled regulatory materials,

32. For example, the CPP was issued in final form after massive outreach and comment. *See supra* note 24.

33. *Cf.* California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (stating agency must "adequately explain" its change and "rejection of its earlier factual findings"). Agency failures to address their own prior facts can also lead to violations of consistency doctrine in the setting of regulatory action on permits. Indigenous Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 584, 591 (D. Mont. 2018) (finding agency reversal on Keystone pipeline permit was inadequately explained and stating agency cannot ignore "inconvenient facts").

34. For a case involve regulatory deadlines, inaction, then attempted agency splintering of rescission and postponement efforts, see Public Citizen v. Steed, 733 F.2d 93 (D.C. Cir. 1984) (declining to set a lowered burden of justification for suspensions and holding agency to enabling act's substantive and procedural requirements plus agency obligation to explain its abandonment of its own past views). *See also* O'Connell, *supra* note 2, at 477–78 (discussing law governing agencies not completing a rulemaking).

35. This obligation is based on the APA but embraced in key "reasoned decisionmaking" and "hard look review" cases, especially *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co*.

sometimes a freestanding legal analysis, and summaries of comments and responses to them.[36] And, in addition, a revised, final cost-benefit regulatory impact analysis will also be prepared to accompany the final regulation.[37] Agencies hoping to go public and final will then transmit these final regulatory materials for White House review, with OIRA often playing the regulatory gatekeeper.[38]

If all is approved, then the final regulation—Reg1—will be published on the web, often with an accompanying White House and agency rollout that includes informal explanation and political credit claiming, plus the far more dense and voluminous written materials.[39] Shortly thereafter, these materials are published in the Federal Register along with the final regulation itself that will eventually appear in the Code of Federal Regulations. Some of these materials are incorporated by reference but separately posted by the agency; they still form part of the agencies' final justifying regulatory materials that become, in the terms of famous *Chenery I* Supreme Court decision,

36. For example, the CPP was issued with a massive Federal Register preamble plus an accompanying lengthy legal memorandum, a responses to comments document, a cost-benefit analysis, and technical memoranda about power plant capabilities. For an archived version of these documents, see U.S. Envtl. Prot. Agency, *Clean Power Plan for Existing Power Plants: Regulatory Actions*, EPA.GOV (Aug. 3, 2015), https://archive.epa.gov/epa/cleanpowerplan/clean-power-plan-existing-power-plants-regulatory-ac-tions.html#CPP-final [https://perma.cc/Q8BF-UQBX].

37. This is usually done to conform with the requirements of EO 12,866, a longstanding executive order requiring agencies to follow specified agenda and consultation requirements and undertake cost-benefit analysis.

38. *Id.*

39. For example, a new 2018 proposal that would roll back the CPP was surrounded by extensive statements about benefits for coal regions. *See* Lisa Friedman, *E.P.A. Will Ease Path for New Coal Plants*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/climate/epa-coal-carbon-capture.html [https://perma.cc/ZCV8-B28S] (discussing coal-targeted benefits); Press Release, The White House, WTAS: Support for Trump Administration's Proposal to Replace the Costly and Overreaching Clean Power Plan (Aug. 22, 2018), https://www.whitehouse.gov/briefings-statements/wtas-support-trump-administrations-proposal-replace-costly-overreaching-clean-power-plan/ [https://perma.cc/FG46-7D7T] (quoting politicians and interest groups supporting rollbacks benefitting coal regions and energy industry and claiming past Obama administration overreach). *See also* Lisa Friedman, *Costs of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/climate/epa-coal-pollution-deaths.html [https://perma.cc/NBM5-ZYKE] (reviewing new proposals and anticipated additional deaths, and discussing statements of President Trump about helping coal country, and other coal-linked rollbacks). The proposal itself, however, hewed more to claims about what the statute allowed, with few references to coal country benefits apart from discussion about avoiding undue regulatory burdens and even frank discussion about trends away from coal utilization. *See* Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,716, 44750–51 (proposed Aug. 31, 2018) [hereinafter ACE Rule Proposal] (discussing industry trends away from coal and lack of new coal plant investments). *But see id.* at 44,754 (mentioning energy production "uncertainties" and view that with new rule "coal-fired power plants are likely to be an important part of the generation mix for the forseeable future").

the agency's "contemporaneous explanation."[40] Neither agencies, government litigators, regulatory stakeholders, nor courts can later strategically supplement or change the agency's legal explanation for the action.

Of substantial importance to this article's analysis and deregulatory shifts, "final" regulations are not immediately effective and face several short-lived vulnerabilities. The APA creates a presumptive thirty-day period before they come into effect.[41] The general view is that the effective date is synonymous with the date of publication in the Code of Federal Regulations.[42] Whether due to statutory edict or simple regulatory prudence, most regulations create some kind of grace period before those subject to a regulation are obligated to adjust their conduct or products. This could delay the effective date, but might just be providing a longer window for the separate "compliance date" obligation.[43] (As analyzed in greater depth below, APA Section 705 grants to agencies and courts additional special powers to stay regulations if they are not yet effective and are facing a litigation challenge.)[44]

The Congressional Review Act creates a time-limited window, measured by legislative days, during which Congress can use a streamlined fast-track legislative process to block a new regulation and any future regulation that is substantially the same.[45] This law was successfully used only once in its first two decades, but was wielded with success over a dozen times during the early months of the Trump administration.[46] With both houses of Congress and the White House in the control of the same party, end-of-term regulations promulgated by agencies during the Barack Obama administration were vulnerable and thrown out through this accelerated process that can only negate a regulation.[47] In addition, some statutes do not rely on a general statute of limitations, but set their own specific statutory periods for judicial

40. *See* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007) (discussing this requirement's centrality to agencies' constitutional role and legitimacy).

41. 5 U.S.C. § 553(d) (2012).

42. Heinzerling, *supra* note 22, at 18 (discussing views of meaning of "effective date" and their substantive nature and importance).

43. *See* California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1118 (N.D. Ca. 2017) (distinguishing between effective and compliance dates and rejecting BLM effort to use late compliance date as grounds to stay final, effective regulation under APA Section 705).

44. *See infra* notes 134–141.

45. 5 U.S.C. §§ 801–808 (2012).

46. President Trump signed fifteen Congressional Review Act resolutions invalidating late Obama Administration regulations. *See* Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, AM. PROSPECT (Feb. 6, 2018), http://prospect.org/article/congressional-review-act-damage-assessment [https://perma.cc/G6K2-JKQF] (describing the law and reviewing invalidations and their impacts).

47. *Id.*

challenges to be filed.[48] Until all three of these periods have all passed and judicial challenges resolved, a regulation may be nominally "final" and legally effective, but still be viewed as somewhat in flux or vulnerable.

Only when the materials are issued in final form do the courts usually enter the picture. APA-based challenges cannot be brought until the agency action is "final."[49] If the stakes are high enough, multiple challenges will follow, often from both those seeking more and less stringent regulation. The agency and its Department of Justice litigators will, if still committed to the regulation, yet again explain and justify the agency's actions, hewing to but also distilling and amplifying the reasonableness of the agency choices as initially explained. Because only that "contemporaneous explanation" can be used to defend the agency's regulatory action, salient legal views, key agency reasoning, and underlying empirical issues (such as issues of science, engineering, environmental impacts, business implications and the like) will be reiterated and repeatedly emphasized.[50] Stakeholders will also enter the fray, highlighting and amplifying key supportive and opposition points and data. Eventually, courts will issue rulings that, after applying the appropriate scope of review and deference regimes, generally find the action merely legal or illegal. Courts rarely state that only one particular legal view or regulatory choice was possible.

B. Deregulatory Splintering's Myriad Forms

Now we turn to the use of deregulatory splintering. As introduced above, the setting involves an agency and often a White House that wants to undo and perhaps replace a finalized regulation. Typically, where Reg1 is a substantial regulation, a deregulatory push starts with a Reg1 already under attack in the courts and an agency and White House that also have to decide what options they will pursue in connection with Reg1 through a regulatory process.[51] This section is describing actually utilized splintering strategies,

48. For example, several modern environmental laws require challenges to regulations to be filed within several months of their publication. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7607(b)(1) (2012) (setting forth presumptive 60 days window for filing challenges to a promulgated standard); Clean Water Act, 33 U.S.C. § 1369(b)(1) (2012) (setting forth presumptive 120 day window for challenges to agency promulgated regulations and other specified actions).

49. 5 U.S.C. § 704 (2012).

50. As discussed in Buzbee, *The Tethered President*, *supra* note 1, for this reason agencies are likely to create a substantial body of explanation repeatedly linking law and fact to explain and justify an earlier regulatory action; a later deregulating agency must engage with these previous explanations and defenses. *Id.* at 1406–07.

51. Congress can of course intervene, but outside of occasional action through appropriation riders, such direct congressional action has become rare during recent years' extended period of partisan legislative gridlock. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (discussing effects of gridlock and regulatory efforts to make socially needed policy despite lack

not commenting or resolving questions of their propriety. Discussion of judicial responses and additional doctrinal and normative critiques follows later.

The first way an agency may seek to undo Reg1 is through the ongoing litigation attack. The agency and its DOJ litigators can flip sides, going from defenders of the regulation to allies of the challengers. Since stakeholder litigants will often seek to stay or delay compliance obligations associated with the challenged regulation, the first and seemingly low-cost strategy is for the agency to join the stay motion.[52] The agency will in such a setting point out that it is considering rescinding or replacing Reg1, plus may go even further and attack Reg1 itself as imprudent, flawed, or the fruit of some sort of illegality in its issuance under the previous administration. If a court grants such a stay, then Reg1 will remain a regulation in name only, either ceasing to have effect or never coming into effect with associated burdens or benefits unless the stay is dissolved.[53] An agency that now attacks its own Reg1 and its challenger allies hence could potentially seek to get full deregulatory mileage by merely joining such a stay motion.[54] Depending on what, if anything, the reviewing court requires or allows, such a stay could linger on for months or years.[55] Most courts deny such arguments, but their occasional successes and reasons such judicial action is problematic is a major contention explored below.

of updated statutes); Richard Lazarus, *A Different Kind of Republican Moment in Environmental Law*, 87 MINN. L. REV. 999 (2003) (observing lack of new legislative momentum to strengthen or improve environmental laws).

52. This happened repeatedly during 2017 and 2018 in connection with the Trump EPA's desired abandonment of the Obama administration's Clean Power Plan. *See supra* notes 3, 9, and *infra* note 60 and accompanying text.

53. Professor Rakoff correctly notes that the regulatory back and forth over an abortion counseling (or gag) rule between administrations led to a de facto stay without full process or justification when an agency promised a future notice-and-comment rulemaking officially adopting and explaining the new approach of the administration of President William Clinton. As is always a risk, the old approach was abandoned but the promised new proposal was never actually made. As I argue below, courts should not allow past regulatory positions to be so abandoned without parity of process and usual full justification. Todd Rakoff, *Response to William W. Buzbee, "Deregulatory Splintering": What Might the Other Side Say*, 94 CHI.-KENT L. REV. (forthcoming 2019) (manuscript at 4–5).

54. *See, e.g.*, Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 557 (D.C. Cir. 2015) (discussing EPA lack of opposition to privately sought regulatory stay, but identifying risks to agency legal obligation to "give reasons before they rescind rules" if they could engage in "rescission by concession"). I return to this case in Part III.

55. Courts have generally resisted agencies seeking to achieve deregulation through delay or stay actions. Heinzerling, *supra* note 22; Buzbee, *The Tethered President*, *supra* note 1, at 1408–17. *See also* Raso, *supra* note 10 (reporting on high losing percentage of Trump regulatory changes). A 2019 news story calculated that the Trump administration had lost twenty-eight out of thirty challenges involving alleged administrative law irregularities in administration efforts to make rule changes. Margot Sanger-Katz, *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html [https://perma.cc/6HQB-775X].

A second strategy, often pursued in conjunction with a reversal of litigation posture (whether a stay is sought or granted), is for the agency to announce a posture of nonimplementation and nonenforcement of Reg1.[56] The agency can acknowledge criticisms and challenges en route to deciding on its own preferred course. By so announcing such a nonenforcement attitude, the agency minimizes investments made by the government and regulatory targets in response to or in reliance on Reg1. This can matter because business investments either to comply with or perhaps even capitalize on opportunities created by a regulation will engender commitment to that regulation and opposition to changes that would unsettle opportunities seized due to Reg1.[57] This is not to say that nonimplementation is legal, or without costs. The people, resources, or perhaps markets that would have been protected will remain vulnerable or experience injury the regulation might have forestalled.[58] Nonetheless, despite the harms associated with inaction and delay, agency nonimplementation and lassitude in enforcing a regulation is rarely subject to meaningful review. An agency that engages in enforcement forbearance can, if it does not reveal legal "abdication" or violate some mandatory obligation in underlying legislation or regulation, often succeed in arguing that its nonimplementation and nonenforcement are "committed to the agency['s]" discretion and unreviewable by the courts under the APA.[59]

56. For a policy change proposal justified in part with reference to a linked nonenforcement commitment, see Tip Regulations Under the Fair Labor Standards Act, 82 Fed. Reg. 57,395, 57,399 (Dec. 5, 2017) (in policy change proposal, reviewing legislative, regulatory, and litigation history preceding the 2017 actions and reiterating department's nonenforcement commitment).

57. *See* William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037 (2018) (discussing how federalism creates several layers of regulation that can entrench regulation by building business investment in markets stimulated and sometimes shaped by one or more layers of regulation).

58. *See, e.g.*, Public Citizen v. Comm'r, Food & Drug Admin., 740 F.2d 21, 26–27, 34–36 (D.C. Cir. 1984) (in mixed decision responding to challenge to regulatory delay in requiring labeling of aspirin to reflect Reyes Syndrome risk and after review of industry entreaties and apparent role of White House review in delaying FDA action, calling for agency to fulfill its "grave responsibility" to protect lives of "hundreds of children" at risk due to delayed action despite contrary studies and apparent but reversed FDA plans to require such labels).

59. Key cases are Norton v. S. Utah Wilderness All., 542 U.S. 55, 55 (2004) (unanimously holding that APA only allows courts to examine government agencies' failures to act where action is required and discrete); Heckler v. Chaney, 470 U.S. 821, 821 (1985) (concluding that nonenforcement choices by agencies are presumptively unreviewable in federal courts). For analyses of general unreviewability of agency choices not to enforce or how to allocate resources, see Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008) (arguing that there is no real difference between decision to regulate or not to regulate under APA); Daniel T. Deacon, Note, *Deregulation through Nonenforcement*, 85 N.Y.U. L. REV. 795, 797 (2010) (discussing issue and citing to Biber and other scholars analyzing inaction law); Ronald Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 702–34 (1990) (closely analyzing precedents on unreviewability).

A third strategy, apart from welcoming a judicial stay or manifesting a nonenforcement attitude about Reg1, is for the agency substantively to capitulate on the merits in court, or even go on the attack against its own regulation. Such arguments would often track the agency's similar attacks on Reg1 in supporting a stay and in regulatory proceedings to rescind or replace Reg1 with RegNew.[60] Sometimes the agency will just applaud the critical arguments made by opponents, but even an agency's litigation surrender can prove critical. Such agency surrender where issues of fact or law present close calls can, for some judges, be enough to eliminate judicial deference to the agency's initial arguments in support of Reg1.[61] Such deference could be, or perhaps could have been, crucial for Reg1 to surmount a judicial review hurdle.

When the agency no longer defends Reg1 but joins or acquiesces in the attack on its validity, courts are somewhat flummoxed about the appropriate standard of review.[62] Deferring to an agency that now attacks the regulation seems illogical, but if the courts just go along and on the merits reject the regulation as illegal, that presents problems as well.[63] After all, the new antiregulatory agency may not yet have actually presented balanced, fully engaged legal or fact-based arguments about the merits of Reg1 or a new regulatory action, yet a litigation surrender and judicial embrace could (if allowed) in effect lead to a result much like a fully deliberated and reasoned regulatory policy change. In fact, judicial embrace of an agency litigation surrender could potentially create an even more enduring legal effect than a mere agency policy reversal; a court opinion declaring legal views about the agency's powers might narrow the range of what any future agency could do.[64]

60. Respondent EPA's Opposition to Interveners' Motion to Decide the Merits of the Case at 5–6, 10, 13, West Virginia v. EPA, No. 15-01363 (D.C. Cir. Oct. 23, 2015) (after reviewing string of regulatory actions and filings in court both regarding the Clean Power Plan (CPP), its stay, its rescission, and its proposed replacement, arguing DC Circuit should continue to refrain from ruling on the CPP because "a ruling on the legality of the Clean Power Plan might not resolve anything regarding the legality of an alternative regulatory approach" and then citing cases about an agencies' ordinary authority to change policy).

61. This issue provoked judicial disagreement in Global Tel*Link v. FCC, 866 F.3d 397 (D.C. Cir. 2017), with the majority assuming *Chevron* deference was no longer applicable with an agency's refutation of its own earlier action, *id.* at 407–08 (Edwards, J., for majority); *id.* at 418 (Silberman, J., concurring), and another judge pointing out reasons such an assumption was unmerited and could lead to strategic agency avoidance of policy change obligations, *id.* at 420, 425 (Pillard, J., concurring in part and dissenting in part).

62. *See supra* note 61 and accompanying text.

63. *See, e.g.*, Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 557 (D.C. Cir. 2015) (identifying risk of agency litigation reversal achieving a policy reversal without required process and justification).

64. *Id.*

Outside the courts, agencies wishing to abandon Reg1 have numerous options that I will refer to as the fourth option of a "practical" stay. The first is nowhere sanctioned by law, but seems to be a near sure thing. And, due to its limited effect (if it is not transformed or extended), it is also unlikely to generate judicial challenges or even governing judicial precedents. Late administration regulations—often referred to as "midnight regulations"—that in some respect are not fully in effect or still in the early weeks or months of implementation may be subject to an across-the-executive-branch-stay order.[65] The President or the White House Chief of Staff will often mandate such a stay to allow new political appointees to assess the wisdom of such end-of-term regulations. This seems to have become a commonplace step by incoming administrations.[66] In addition, during the Trump administration, the President himself also issued memoranda and orders that specified particular regulations or bodies of regulation that he wanted rescinded or revoked.[67]

These executive orders or memoranda similarly can have the effect of putting a pause or hold on regulations, yet due to their terms and because of constitutional hierarchies, they cannot legally on their own actually have such effect.[68] They cannot command action prohibited by the Constitution, by statutes, by existing regulations, or commanded by other forms of law such

65. Beerman, *supra* note 15, at 336–38 (describing new White House chiefs of staff seeking freeze or stay on recent regulations of the previous administration); Heinzerling, *supra* note 22 (same, focused on Trump administration); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008) (discussing such stays and other political transitions and presidential and agency responses).

66. Beerman, *supra* note 15, at 336–47 (discussing orders to stay regulations not yet effective and other agency actions that followed under recent administrations); Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269, 270–71 (2017) (discussing Trump rollbacks and White House mandate to suspend or withdraw regulations that were not yet effective); Heinzerling, *supra* note 22 (presenting and analyzing Trump stay and delay efforts); O'Connell, *supra* note 65 (discussing stays and other transition strategies).

67. Based on this author's review of Trump administration regulatory activity post-dating Trump's Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (calling for cost-only analysis of old and new regulations and no new net regulatory costs and elimination of two regulations for each new regulation), it appears that such orders or memoranda with a more specific regulatory focus have overwhelmingly sought deregulatory policy shifts, often either rescissions or replacements, and with broad orders seeking rollbacks of protective environmental and energy regulations. *See generally* The White House, *Presidential Actions*, WHITEHOUSE.GOV, https://www.whitehouse.gov/presidential-actions/ [https://perma.cc/AU22-ZNUD]. *See, e.g.*, Exec. Order No. 13,783, 82 Fed. Reg. 31,396 (Mar. 28, 2017) (setting forth broad order calling for reexamination and elimination of regulatory burdens on energy sector). *See also supra* note 7 (citing executive order calling for revision or rescission of 2015 Clean Water Rule, cited *supra* note 6).

68. *See* Nat. Res. Def. Council v. U.S. EPA, 683 F.2d 752, 765–68 (3d Cir. 1982) (reviewing and rejecting agency arguments in support of an indefinite postponement of a regulation's past effective date and finding no legal basis for agency to follow executive order's requirements over those set by statute in the APA).

as judicial precedents or orders. They are internal instructions to the executive branch, to be complied with to the extent consistent with more binding forms of law. They can, however, seek and catalyze agency responsive action.[69] The presidential edict will also immediately alert stakeholders, the agency, and any court reviewing those same regulations that change is likely coming. That presidents and agencies can telegraph their priorities and agenda for actions is ordinary and unlikely to be legally vulnerable. As documented by Professor Golden, Justice Elena Kagan, and others, politicized regulatory agenda setting and prompting of agency action are now a standard feature of presidential life and the modern administrative state.[70] And, as a practical matter, a short start-of-presidency regulatory pause will—if truly short-lived—likely avoid any judicial rebuke due to the time and effort required to file a challenge and the substantial risk that mootness, ripeness, finality or standing hurdles would derail any challengers. In addition, as concluded by several courts, if such orders are truly directed only to rules that have not yet taken effect and where no other legal authority mandates completion of the action, an agency or President's choice to delay or shelve such a rule can be legal.[71]

Where agencies begin to run into troubled waters is in the steps that they may subsequently take via declaration or a series of noticed agency actions. In this fifth setting (with several further different subpart forms) agencies may seek to walk away from the considerable legal and fact-based infrastructure underpinning Reg1, in the period after it has become effective, but through regulatory actions that do not respect the parity of process prin-

69. I review forms of presidential influence over agencies and their relative legitimacy in Buzbee, *The Tethered President*, *supra* note 1, at 1426–41. Presidents have broad power to set regulatory priorities and nudge agencies to do work in an area. *Id.* at 1426–29.

70. MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000) (reviewing Reagan era deregulatory efforts, including executive orders, and responses within agencies by political and career personnel); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (documenting and defending presidential involvement with regulatory initiatives as presumptively legal). That this presidential involvement is common does not mean it is accepted by all. For criticisms of this involvement and arguments for more statute-specific assessment for what agencies and presidents can do, see, e.g., Kevin M. Stack, *The President's Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263, 284 (2006) (noting varied statutory language on delegations to agencies or presidents and arguing for all to respect those choices); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 977–79 (1997) (arguing for presidential respect for power allocations and procedures chosen by Congress and Constitution's specified means of presidential control). Historical practices and conflicts also have revealed changing views about such presidential power. *See* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2495–500 (2011).

71. *See* Beerman, *supra* note at 15, at 354–60 (discussing Reagan Administration Office of Legal Counsel opinion broadly claiming legality of such stays and courts upholding legality of stays or shelving of rules in period before becoming effective).

ciple. This occurred in one notable instance during the Obama administration, and a few other cases during past deregulatory pushes, but in numerous instances during the Trump administration.[72]

A few agencies just declared that they would stay a regulation, but without any identification of legal authority for such an action and sometimes with no preceding process whatsoever.[73] These actions were rejected quickly and easily in the courts despite agency protestations that such a de facto stay was the first step en route to more official actions to rescind or replace Reg1.[74] In the face of such quick rejections, other agencies noticed intents to stay, postpone, nor delay a regulation or add a new effective date.[75] Or, in one instance, the agency came up with a new term of its own that was in neither the enabling act nor the APA, proposing to create and add an "applicability" date that would be substantially later than the regulation's initial effective date.[76] Some agencies relied in part on APA Section 705 as granting it and

72. In N.C. Growers' Ass'n v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012), the Fourth Circuit rejected as an illegal violation of APA notice-and-comment requirements an Obama Administration Department of Labor 2009 suspension of a late Bush administration rule that had just come into effect two months earlier, in 2008. The Department offered summary reasons for the action and stated it would through the suspension reinstate an earlier rule. It also limited opportunities for comment. The court stated such a suspension was itself a rulemaking, found no "good cause" to excuse avoidance of the notice-and-comment norm, and required the agency to provide a full opportunity for comment on the merits. *Id.* at 763–72. *See also id.* at 771–72 (Wilkinson, J., concurring) (discussing permissibility of agency policy changes but need for "fidelity to law and process" to avoid "whim and caprice" of the bureaucracy and avoid "arbitrar[y] upset[ting]" of rules). Trump changes and judicial responses are discussed below.

73. For a Reagan era splintering and unsuccessful efforts to trigger less rigorous judicial review due to that splintering, see Public Citizen v. Steed, 733 F.2d 93, 94–97, 99–105 (1984) (tracing "dreary history" of agency inaction, then action and rollback efforts, and declining to judicially adopt a lesser burden of agency justification en route to finding the deregulatory actions illegal). For a similar unsuccessful Trump effort, see Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017) (recounting series of litigation and regulatory actions directed at abandoning Obama administration methane emission regulation and finding suspension of compliance deadlines was a de facto amendment of the earlier regulation and required similar full process to undo).

74. *See* cases cited *supra* notes 72, 73.

75. For a description of these many actions, see Buzbee, *The Tethered President*, *supra* note 1, at 1376–90, 1412–17 (describing such actions and judicial responses); Heinzerling, *supra* note 22 (same). *See also* Jennifer Dlouhy & Alan Levin, *Trump Tests Legal Limits by Delaying Dozens of Obama's Rules*, BLOOMBERG: POL. (July 13, 2017 4:00 AM), https://www.bloomberg.com/news/articles/2017-07-13/trump-tests-legal-limits-by-delaying-dozens-of-obama-s-rules [https://perma.cc/3NHC-FPNB] (identifying rules proposed for delay, stay, or non-enforcement).

76. *See, e.g.*, Applicability Date Proposal, *supra* note 6, 82 Fed. Reg. at 55,544–45 (proposing applicability date and reiterating that agencies were not soliciting comment on scope of definition of "waters of the United States" "[b]ecause the agencies propose to simply add the applicability date and ensure continuance of the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking"). *See also* Applicability Date Final Rule, *supra* note 6, 83 Fed. Reg. at 5202–03 (emphasizing lack of associated costs and benefits due to claimed maintenance of legal status quo of Clean Water Rule finalized but not yet in effect due to judicial stays). This newly created category of action and related agency steps were found illegal in S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018) (finding illegal under the APA the Applicability Date Final Rule, cited *supra* note 6 (referred to in the opinion as the "Suspension Rule")).

reviewing courts latitude to stay a Reg1, even where the underlying Reg1 had already actually come into effect.[77]

As part of such stay actions or efforts to push off regulatory effective or applicability dates, agencies in several instances made clear in their notices that they did not seek or welcome comments on the overall merits of Reg1 or other plans afoot to eliminate or change it.[78] Agencies indicated that such opportunities for engagement on the merits would come later. Initial stay or effective date extension notices were sometimes followed shortly thereafter with notices declaring intent to impose lengthier stays, yet still without the agency's notice engaging on legal issues, or fact or science issues, or providing comparative analysis of its original and new reasoning.[79]

A few agencies more forthrightly pursued strategies to rescind or replace an original regulation (Reg1), but even in those settings some agencies sidestepped the analysis typically provided and, as further explained below, is required by the cases making up consistency doctrine. The splintering in these actions was more implicit than explicit. Many of these agency actions involved the agency claiming that its earlier action was illegal, sometimes even claiming that the agency lacked statutory power to regulate at all in the area previously subject to regulation by the very same agency. I refer to such agency disclaimers of statutory power previously asserted as "agency statutory abnegation."[80] As utilized, these statutory abnegation claims have involved a form a splintering because these agencies seem to view the abnegation rationale as providing agency latitude to walk away from Reg1 with little or no justifying analysis. Abnegating agencies have disclaimed

77. This argument failed. *See* California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1117–20 (N.D. Cal. 2017) (reviewing APA language and differences between effective and compliance dates).

78. *See, e.g.*, Applicability Date Proposal, *supra* note 6; *S.C. Coastal*, 318 F. Supp. 3d at 969 (rejecting Applicability Date Final Rule, *supra* note 6, in part due to lack of opportunity for comment and other APA shortcomings); Pennsylvania v. Trump, 281 F. Supp. 3d 553, 570–78 (E.D. Pa. 2017) (rejecting new "interim final rule" regarding no-cost contraceptive coverage for failure to allow pre-action notice-and-comment and lack of statutory authority); California v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054, 1065–68, 1071 (N.D. Cal. 2018) (faulting agency failure to engage on factual claims and limitation of comment on suspension of rule regarding waste of natural gas while using burden claims to explain need for rule).

79. This occurred in several splintered deregulatory actions. *See, e.g.*, Nat'l Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5, 10–11 (D.D.C. 2017) (describing final rule, last-second Delay Rule not proceeded by notice-and-comment process, citation of "good cause" by agency for this choice, and agency statement it was "highly likely" initial final rule would be rescinded but without evidence such a proposal was forthcoming, with court finding such actions in violation of the APA); *S.C. Coastal*, 318 F. Supp. 3d at 965–66 (describing string of deregulatory actions related to the Clean Water Rule leading up to the Applicability Date Final Rule, *supra* note 6, and finding the Applicability Date Final Rule's promulgation to violate APA requirements).

80. I cite examples and analyze this sort of justification in Buzbee, *The Tethered President*, *supra* note 1, at 1378–81, 1433–511. *See also* Buzbee, *Agency Statutory Abnegation*, *supra* note 5.

regulatory power previously claimed but without substantial engagement with underlying facts and science, with little or no analysis of reliance interests and changes that may have occurred since final promulgation of Reg1, and with summary or omitted comparative engagement with past agency reasoning.[81] They have left unclear what legal reasoning or empirical claims the agency views as justifying the policy reversal. The view seems to be that if law alone justifies a claim of no power, then the agency can shuck off the burden of full engagement with facts, law, and reasoning.

Some agencies also have started down a rescission path, but then, while the rescission action still is pending, the agencies have proposed to replace the earlier regulation (Reg1).[82] In yet more splintering, with the Environmental Protection Agency the notable example, agencies have sometimes not only attacked the same Reg1 with proposed rescission and replacement notices, but issued supplementary notices that provide additional support for the action proposed.[83]

As a result, stakeholders trying to respond have to review and respond to numerous rounds of agency materials and proposals, both in the courts about Reg1 and RegNew and also before the agency about related but sequentially rolled out regulatory proposals. And, as alluded to above, in each such action, the agency has sometimes called for comments to focus on the particular proposed action, sometimes saying other more broadly focused comments are not welcome. As a result, neither agencies nor stakeholders have provided or been given the opportunity to engage in an apples-to-apples comparison of the initial regulation (the Reg1) and a nonexistent or perhaps a vaguely intimated future regulation or regulatory act (the RegNew). Instead of a clearly noticed proposed RegNew, where the agency has stated in fully reasoned and legally and factually supported form a single proposal for comment, stakeholders are confronted by a sequence of splintered actions. Few of these steps involved substantial agency engagement fully explaining the basis for its new action. Some have been so lightly reasoned that it was unclear if the agency itself had yet figured out why it planned to shelve the initial regulation.[84]

81. *See, e.g.*, *California v. BLM*, 286 F. Supp. 3d at 1065–68 (pointing out unsupported fact claims regarding burdens and associated costs and benefits contradicting earlier claims and also noting agency's questioning of its own statutory authority to work in area at all).

82. *See supra* note 6 (citing string of actions regarding efforts to rollback 2015 Clean Water Rule, cited *supra* note 6).

83. *See* Supplemental Waters Proposal, *supra* note 6, 83 Fed. Reg. at 32,241–42.

84. For example, despite the massive public attention regarding the plight of immigrant "dreamers" and the Obama administration's Deferred Action for Childhood Arrivals ("DACA") program, the federal government twice supplied only conclusory statements about illegality that were found to be based on legal error and insufficient to support the justifying claim of past illegality. *See* Regents of Univ. of Cal.

A few agencies, in contrast, have acted more directly and through a single action, setting in motion a single notice-and-comment rulemaking to rescind or replace the Reg1. Although some such actions have involved variants on statutory abnegation, they have involved minimal splintering. The FCC's efforts to abandon the Net Neutrality Rule and the legal validity of that rule are the source of ongoing contestation, but the agency's process has lacked the splintering evident with other agencies.[85] The Department of Labor similarly at least stated it would embrace the more common and slow legal revision process, but has also skirted its analytical obligations to explain a policy change.[86]

At the back end of this fifth multipart form of deregulatory splintering, a sixth form or perhaps stage of deregulatory splintering occurs. When litigants who support Reg1 claim that the deregulatory action (whether a stay, rescission, or new proposed RegNew) is legally, factually, or procedurally defective, the agency and its lawyers will often point to all of the other related skirmishing, including ongoing litigation over Reg1. They argue that the court should just let the agency's work run its course rather than the judiciary getting involved in such a complex intertwined array of actions before they have all been sorted out. The very splintering of actions and ensuing

v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1025–26 (N.D. Cal. 2018) (reviewing history of DACA and rescission efforts and claims), *aff'd*, 908 F.3d 476 (9th Cir. Nov. 8, 2018) (reviewing history of the actions and finding erroneous and insufficient government arguments about the law compelling the rescission of DACA but also stating court was not precluding rescission, but could not uphold it due to the agency's legal errors). *See also* Nat'l Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 10, 18–19 (D.D.C. 2017) (reporting agency's statements it would likely propose to rescind the disliked earlier rule, but noting lack of any such proposal, and finding other failures of required process and missing analysis).

85. *See* Restoring Internet Freedom, 82 Fed. Reg. 25,568, 25,573 (proposed June 2, 2017) (to be codified at 47 C.F.R. pts. 8, 20).

86. Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, WALL STREET J. (May 22, 2017), https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029 [https://perma.cc/L3V4-XMWE] (op-ed by Secretary of Labor stating his department would follow the "rule of law," whether regulating or deregulating). *But see* Tip Regulations Under the Fair Labor Standards Act ("FLSA"), 82 Fed. Reg. 57,395, 57,399 (Dec. 5, 2017) (to be codified at 29 C.F.R. pt. 531) (proposing to abandon previous regulation regarding tips policy, claiming that agency had earlier misinterpreted extent of its statutory authority). The proposal traced the earlier regulation's history but provided little detail on impacts of the old rule or under the new rule. *Id.* at 57,396–401 (reviewing history of proposal and stating that department "lacks data to quantify possible reallocations of tips" and hence presents "primarily qualitative approach"). After subsequent revelation of a withheld unfavorable agency cost-benefit analysis indicating a massive shift of income from tipped workers to management, see Ben Penn, *Labor Dept. Ditches Data Showing Bosses Could Skim Waiters' Tips*, BLOOMBERG (Feb. 1, 2018), https://bnanews.bna.com/ daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips [https://perma.cc/K8L9-PE69] (reporting that Labor Department "scrubbed an unfavorable internal analysis" showing that change to tip retention regulations would result in employees "los[ing] out on billions . . . in gratuities"), a legislative deal resolved the legal issue. Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong. § 1201 (as enrolled, Mar. 23, 2018) (in appropriations rider, resolving controversy with prohibition on employers keeping employees' tips).

confusion has been used to argue for judicial forbearance, but in the mean-time a stay of Reg1. And sometimes this argument meets with success.[87] The following Parts explore why such judicial acceptance or forebearance is legally problematic.

II. HURDLES FOR DEREGULATORY SPLINTERING

Several strains of administrative law collectively constitute what I refer to here as "consistency doctrine." Consistency doctrine's basic tenets and requirements have been largely hewn to by the courts for roughly forty years and are quite uniform and clear. Nonetheless, the mix of litigation claims and splintered deregulatory actions observed in recent Trump administration efforts to achieve regulatory rollbacks of Obama administration regulations indicate either confusion over this body of law or willful disregard of its requirements. This part starts by briefly reviewing key doctrines governing this area, then turns to judicial responses to deregulatory splintering. In closing Part III, the article unites the strains and concerns underlying judicial rejections of many of the Trump administration rollbacks, suggesting fundamental precepts and the analytical sequence that should guide the courts.

A. Binding Until Changed

A substantial undercurrent of the many cases and actions described hinges on the substantial legal effects of a finalized notice-and-comment rule. A regulation that has surmounted the full rulemaking process and come into effect becomes a binding form of law.[88] Those subject to or protected by the regulation can bank on its ongoing effects. The promulgating agency also is bound by the regulation, obligated to act in conformity with it unless and until it is validly changed.[89] Similarly, except if hearing a direct and timely challenge to the rule, courts are obligated to take that regulation as

87. For briefing arguments seeking to use the many agency actions as grounds for judicial forbearance, see *supra* note 60 (quoting briefs by Department of Justice and EPA arguing for ongoing stay of CPP). For courts partly accepting such actions, the D.C. Circuit's continuing not to rule on the Clean Power Plan over two years after its case argument is a notable example. *See also* Becerra v. U.S. Dep't of the Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (finding agency regulatory reversal and reinstatement of new rule to violate the APA and to have required notice-and-comment process, but declining to vacate the illegally made change due to postponement and repeal efforts that would limit vacatur to relief to only "a few days" of restoration of the illegally postponed rule "before the Repeal Rule takes effect"); Wyoming v. U.S. Dep't of the Interior, No. 2:16-cv-00285-SWS, slip op. (D. Wy. Apr. 4, 2018) (staying phase-in provisions of late-term Obama administration regulation of methane waste recovery due to litigation over that rule (a Reg1), suspension and repeal efforts).

88. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265–68 (1954).

89. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015) (noting different effects of promulgated regulations and policy or guidance documents and declining to require notice-and-comment process to change an agency policy never set forth in a promulgated regulation and affirming law requiring policy change through parity of process); Clean Air Council v. Pruitt, 862 F.3d 1, 8–9 (D.C. Cir. 2017) (emphasizing durability of promulgated regulation and need for change to be preceded by legally required process).

part of the legal landscape and, as set forth in that regulation, apply it according to its terms. Many of the cases and related rollback actions hinge on challengers' and agencies' efforts to sidestep still effective regulations. Most courts reviewing rollback actions and deregulatory splintering frame their analysis by hewing to this basic regulatory rule of law precept that a finalized regulation remains binding on all until validly changed.[90]

B. Politics and Change

That a regulation is in effect and binding on all does not, however, mean that it will necessarily be enduring. As I have reviewed in other recent scholarship and is well established by decades of quite consistent Supreme Court and appellate court cases, regulatory change is often possible but must satisfy several analytical justifying hurdles.[91]

The famed *Chevron* case notably went further than just allowing policy change.[92] En route to articulating its "two-step" deference framework, the Court applauded agency reconsiderations of policy, even stating that an agency "must" reconsider the wisdom of its policies on an ongoing basis.[93] The *Chevron* Court allowed EPA to make a substantial change in how states could regulate stationary sources of pollution. EPA shifted from requiring a stack-by-stack approach to a new approach that allowed states to regulate stationary sources under a "bubble" strategy, assessing increases in pollution and associated heightened pollution control obligations by looking at each "stationary source" as though under a bubble.[94] Unlike the earlier *Skidmore* case, lack of consistency was not stated or implied to require a heightened, more rigorous form of judicial review.[95] The *Chevron* Court found that the agency had statutory latitude to make this change, plus had supplied adequate

90. *See, e.g.*, *Clean Air Council*, 862 F.3d at 9; California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1121 (N.D. Cal. 2017).

91. *See* Buzbee, *The Tethered President*, *supra* note 1; Buzbee, *Agency Statutory Abnegation*, *supra* note 5. *See also* William W. Buzbee, *Dismantling Climate Rules Isn't So Easy*, N.Y. TIMES (Dec. 8, 2016), https://www.nytimes.com/2016/12/08/opinion/dismantling-climate-rules-isnt-so-easy.html [https://perma.cc/UC6Z-WQCX] (after President-elect Trump designated climate skeptic Scott Pruitt his nominee to become administrator of US Environmental Protection Agency, reviewing underlying law and actions and why they would make difficult Pruitt's goal of reversing Obama administration climate regulations).

92. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (upholding regulation and articulating deference framework now known as the *Chevron* two-step).

93. *Id.* at 863–64.

94. *Id.* at 840–42, 851–59, 863 (reviewing agency's move to the bubble policy and grounds provided).

95. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (setting forth what are now labeled "sliding scale" deference factors, and including consistency as among the factors triggering judicial deference to agencies).

empirical and policy justification for the choice in this "technical and complex" setting.[96] Nonetheless, other post-*Chevron* cases still see the presence of consistency as a "plus" factor[97], and unexplained vacillation remains illegal[98], but under current doctrine the mere fact of policy change should not disadvantage the agency.

The Supreme Court's *State Farm* case more directly dealt with agency burdens of justification when acting in an overtly deregulatory mode, in that instance rolling back a regulation requiring motor vehicle manufacturers to provide air bags or automatic seat belts.[99] Although the agency, the National Highway Traffic Safety Administration, made judicial rejection easy by offering no justification for one action and skewed superficial analysis of the other, the Supreme Court articulated the general obligations of deregulating agencies.[100] An agency "changing its course" must provide a "reasoned analysis for the change."[101] This requires more analysis than if the agency had not acted at all; the Court did not view initial lack of action or deregulating as the same.[102] They were "substantially different" because the change would be "a reversal of an agency's former views as to the proper course."[103] That earlier action would reflect the agency's "informed judgment" that the initial action (Reg1 under this article's framework) would "carry out the policies committed to it by Congress." Quoting an earlier case, the Court said that the initial action creates "'at least a presumption that those policies will be carried out best if the settled rule is adhered to.'"[104] The *State Farm* Court, like the Court in *Chevron*, affirmed that agencies could change policy, emphasizing that it was permissible for agencies to make policy adjustments in light of "changing circumstances" and other grounds for change justified by the "rulemaking record."[105] But such justification had not been offered by the

96. *Chevron*, 467 U.S. at 863–64.

97. For discussion of cases still viewing consistency and longstanding views as positive factors for the agency, see Anita Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015) (analyzing approaches to longstanding agency interpretations of statutes). Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2344 (2014), building on FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000), carves out another *Chevron* exception that creates resistance to change from consistent agency claims about their authority, finding agency claims over substantial new turf to trigger either judicial skepticism or lessened deference.

98. *See* Smiley v. Citibank, 517 U.S. 735, 742 (1996); Judulang v. Holder, 565 U.S. 42, 56–57 (2011).

99. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

100. *Id.* at 48–50 (explaining lack of basis for agency action).

101. *Id.* at 41–44 (stating overall factors required for policy change justification).

102. *Id.*

103. *Id.*

104. *Id.* This key language is further analyzed in Buzbee, *The Tethered President*, *supra* note 1, at 1396–97.

105. *State Farm*, 463 U.S. at 42.

agency. Chief Justice Rehnquist, writing only for himself, argued that a president's different attitudes about regulation could be part of a "reasonable basis for an executive agency's reappraisal" of policy.[106]

Massachusetts v. EPA also involved an agency policy change and Court discussion of what agencies must surmount.[107] States and environmentalists petitioned the Environmental Protection Agency to regulate greenhouse gases from motor vehicles due to their climate impacts. The agency's past general counsel had concluded EPA had such authority, but EPA had not actually regulated such emissions.[108] The George W. Bush administration declined the petition and in so doing also reversed EPA's legal views, now reading the Clean Air Act to preclude such EPA regulation. It also offered several other political and prudential grounds for the petition denial. The *Massachusetts* Court stated the agency erred in its statutory interpretation and could not decline action based on "reasoning divorced from the statutory text."[109] It rejected agency action that ignored the statutory criteria and underlying science and facts relevant to the legally required criteria.[110]

The 2009 *Fox v. FCC* and 2016 *Encino Motorcars, LLC v. Navarro* cases together set forth the most recent Court discussion of how courts should review agency policy changes and the permissible role of politics in shaping such change.[111] In *Fox*, the Court was reviewing an FCC change in policy regarding "fleeting obscenities" on television. The Court, speaking through an opinion by Justice Antonin Scalia, but also eliciting concurring and dissenting opinions, allowed the FCC policy change, stating that such change does not trigger a heightened standard of review.[112] The agency would have to supply "good reasons" for the change. And where Reg1 involved underlying issues of fact, science, or reliance interests, the agency proposing change would need to engage on those issues as well.[113] The opinion by Justice Scalia said that the agency need not show that the reasons for the change "are *better"* than the initial reasons, just that it "*believes*" it to be better.[114] The opinion approvingly cited the Rehnquist *State Farm* language about changed presidential priorities being part of the permissible reasons

106. *Id.* at 59 (Rehnquist, C.J., concurring in part and dissenting in part).
107. Massachusetts v. EPA, 549 U.S. 497, 533 (2007).
108. *Id.* at 510–14.
109. *Id.* at 532–35.
110. *Id.*
111. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).
112. *Fox*, 556 U.S. at 514–15.
113. *Id.*
114. *Id.* at 515 (emphasis in original).

for an agency's policy reappraisal. Justice Kennedy joined parts of the Scalia opinion—and was necessary to make any of it a majority opinion—but emphasized more than did Justice Scalia the agency obligation to engage with "factual findings" and a more developed record than if it were acting anew.[115]

In *Encino Motorcars*, which was decided after Justice Scalia's death, the majority opinion by Justice Anthony Kennedy rejected as inadequately justified a Department of Labor policy shift about the employment status of service advisors in automobile dealerships.[116] The Court quoted key language from *Fox*, but with language choices and omissions that emphasized more that an agency changing policy must look at "facts and circumstances" underlying the earlier action, any "reliance interests," and leave no "unexplained inconsistency" or be rejected as arbitrary and capricious.[117] Agencies cannot force "courts to speculate on reasons that might have supported an agency's decision."[118] The Court stated that agency policy change triggers a familiar variant of "hard look review" and "reasoned decisionmaking" agency obligations as set forth in *State Farm*.[119]

These cases thus are quite uniform in their collective lessons. Agencies may be able to change policy, but to do so they must acknowledge and identify change, fully engage with their past reasoning, address facts and circumstances underlying the initial action (Reg1) and the changed action (RegNew), and study reliance interests or other changes in conditions or experience.[120] Agencies cannot leave "unexplained inconsistency" and must

115. *Id.* at 536–37 (Kennedy, J., concurring in part and concurring in the judgment).

116. *Encino Motorcars*, 136 S. Ct. at 2126–27. The baseline policy itself was a change from earlier policy and was set forth in a Department of Labor 1978 opinion letter that was consistent with court rulings. *Id.* at 2123. In the new policy, the Department, following a notice-and-comment rulemaking, in 2011 reversed course from its proposal and several decades of contrary policy, but for reasons the Court concluded lacked adequate "reasoned explication," especially given "serious reliance interests at stake." *Id.* at 2127.

117. *Id.* at 2126–27

118. *Id.* at 2127.

119. *Id.* at 2125, 2127.

120. For another policy shift—but a shift announced in a precedent-creating adjudicatory determination then a Policy Memorandum explaining the decision and what it required of agency officials—that was found both unexplained, contrary to statutory language, and arbitrary and capricious, see Grace v. Whitaker, 344 F. Supp. 3d 96, 113–14, 116, 125–30, 133 (D.D.C. 2018) (finding new Attorney General policy regarding refugee "credible fear of persecution" claims involving domestic or gang violence to be a policy change both inadequately explained and contrary to statutory language). The form of policy shift splintering addressed in *Grace* was a bit different than most examples in this article, with the new and old policies developed mainly through adjudicatory rulings, policy documents, and government briefs, but with the government arguing in *Grace* that the array of putative policy-declaring materials were not even reviewable forms of policy under relevant immigration law that in some sections preclude judicial review and in others provide for review of "written policy directive[]s" or "guideline[s]" to implement expedited removal provisions. 8 U.S.C. § 1252(e)(3)(A)(ii) (2012); *Grace*, 344 F. Supp. 3d at 117–19.

meet usual "reasoned decisionmaking" obligations. In supplying "good reasons" for a policy change, the agency will need to engage in a comparative analysis of the old and new policies, explaining the change. And those "reasoned decisionmaking" precedents emphasize the agency obligation to engage with key issues of fact and science and address salient comments and criticisms.

Courts reviewing splintered deregulatory actions at some point apply most or all of these cases. They note how splintered deregulatory actions, due to their splintered nature, fail to engage in the required comparative analysis and in a forthright manner address issues of fact, science, changes in conditions, and legal reasoning to explain with "good reasons" why a change is being pursued.[121] The legal centrality of these linked requirements to ensuring agency legitimacy and political accountability is returned to in Part III.

C. Positive Law and Windows for Abandonment

Courts assessing agency policy change and confronted with deregulatory splintering typically start their analysis not with reliance on broad administrative law principals, but with analysis of three forms of positive law analysis. First, they look to see what the underlying enabling legislation itself dictates about the agency action. This includes substantive criteria for action but, more importantly for this article, statutory procedural requirements. For example, courts will enforce statutory requirements regarding timing, venue, and prerequisites for regulatory challenges, with Clean Air Act Section 307(d) as a prominent example.[122] That provision creates a special window

The court found there to be reviewable policy change despite the government's claim that there was none, or (in the alternative) no change that was reviewable. *Grace*, 344 F. Supp. 3d at 117–19.

121. *See, e.g.*, *Grace*, 344 F. Supp. 3d at 117–19 (criticizing the Attorney General for failing even to acknowledge that it was making a policy change as required by consistency doctrine precedents). *See also* California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (stating agency must "adequately explain" its change and "rejection of its earlier factual findings"). Inadequate engagement with prior facts can also lead to violations of consistency doctrine in the setting of regulatory action on permits. *See, e.g.*, Indigenous Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 584, 591 (D. Mont. 2018) (finding agency reversal on Keystone pipeline permit was inadequately explained and stating agency cannot ignore "inconvenient facts").

122. *See, e.g.*, Air All. Hous. v. EPA, 906 F.3d 1049, 1054 (D.C. Cir. 2018) (discussing court and agency's obligation to follow process chosen by Congress and parsing 307(d)(7)(B)'s requirements); Clean Air Council v. Pruitt, 862 F.3d 1, 7, 9–10 (D.C. Cir. 2017) (discussing court's obligation to find agency justification for change and examining implications of Section 307(d)(7)(B) for agency power to issue a stay and judicial power of review). *See also* NRDC v. Abraham, 355 F.3d 179, 203 (2d Cir. 2004) (stating agency "may not ignore the decisionmaking procedure Congress specifically mandated") (citation omitted). Procedural irregularities—as well as agency failures to focus on statutory criteria, failures to explain shifts in policy, or to explain the action with an adequate basis in the administrative record—were critical to rejection on APA grounds of Trump administration efforts to add a citizenship status question to the census questionnaire. New York v. U.S. Dep't of Commerce, No. 18-CV-2921 (JMF),

(which is both an opportunity and in some settings an obligation) for challengers alleging some regulatory oversight or issue that could not have been raised in a finalized regulatory action to go back to the agency to seek new consideration, not immediately seek judicial relief.[123] Similarly, if an action under the enabling act is required by that statute to be preceded by notice and comment, or perhaps a process like negotiated rulemaking, courts will require procedural compliance.[124] And, as in *Massachusetts*, if a regulatory choice must be based on scientific or other empirical factors made relevant by statute, courts will enforce those requirements.[125]

On the other hand, the Congressional Review Act provides an express statutory process for legislative invalidation of a regulation.[126] That fast-track process, while primarily a means to abandon another administration's late-term rules, is an empowerment of the legislature to check potential regulatory overreach or, even if the initial action was legal, express legislative disagreement and invalidate the action. Agencies under new leadership may welcome such CRA invalidations. Although of huge importance, it is tangential to this article's analysis and has only arisen in deregulatory splintering cases when a CRA invalidation effort failed, leading to later agency efforts to derail or abandon the earlier regulation by other means.

Even where an enabling act may not itself set forth procedural mandates, the APA's requirements apply, as does the substantial body of law fleshing out the APA's requirements. When courts state that it takes a new notice-and-comment proceeding to undo a regulation that was generated after such a proceeding, they rightly cite the APA, which includes repeals of rules as among the forms of rules.[127]

But the APA also provides some potential space for agency skirting of full-blown new rulemaking with each step away from a finalized regulation. First, courts recognize that the APA itself allows regulatory actions to bypass

(S.D.N.Y. Jan. 15, 2019), *cert. granted*, U.S. Dep't of Commerce v. New York, No. 18-966 (U.S. Feb. 15, 2019).

123. 42 U.S.C. § 7607(d)(7) (2012).

124. For example, in *Bauer v. DeVos*, the court rejected the Trump Department of Education's effort to delay implementation of the 2016 Obama Administration's "Borrower Defense Regulations," 332 F. Supp. 3d 181, 183 (D.D.C. 2018), in part due to the agency's failure to abide by two enabling act procedural mandates, *id.* at 186.

125. *See supra* notes 107–110 and accompanying text.

126. *See supra* notes 45–46 and accompanying text (citing and discussing recent uses of the Congressional Review Act).

127. 5 U.S.C. § 551(4), (5) (2012). This APA language and the need for agencies to follow APA process is cited in virtually all cases reviewing deregulatory process pursued by something less than a full, open, notice-and-comment process. Heinzerling, *supra* note 22 (discussing stay and delay actions and court rejections due to APA requirements); Noll & Grab, *supra* note 66 (same).

notice-and-comment process for "good cause." But abundant precedents, especially in the D.C. Circuit, allow such "good cause" only in limited circumstances.[128] These circumstances, almost by definition, are not applicable when the regulation at issue is highly visible, fiercely contested, and has even been the subject of presidential direction.[129] In such settings, opportunities for comment in response to notice prior to an agency action are of especial importance.[130] In addition, regulations with significant effects on stakeholders are not the sort of internal, or procedural, or low conflict actions that might pass "good cause" muster.[131] Nonetheless, practical agency achievement of some deregulatory impacts can be accomplished through enforcement laxity, although an agency that too overtly declares such a strategy can find itself back in court and even forced to go through a new notice-and-comment process.[132] Nonexistent or highly deferential oversight of agency nonenforcement, nonimplementation, and resource allocation choices is also rooted in the APA's express language of judicial review preclusion for actions "committed to agency discretion by law."[133]

APA Section 705, in contrast, by its terms provides a narrow window for agencies and courts, and litigating stakeholders, to seek a stay of a finalized but not yet "effective" regulatory action that is being challenged in court.[134] An agency can "postpone the effective date of action taken by it,

128. For cases discussing this exception and its "narrow" applicability in discussing injunctive relief for a Trump administration policy change made without notice-and-comment process, see E. Bay Sanctuary Covenant v. Trump, No. 18-17274, 2018 U.S. App. LEXIS 34542, at *55 (9th Cir. Dec. 7, 2018) (citing United States v. Valverde, 628 F.3d 1159, 1165 (9th Cir. 2010) (quotation omitted), and calling the exception "narrowly construed and only reluctantly countenanced," Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004), and requiring agencies to "overcome a high bar" and show that "delay would do real harm" to life, property, or public safety, *id.* (quoting Valverde, 628 F.3d at 1164–65 (citation omitted)).

129. For extensive discussion on how high-conflict regulations and related efforts to postpone or rescind are unlikely to ever legally bypass notice-and-comment under a "good cause" rationale, see Pennsylvania v. Trump, 281 F. Supp. 3d 553, 574–76 (E.D. Pa. 2017).

130. Cases emphasize the need for notice and opportunities for comment prior to the agency action. *See, e.g.*, N.C. Grower's Ass'n v. United Farm Workers, 702 F.3d 755, 769–71 (4th Cir. 2012).

131. *See id.*

132. *See, e.g.*, Envtl. Def. Fund v. Gorsuch, 713 F.2d 802, 810–12, 814–18 (D.C. Cir. 1983) (reviewing and vacating EPA's express decision to defer processing of permits for hazardous waste incinerators, finding dispute not moot and actually a "deadline suit" due to statutory deadlines for action and noting "history of deferrals and suspensions" and concerns that they served to "effectively suspend . . . promulgated . . . regulation"). The agency decision "which effectively suspend[ed] . . . duly promulgated standards" was held to "constitute rulemaking subject to notice and comment requirements" of section 553 of the APA. *Id.* at 816.

133. 5 U.S.C. § 701(a)(2) (2012). Despite this general presumption, if an agency bases it action on legal error, it would still be reviewable. *See* Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1025–26 (N.D. Cal. 2018) (parsing law and explaining why reviewability remains for ordinarily discretionary choices if rooted in misapprehensions about the scope and nature of the agency's power), *aff'd*, 908 F.3d 476 (9th Cir. 2018).

134. 5 U.S.C. § 705 (2012).

pending judicial review," if it "finds that justice so requires."[135] And a reviewing court may "postpone the effective date of an action" or act "to preserve status or rights pending conclusion of the review proceedings" to "the extent necessary to prevent irreparable injury."[136] Cases interpreting this provision are surprisingly few, but they enforce it according to its terms. They generally view it as applicable prior to the date a regulation becomes effective; it is about "postponing" a regulation that is not yet in effect.[137] It applies before courts rule on the merits of a challenge. And the provisions directed at courts potentially issuing a stay are viewed as triggering preliminary injunction standards with the usual high hurdles to providing such relief.[138]

Although the Trump administration has argued that agency reliance on Section 705 is unreviewable action that is "committed to agency discretion," it has failed so far in this argument. Courts expect an agency acting on its own or in joining in a request for a court stay to engage in transparent, balanced reasoning and to justify any stay with assessment of all interests and the merits of the underlying challenge.[139] Trump administration agencies have so far failed in their reliance on Section 705, but all courts acknowledge it provides a context-limited window for well justified agency or court stays, as did the Office of Legal Counsel during the presidency of Ronald Reagan.[140] Lastly, agencies themselves in promulgating a regulation often have initial discretion in deciding when to make a regulation come into effect or when compliance is required. And they also have discretion to start a rule reconsideration. That discretion at time of promulgating Reg1 or proposing a RegNew, however, is far different from a later agency effort to render the earlier rule invalid without process or justification or to change effective or compliance dates already set forth in a final regulation.[141] These congressionally conferred limited grounds and settings for stays cut against claims

135. *Id.*

136. *Id.*

137. Bauer v. DeVos, 325 F. Supp. 3d 74, 104–07 (D.D.C. 2018).

138. *Id.*; California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1123–27 (N.D. Cal. 2017).

139. Agencies cannot, for example, engaged in one-sided analysis of vague claims of business burdens and provide no analysis of lost regulatory protections. *See Bauer*, 325 F. Supp. 3d at 107–10. Relatedly, agencies cannot make inconsistent claims about burdens and benefits in Reg1 and RegNew settings, yet fail to explain the clashing claims. California v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054, 1064–66, 1072 (N.D. Cal. 2018) (highlighting inconsistencies and explaining how they rendered the policy change action (a suspension action) invalid).

140. Beerman, *supra* note 15, at 354–60.

141. Clean Air Council v. Pruitt, 862 F.3d 1, 7–9 (D.C. Cir. 2017) (making distinction between agency ability to choose priorities and start rulemakings versus illegal efforts to sidestep already effective regulation without required process and justification).

that agencies have inherent broad power to achieve similar results without a positive law authorization.[142]

D. Regulation, Change, and Notice Opportunities

Agencies splintering their actions have sometimes sought to wholly avoid notice-and-comment process or, with Federal Register notice instructions, limit the focus of comments.[143] For example, agencies have asked commenters to focus on the merits of a stay or other delay action, versus the merits of larger substantive deregulation that might be forthcoming. As mentioned above, bypassing of notice-and-comment in a highly contentious, politicized regulatory battle is destined for judicial rejection. Both before the Trump administration and in reviewing Trump agency deregulatory action, courts look askance at agency avoidance or splintering of opportunities for comment.[144] Although agencies claim that merits-focused comments will be welcome at some later stage, there is no guarantee that an indefinitely delayed or stayed regulation will ever be subject to full merits consideration, or that a replacement rule proposal will actually emerge.[145] The presumptive unreviewability of agency inaction and latitude for presidential direction about agency priorities create this risk.[146] Courts have agreed with challenging litigants that even where an agency claims it is just returning to some earlier regulatory status quo with a stay of a disputed regulation (a Reg1), the agency cannot so limit or channel comments.[147]

142. *See infra* at Part III.

143. *See supra* notes 78–79 and accompanying text.

144. N.C. Grower's Ass'n v. United Farm Workers, 702 F.3d 755, 763–71 (4th Cir. 2012); Pennsylvania v. Trump, 281 F. Supp. 3d 553, 570–76 (E.D. Pa. 2017) (providing extensive analysis of why opportunities for comment typically must precede the action and rejecting as illogical agency claim that extensive comment on initial action to be undone could justify lack of comment before the policy change); California v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054, 1071–72 (N.D. Cal. 2018) (rejecting as unlawful effort to limit substance of comments).

145. *See, e.g.*, Public Citizen v. Steed, 733 F.2d 93, 102 (D.C. Cir. 1984) (rejecting agency arguments in support of regulatory reversal after delays and stating "for NHTSA to say that no policy is better than the old policy solely because the a new policy *might* be put into place in the indefinite future is as silly as it sounds"); Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1711–15 (2008) (discussing problem of regulations that endure without updating); Wagner et al., *supra* note 3 (discussing agencies that did engage in post-promulgation refinements of regulations); O'Connell, *supra* note 2 (noting that most agencies have broad discretion in choosing whether to complete a rulemaking); Rakoff, *supra* note 53.

146. *See* Buzbee, *The Tethered President*, *supra* note 1, at 1426–29 (reviewing law and practical constraints that protect presidential control over agency priorities and agenda); Peter L. Strauss, *On the Difficulties of Generalization*—PCAOB *in the Footsteps of* Myers*,* Humphrey's Executor*,* Morrison*, and* Freytag, 32 CARDOZO L. REV. 2255, 2275 (2011) (acknowledging role of presidential oversight but not "to decide").

147. *See, e.g.*, *N.C. Grower's Ass'n*, 702 F. 3d at 763–71 (rejecting agency claim that change of little importance because returning back to old status quo, but also rejecting action due to strictures on notice and comment).

E. Judicial Injunctions as Extraordinary and Standing Linkages

In applying APA § 705 or at some later post-effective date point, litigants (sometimes now joined by the newly antiregulatory agency) may seek or join requests for injunctive relief against a regulatory action. The actions could concern Reg1, some sort of delay or stay action, or even a replacement with RegNew. Courts view requests for a stay of any valid, finalized regulatory action as extraordinary relief. It must surmount all of the usual hurdles for issuance of preliminary injunctive relief, including showing of irreparable injury and a likelihood of success on the merits.[148] Courts expect the agency and other stakeholders to make their case with much more than summary or conclusory claims of illegality, or hardship, or litigation risk.[149] Relatedly, and often in overlapping analysis, courts addressing standing look for specified linkages between the challenged regulatory action and particularized effects on the entity or person claiming standing.[150] The mere existence of litigation and protestations about compliance hardship or litigation vulnerabilities have been inadequate. Since almost any agency action is subject to litigation, any agency response to litigation—whether a surrender or a decision to battle on—creates risks of a loss down the road. Losses or costs will befall someone, whether an agency retains a regulation or deregulates. Courts thus look for litigants and newly antiregulatory agencies to be detailed and persuasive in identifying the alleged regulatory errors or other litigation vulnerabilities of the challenged action.[151] Again, courts look for balanced analysis much like that called for under consistency doctrine precedents.

148. *But see* Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425 (2016) (reviewing and questioning potential grounds for the Supreme Court unexplained stay of the CPP regulation).

149. *See, e.g.*, NAACP v. Trump, 298 F. Supp. 3d 209, 233–35 (D.D.C. 2018) (rejecting adequacy of conclusory claims of litigation risk as grounds for reversing DACA policy); Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 555–58 (D.C. Cir. 2015) (discussing injunctive standard and lack of adequate showings and risks to integrity of regulatory process if courts granted stays due to agency assent).

150. Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018) (in assessing legality of agency policy change and judicial relief, looking at standing and injunction with overlapping assessment of interests at stake); Bauer v. DeVos, 325 F. Supp. 3d 74 (D.D.C. 2018) (same).

151. *See, e.g.*, *Bauer*, 325 F. Supp. 3d at 107–10 (finding conclusory agency justifications inadequate); Ramos v. Nielson, 336 F. Supp. 3d 1075, 1089–90 (N.D. Cal. 2018) (stating agency cannot sub silentio and without any justification reverse policy regardless of mode in which policy is evident). *See Mexichem*, 787 F.3d at 557–58, for earlier similar analysis about need for agency justification and balanced analysis.

F. The Deference Puzzle with Agency Reversals

Agencies and courts also must make choices about deference regimes with a regulatory reversal. That an agency reverses a policy does not eliminate deference to that new policy approach; *Chevron* itself involved such a setting and found the change to EPA's bubble policy worthy of deference.[152] If "sudden and unexplained," however, it would likely be found arbitrary and capricious.[153] In fact, a policy change that is unacknowledged is viewed as a separate grounds for rejection.[154] Agency policy changes that are unacknowledged or unjustified with good reasons would also flunk the modern consistency doctrine cases.[155] The tougher question is what courts should do in assessing an old regulation (Reg1) that remains in force but is no longer defended by the agency and may be en route to possible rescission or replacement. Should the agency's choice to switch sides in litigation or to undertake future regulatory actions to abandon or change it eliminate deference? The cases are few, and one recent case, *Global Tel*Link,* reveals judges splitting on how to think about the issue. I return to this issue below in Part III.[156]

G. Judicial Responses to Stays and Other Deregulatory Splintering

Agency efforts to adjust or abandon their own regulations finalized under other leadership is not a new phenomenon.[157] Previous administrations, however, tended to observe a bright line between regulations that were in effect already and those just in the pipeline or in the pre-effective date window. This usual restraint, however, was not evident in a wave of rapidly rolled out deregulatory stays and other actions during 2017 and 2018 by the Trump administration. They resulted in a remarkable string of losses before

152. *See* Smiley v. Citibank, 517 U.S. 735, 742 (1996) (stating that "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency").

153. *Id.*

154. California v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054, 1064 (N.D. Cal. 2018) (citing Action for Children's Televisions v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987), for proposition agency making a policy change must supply a "reasoned analysis" and show its "prior policies are being deliberately changed, not casually ignored").

155. *See supra* Section II.B (discussing the leading consistency doctrine cases); Buzbee, *The Tethered President*, *supra* note 1, at 1396–1401 (reviewing this body of law in detail in article focusing on agency obligation to address contingencies (such as facts, science, and past reasoning) in making a policy change).

156. *See infra* notes 168–184 and accompanying text.

157. *See* Beerman, *supra* note 15 (discussing prevalence of policy changes with new administrations, especially to "midnight rules"); O'Connell, *supra* note 2 (same).

the courts.[158] But on the crucial issue of relief in the context of deregulatory splintering, a slight schism emerged.

Many agency actions have been rejected, although ultimate choices about relief have varied.[159] The policy change was not the problem; the agencies' pervasive failures to offer rigorous comparative analysis and hew to consistency doctrine's requirements was the usually fatal flaw. Relatedly, even where agencies at least alluded to required analytical steps, the tendency to be conclusory on issues of fact, reliance interests and effects, and the general failure to explain and compare with nuance the new and earlier legal views led to judicial rejections.[160] Some judges seem to have viewed the deregulatory splintering with repeated skimpy reasoning as evidence of haste and lack of due deliberation that perhaps contributed to judicial invalidation.[161]

A few courts, however, seem to find the very splintering of actions as justifying either judicial avoidance of a ruling on the merits or as justifying relief that allowed the initial regulation (Reg1) to be stayed or de facto abandoned, yet without the usual full regulatory process and agency justification.[162] The article now turns to the questions of relief, reasons judicial

158. *See supra* notes 10, 55 and accompanying text (citing sources and discussing unusually high rate of judicial rejections of Trump administration regulatory rollbacks).

159. Most recent cases have rejected abrupt unexplained policy changes or stays lacking full process and justification, *see, e.g.*, Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017); Bauer v. Devos, 325 F. Supp. 3d 74 (D.D.C. 2018); NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018), but a few have declined to strike them down or have eased path of rejection or staying of initial regulation (Reg1) due to claimed forthcoming regulatory action, *see supra* note 87 and *infra* note 162 (reviewing these cases).

160. *See* Buzbee, *The Tethered President*, *supra* note 1 (analyzing law surrounding policy changes with focus on agency need to address "contingencies" underlying the old and new policies).

161. Several courts alluded to abrupt reversals and hasty actions as possible reasons for the skimpy explanations. *See, e.g.*, S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 965–66 n.2 (D.S.C. 2018) (citing other courts setting aside "similarly hastily enacted rules"); Regents of the Univ. of Cal. V. U.S. Dep't of Homeland Sec., 908 F.3d 476, 510 n.24, 518–19 (9th Cir. 2018) (referring to a third agency effort to legally justify the DACA rescission and approvingly citing another court's observation that the DACA was "hurriedly cast aside").

162. The most problematic decision was Wyoming v. U.S. Dep't of the Interior, No. 2:16-cv-0285-SWS, 2017 U.S. Dist. LEXIS 5736 (D. Wyo. Jan. 16, 2017) (staying phase-in provisions of late-term Obama administration regulation of methane waste recovery due to litigation over that rule (a Reg1), plus new agency suspension and repeal efforts). In another approach resulting in a similar outcome (and some confusion), the 10th Circuit dismissed an appeal from the 2016 invalidation of an Obama regulation of fracking, holding it "unripe" due to the pendency of a rulemaking anticipated to rescind that regulation. Wyoming v. Zinke, 871 F.3d 1133, 1145–46 (10th Cir. 2017). The court also, however, vacated the earlier judgment invalidating the Obama regulation, *id.* at 1146, provoking an additional opinion questioning the effects of the ruling and remedy choices, *id.* at 1146–47 (Hartz, J., concurring and dissenting) (agreeing judicial ruling on challenge to a Reg1 during pending possible regulatory change could be "wasteful" but highlighting problems with dismissing the earlier invalidating ruling when a new replacement rule is not yet finalized and arguing for appellate court remand for trial court assessment of appropriate injunctive relief). *See also* Becerra v. U.S. Dep't of the Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (finding agency regulatory reversal and reinstatement of new rule to violate the APA and to

rejections of efforts to achieve deregulation via splintering are sound, and how logic and positive law provide additional support for judicial rejection of this wave of often unreasoned policy changes sometimes pursued via litigation and regulatory stay actions.

III. REGULATION AS CONSTRUCTED AND THE CENTRALITY OF FULL AGENCY ENGAGEMENT

Agencies engaged in deregulatory splintering and courts reviewing such actions reveal diverse views on prerequisites for successful policy change. Agencies using a combination of litigation and regulatory changes en route to regulatory reversals reflect an apparent agency view that splintering is acceptable.[163] Their tendency to cite presidential orders and directives also perhaps reveals a view that presidential involvement lends additional legitimacy to these actions. These Trump administration deregulating agencies have also sometimes sought to bypass notice-and-comment opportunities or force stakeholders to provide only constrained comments, ignoring the larger policy reversal underway.[164] The very fact of splintering and a swirl of linked litigation and regulatory actions has been argued to provide an additional grounds for judicial forbearance and acceptance of de facto shelving of an earlier, finalized regulation.[165] A few courts have accepted this last call for judicial forbearance, but most have rejected such entreaties due to concerns about unreasoned policy changes preceded by no deliberative notice-and-comment process.[166]

Some degree of deregulatory splintering may be unavoidable since a new president, agencies, and Department of Justice litigators have no choice but to participate in ongoing litigation over the initial regulation. But the fact

have required notice-and-comment process, but declining to vacate the illegally made change due to postponement and repeal efforts that would limit vacatur to relief to only "a few days" of restoration of the illegally postponed rule "before the Repeal Rule takes effect"). *See also* Rakoff, *supra* note 53.

163. However, the agency might be seeking immediate political credit with little concern for enduring change or ultimate determinations of legal validity. *See* Buzbee, *The Tethered President*, *supra* note 1, at 1366–68, 1376–90 (describing and analyzing Trump administration policy shifts); Buzbee, *Agency Statutory Abnegation*, *supra* note 5, at Part III (exploring political explanations for agency reliance on legal claims and strategy likely to be legally vulnerable).

164. *See supra* notes 78–79 and accompanying text (discussing and citing actions that sought to limit comment).

165. As reviewed earlier, the Department of Justice brief arguing for an extension of the longstanding stay of litigation over the CPP's legality explicitly used the many splintered actions as grounds for the court of appeals to leave the stay of the CPP in place. *See supra* note 60 and accompanying text.

166. *Wyoming* is the most problematic example due to court staying the earlier regulation (Reg1) due to the array of other revision and stay actions underway, but without agency explanation based on fact and law or court assessment of the merits of those argument. As discussed *supra* in note 87 and accompanying text, the 10th Circuit in Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017), used the existence of a proposed regulation that would rescind the 2015 Fracking Regulation, *see id.* at 1137 n.1, as grounds to hold an appeal from a regulatory invalidation "prudentially unripe."

of deregulatory splintering should not streamline the path to deregulatory rollbacks. If courts grant agencies latitude to achieve de facto deregulation through splintering, such a result would provide a workaround that sidesteps the requirements of positive law and violates the Supreme Court's consistency precedents. It would also upend the hierarchy of standard of review deference frames. Rewarding such strategies also threatens to undermine administrative law's usual balance of process virtues, stability and regulatory rule of law values, and agencies' obligations to utilize expertise delegated to them by Congress.[167] A mere change in political winds should not be enough—and under current doctrine is not enough—for agencies to unsettle regulations that are usually years in the making and can never be the fruit of mere political preferences. If regulation is viewed as the reflection and output of mere assertions of agency power or preference or personal presidential prerogative, then unreasoned rollbacks and deregulatory splintering might be viewed as unproblematic (if one ignores the contrary mandates of actual administrative law doctrine). But this Part and article argue that regulations should instead be viewed as a form of law constructed through an institutional process that is central to the action's legitimacy and arguments for deference. Regulatory policy must be built—or later replaced—in conformity with legislative substantive and procedural choices that also shape the work of reviewing courts.

A. Chevron*'s Layers and the Deregulatory Splintering Gambit*

Chevron is under attack today by opponents of the regulatory state, but still plays a major part in battles over any notice-and-comment regulation, including a regulation's abandonment.[168] This section contends that a misunderstanding or misrepresentation of *Chevron* may partly explain both

167. For recent efforts to identify these core administrative law values in shaping administrative law doctrine, see e.g., Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 773, 784–85 (2007) (explaining major administrative law precedents as reinforcing need for agencies to provide quasi-democratic and accountable process if seeking judicial deference); Gillian Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1359, 1366–69 (2012) (observing how much of administrative law has developed in common law-like fashion in light of core aspirations and including consistency doctrine and agency obligations to respond to expert criticisms as examples); Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018) (identifying array of administrative law doctrines as more reflective of "morality" of administrative law's core tenets than rooted in positive law).

168. For discussions and expressions of skepticism about *Chevron*'s legitimacy, see, e.g., Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323–24 (2017) (expressing questions about *Chevron* deference and claiming problem of "arrogation" of power by agencies and agencies' "palpable sense of entitlement" due to deferential review); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*,

agencies' use of deregulatory splintering and other unreasoned attempts to change policy and somewhat inconsistent judicial responses. Properly understood, and harmonized with linked cases and accompanying "reasoned decisionmaking" requirements, *Chevron* provides a strong doctrinal counter to arguments that deregulatory splintering should ease the path for such a regulatory reversal.

To recapitulate the basic workings of *Chevron* as relevant to deregulation, the first broadly correct claim is that *Chevron* means that a policy change can receive judicial deference. This is irrefutable.[169] And some questions of regulatory power will be ruled by statutory language in ways that address the "precise question at issue."[170] There, at *Chevron*'s step one, the agency and reviewing courts must agree for the agency view to prevail. And an agency error about the nature of its own statutory power will lead to a loss in court.[171] So, for example, agencies seeking a deregulatory policy change with reliance on a broad statutory abnegation claim will only win if the reviewing court agrees with that exact agency claim that it never had power it previously asserted.[172] But *Chevron's* implications for policy change actions and, in particular, deregulatory splintering, has proven less clear or perhaps is undergoing yet another doctrinal transmogrification.

In promulgating Reg1 or a RegNew, if language leaves room for agency choice in light of underlying criteria and empirical claims about the world (such as assessments of science, or technology, or health effects, or business practices or effects, or benefits of market-based regulation, for example),

16 GEO. J.L. & PUB. POL'Y 103, 104 (2018) (reviewing jurisprudence and scholarship criticizing deference regimes). For a journalistic blistering attack on *Chevron*, see Iain Murray, *Stopping the Bureaucrats Requires an End to* Chevron *Deference*, NAT'L REV. (May 11, 2016, 6:53 PM), https://www.nationalreview.com/corner/stop-bureaucrats-ending-chevron-deference-through-sopra/ [https://perma.cc/FH6V-4X6Y]. *See also supra* Section I.C (further citing and discussing such concerns). Others raise questions about its manipulability and prefer earlier deference regimes. *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why it Can and Should be Overruled*, 42 CONN. L. REV. 779 (2010).

169. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 840–42, 863–64 (1984) (stating the two steps of *Chevron*'s framework and also endorsing agencies assessing their policies and changing them when appropriate).

170. *Id.* at 842.

171. *See generally* Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half,* 84 U. CHI. L. REV. 757 (2017) (analyzing agency errors about their authority, possible motivations, and judicial responses under "Prill" doctrine, *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985)). Hemel and Nielson disagree with scholars who argue agency authority errors should not necessarily require a remand to the agency. *See id.* at 760–61 (responding to Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 296–302 (2017)).

172. Buzbee, *The Tethered President*, *supra* note 1, at 1416–17 (discussing court rejections of regulatory rollbacks rooted in abnegation claims of no agency power); Buzbee, *Agency Statutory Abnegation*, *supra* note 5; Hemel & Nielson, *supra* note 171 (explaining and defending judicial rejections of agency actions rooted in erroneous views of extent of their own power).

then an agency action that deserves *Chevron* deference generally must go through a notice-and-comment process.[173] And, as explained in *Mead,* this is due to the importance of transparent deliberative process preceding the agency regulatory choice.[174] Justice Scalia and critics of *Mead* dislike the case's fuzzy doctrinal margins, but its core lesson is clear and important to assessment of deregulatory splintering's legality and effects.[175] Other modes of agency action may still receive deference under the *Skidmore* sliding scale standard, but even there the rigor and transparency of the preceding process shapes the required degree of judicial deference.[176] So if an agency seeks to abandon Reg1 or replace it with RegNew, the preceding process is crucial to subsequent judicial review and deference standards. A choice to do so through a litigation reversal, or through an unreasoned regulatory proposal or regulatory mode lacking full deliberation opportunities, should not be given the effect of a notice-and-comment regulation. Nor can it be argued to deserve *Chevron* deference.

Agencies pushing deregulatory change through a splintered and minimally justified set of actions almost seem to be laboring under a caricaturish view of *Chevron* that current doctrine allows agencies to act on whim and without accountability.[177] In reality, and under a sounder view of prevailing doctrine, regulations are rigorously constructed and tested through the notice-and-comment process, through White House and OIRA review, and due to post-promulgation litigation and judicial "hard look review."[178] They may

173. United States v. Mead Corp., 533 U.S. 218, 234–35 (2001), also identifies the far more rare formal agency action as perhaps enough to trigger *Chevron* deference, plus the Court acknowledges it has sometimes deferred to agency actions lacking a notice-and-comment lineage, but the basic lesson of the case is that notice-and-comment process is the general precondition for an agency claim of *Chevron* deference. For analyses of *Chevron*, *Mead*, and implications of agency choices about process under current frame-works, see Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1171–72 (2014) (discussing usual procedural prerequisites for agency claims of deference after *Mead*); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004) (discussing agency policymaking modes and their implications); Thomas W. Merrill & Kristen E. Hick-man, Chevron's *Domain*, 89 GEO. L.J. 883 (2001) (emphasizing importance of procedural accountability through notice-and-comment rulemaking that preceded policy change upheld in *Chevron*).

174. *Mead*, 533 U.S. at 234–35.

175. *Id.* at 239–61 (Scalia, J., dissenting) (in strongly worded dissent, criticizing the logic, legal basis, and allegedly confusing implications of *Mead*); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (criticizing *Mead* for its alleged indeterminacy).

176. *Mead*, 533 U.S. at 234–35 (making clear that deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which sets forth a form of "sliding scale" deference involving several factors, is applicable even if conditions for *Chevron* deference are not met).

177. Justice Gorsuch, when Judge Gorsuch, viewed *Chevron* as providing agency room to act on "whim" and change policies day to day. This claim is in error. *See* Buzbee, *The Tethered President*, *supra* note 1, at 1368–71 (presenting the Gorsuch claims and reasons they are overbroad and not supported by the larger body of administrative law and consistency law doctrine).

178. For review of the basics of agency rulemaking, see *supra* Section I.A.

be worthy of contestation, but duly promulgated regulations are rarely if ever hastily rolled out or untested. The basic lesson of *Chevron* and *Mead* is consistent with the rule of law tenet that regulations live on until validly changed with process parity.[179] Whatever the venue, agencies claiming need for a regulatory policy change must back up their arguments with reasoning and empirical grounding commensurate with the relief sought.[180]

If splintering is to be given some weight in judicial review, splintering unaccompanied by clear reasoning and full engagement on empirical and legal issues should be viewed as a danger signal that politics, rather than law-channeled expertise, is motivating the change.[181] As properly understood, *Chevron* deference to agency actions should not be shaped just by mere reference to agency or presidential preferences.[182] A lawyer or agency exclaiming "*Chevron!"* should not, without much more, be granted such deference or prevail. Politics surely shapes all agency agendas and, to some extent, final agency choices. Nonetheless, agencies are collective institutions that must act through legally required procedures. And because statute's words are virtually never all that explains agency actions, it is agencies' reasoning and underlying supporting materials as revealed, analyzed, and addressed through required process that must shape eventual judicial review.[183] This is the collective lesson of *Chevron, Mead*, and key "reasoned decisionmaking" precedents like *State Farm*, as well as more recent consistency doctrine prec-

179. *See supra* Section II.B (discussing cases establishing this enduring doctrine).

180. For a case where a George W. Bush administration agency policy change was held to be within the statutory space left for agency policy choice and the agency provided adequate process, effects assessment, and justification, see Irvine Med. Ctr. v. Thompson, 275 F.3d 823 (9th Cir. 2002).

181. Case law on policy change prior to *State Farm* saw policy change as itself a "danger signal," but neither *State Farm* nor subsequent consistency cases such as *Fox* and *Encino Motorcars* go that far. More analysis is often required for a policy change, but the standard of review remains the same. *See supra* Section II.B. Scholars read *Massachusetts v. EPA* as reflecting Supreme Court embrace of agency obligations to act based on statutory criteria and science rather than mere politics or presidential predilections. *See* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008) (discussing cases rejecting adequacy of politics as explanation for agency action); Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (same, focusing on *Massachusetts*).

182. The 2018 decision in *Grace* extensively discusses the deferential framing and applicability of *Chevron* while still finding agency policy change action either arbitrary and capricious or contrary to statutory requirements. *See supra* note 120 (citing and discussing *Grace*).

183. For two articles developing the argument that the reality of political influence on regulatory action should be irrelevant to judicial review, see Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83 (1994). Peter L. Strauss, in *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1153–72 (2012), soundly characterizes *Chevron* not as meaning an agency wins, but that it is given "space" in which to apply statutory criteria and relevant data or science to make a regulatory choice delegated to it.

edents. As a matter of logic and respect for legislative supremacy, if unreasoned deregulatory splintering triggers lesser deference or, due to lack of deliberative process, almost no deference, then it logically should not be given the same effect as a fully noticed and rationalized deregulatory process that surmounts judicial review. Such a conclusion is in line with several Supreme Court cases declining to find preemptive impact of agency actions that lacked the force of law and were not justified with rigorous engagement with underlying issues of fact.[184]

B. The Agency Circumvention Concern

Despite the occasional judicial acceptance of agency and opponent requests for a stay of an already effective regulation, for most courts the hurdle for relief is high and such relief disfavored.[185] Both in recent rejections and earlier cases responding to similar policy reversals, courts voice concern with minimally reasoned or conclusory actions nonetheless resulting in a de facto undoing of an earlier, fully effective regulation. They allude both to concern with upending core administrative law norms and also positive law requirements.[186] Virtually all mention some variant on the importance of the rule of law, both in the sense of stability in the law but also legal integrity and transparency of process when making a policy change.

Courts responding to arguments that Section 705 should justify a stay after a regulation is already effective have read that provision to provide only a limited statutory window for agency and judicial staying of a regulation.[187]

Other courts faced with unexplained actions and deregulatory splintering have enforced the APA's mandate that rule repeals require a new rulemaking as a critical mandate. Without enforcement, courts have noted,

184. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243 (2006); Wyeth v. Levine, 555 U.S. 555 (2009). *See also* Bressman, *supra* note 167 (explaining results in *Gonzalez* and other key administrative law precedents as reinforcing need for agencies to provide quasi-democratic and accountable process if seeking judicial deference); William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1547–80 (2009) (analyzing similarities in Supreme Court review of agency preemptive impact claims and hard look review and need for agencies claiming conflict preemption to ground claims in facts).

185. *See supra* notes 22, 52–54, 65–68 and *infra* notes 186, 196–198 (discussing use of stay or delay strategies and judicial responses); Buzbee, *The Tethered President*, *supra* note 1, at 1378, 1408–17 (discussing stay and delay actions and judicial rejections when not preceded by required process and justification); Heinzerling, *supra* note 22 (same).

186. Clean Air Council v. Pruitt, 862 F.3d 1, 7–10 (D.C. Cir. 2017), is especially careful in parsing positive law requirements and administrative law doctrine in rejecting policy change sought without full process and justifying reasoning.

187. *See* California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1117–20 (N.D. Cal. 2017) (discussing limited window for reliance on Section 705); Heinzerling, *supra* note 22 (similarly concluding that Section 705 provides a limited opportunity to stay a regulatory action).

agencies could circumvent their critical obligations to act in a transparent, politically accountable manner; these courts call for agencies to justify their deregulatory claims with full engagement on facts and law.[188] The consistency doctrine precedents are parsed, with courts demanding balanced assessment of associated costs and benefits under the new policy, compared with similar "underlying facts" found relevant for Reg1. Vague references to burdens or concerns, or conclusory statement about illegality, are inadequate.[189] Similarly, unbalanced analysis of underlying stakeholders' interests or failure to address and explain changes in legal reasoning lead to judicial rejection.[190]

Relatedly, as stated in *Mexichem Specialty Resins*, agencies conceding it appropriate to stay their own earlier regulation cannot just be accepted by the courts. "The risk," the court observes, "is that an agency could circumvent the rulemaking process through litigation concessions, thereby denying interested parties the opportunity to oppose or otherwise comment on significant changes in regulatory policy."[191] That same court drew the inference from the Clean Air Act's specific provisions for rule reconsiderations that courts should not create their own additional non-statutory forms of relief.[192]

Similarly, agencies relying on statutory abnegation claims—that is, claims they lacked any authority for an earlier action—have also often been rejected both due to unconvincing statutory claims but also for failing to provide full legal and factual comparative analysis and reasoning to justify the new statutory claim and policy choice.[193] Courts have hewn to the usual rule

188. *See, e.g.*, Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 815 (D.C. Cir. 1982) (pointing out how indefinite deferral of effective dates could "'effectively repeal'" a rule but without required rulemaking procedures) (citation omitted); Public Citizen v. Steed, 733 F.2d 93, 102 (D.C. Cir. 1984) (declining to accept agency notice of a policy change as enough to escape an old, still effective policy). *See also* Am. Petroleum Inst. v. EPA, 683 F.3d 382, 388 (D.C. Cir. 2012) (holding challenge to deregulatory action was unripe due to a new proposed regulation, but leaving old regulation still in place, and noting risk of agency "perpetually dodg[ing] review" if mere proposals could "stave off judicial review").

189. California v. Bureau of Land Mgmt., 286 F. Supp. 3d 1056, 1064–68 (N.D. Cal. 2018) (emphasizing need for comparative analysis of new and old claims and reasoning and highlighting internal inconsistencies in agency's claims in seeking a policy change through a "suspension rule"). For another example, an Obama era regulatory change regarding industrial boiler toxics regulation was rejected due to the agency's failure to support the change with data, holding it "inappropriate to give EPA a pass on backing up its apparent hunch . . . where EPA was operating against the background of its own prior reasoned judgment" and acting counter to "the only empirical evidence EPA had before it." Sierra Club v. EPA, 884 F.3d 1185, 1198 (D.C. Cir. 2018).

190. NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C 2018) (noting failure to assess costs on both sides of policy).

191. Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 557–58 (D.C. Cir. 2015).

192. *Id.* at 558.

193. *See, e.g.*, Ramos v. Nielson, 336 F. Supp. 3d 1075, 1089–90 (N.D. Cal. 2018) (rejecting changed agency policy regarding immigrant status rooted in claim of no statutory power that was also an unannounced change in agency policy views); Bauer v. DeVos, 325 F. Supp. 3d 74, 94–96, 109–10 (D.D.C. 2018) (rejecting as erroneous and unjustified claims by agency that it had no choice but to take

that agency authority errors require the agency to try again. Due to political accountability concerns as well as Supreme Court doctrine, agencies need to make choices based on the criteria chosen by Congress, using congressionally dictated process, and full comparative engagement with underlying facts, legal reasoning, and policy implications.[194] Allowing less would short-circuit the process chosen by Congress. If Congress has not required or prohibited the action, as the abnegating agency has claimed, then the agency must engage with law and all underlying facts and issues anew, wielding the power actually conferred by Congress. As stated by a district court rejecting the legal explanation and abnegation claim of DHS in the DACA rescission, there is an accountability loss when an agency does not explain its rationale due to a claim its hand are tied, even in a setting where agencies generally wield broad discretion: "When an official claims that the law requires her to exercise her enforcement authority in a certain way, however, she excuses herself from accountability." The court concluded that "an official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her. She may escape political accountability or judicial review, but not both."[195] The court hence refused to accept the validity of the DACA rescission rooted in what were either erroneous or inadequately explained legal views.

In almost all cases addressing agency deregulatory efforts that short-circuit full apples-to-apples analysis of an old regulation and new proposal, the courts' opinions are laden with terminology reflecting the fundamental values and aspirations of administrative law doctrine. Legislative supremacy and the centrality of congressional choice are ubiquitous in explaining why agencies must heed the substantive and procedural mandates of enabling acts

the actions challenged); Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1025–26 (N.D. Cal. 2018) (reviewing history of DACA and rescission efforts and rejecting agency policy change), *aff'd*, 908 F.3d 476 (9th Cir. 2018) (reviewing history of the actions and finding erroneous and insufficient government arguments about the law compelling the rescission of DACA but also stating court was not precluding rescission if not rooted in legal errors); Pennsylvania v. Trump, 281 F. Supp. 3d 553, 579–81 (E.D. Pa. 2017) (rejecting new "interim final rule" regarding no-cost contraceptive coverage for several procedural shortcomings and errors about statutory authority, including erroneous agency claim that its challenged Religious Exemption Rule was "compelled" by the Religious Freedom Restoration Act). Likewise, the Supreme Court rejected the abnegation claims and accompanying lack of statutorily required analysis in Massachusetts v. EPA, 549 U.S. 497, 527–34 (2007). *See also* Buzbee, *Agency Statutory Abnegation*, *supra* note 5, at Sections I.A and III.B.vi (reviewing multiple agencies relying on claims of no statutory power despite contrary earlier claims and analyzing court rulings regarding such claims).

194. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 520 (1978), and SEC v. Chenery Corp., 332 U.S. 194, 203 (1947), emphasize that agencies generally can choose among legally permissible procedural modes, but also emphasize that substantive justification is a different matter and still subject to meaningful judicial oversight.

195. *Trump*, 298 F. Supp. 3d at 249.

and the APA. Skirting or squelching a full notice-and-comment process leads courts to emphasize the importance of stakeholder voice and full agency engagement with disputed contentions. Any agency efforts to sidestep such process, whether through an expansive new read of APA Section 705 or a liberal extension of "good cause" for bypassing such process, are given little sympathy due to how these two APA provisions provide a limited and specified grounds for circumventing the usual open, thorough, and transparent process. Cognizant of the risks that an allegedly temporary stay might linger on indefinitely, courts have appropriately eyed such requests warily and construed claimed legal authority narrowly due to how acceptance of such strategies would allow agencies to avoid requirements set forth in positive law and enduring administrative law doctrine.[196]

In this wave of cases, a few outlier decisions have stayed the original regulation despite the lack of full justification, largely due (it appears) to the extensive deregulatory splintering.[197] The sense of inevitability of a future policy change and risk of wasted resources seem predominant in these courts' conclusions.[198] But the flaws in these rulings are apparent in what they cannot explain or assess. The comparative merits and effects of the original regulation and new allegedly impending action remain unrevealed and actually unknown; without full agency engagement and analysis, or at least focused direct agency claims about specific legal or factual concerns, courts cannot police agency observance of the key consistency doctrine requirements. Life is not all Yogi Berra-isms, but it is true "it ain't over until it's

196. *See, e.g.*, Air All. Hous. v. EPA, 906 F.3d 1049, 1065 (D.C. Cir. 2018) (rejecting argument for delay action due to EPA "considering revising it" because such a claim has "no stopping point" and is contrary to the Clean Air Act's substantive and procedural requirements).

197. *See* Wyoming v. U.S. Dep't of the Interior, No. 2:16-cv-0285-SWS, 2017 U.S. Dist. LEXIS 5736 (D. Wyo. Jan. 16, 2017) (staying phase-in provisions of late-term Obama administration regulation of methane waste recovery due to litigation over that rule (a Reg1), suspension and repeal efforts). *See also* Becerra v. U.S. Dep't of the Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (finding agency regulatory reversal and reinstatement of new rule to violate the APA and to have required notice-and-comment process, but declining to vacate the illegal action because postponement and repeal efforts left matter, at time of court ruling, so potential vacatur would provide relief of only "a few days" of restoration of the illegally postponed rule "before the Repeal Rule takes effect"). As stated earlier, the CPP was stayed by the Supreme Court without an explanatory opinion, and during 2017 and 2018 the D.C. Circuit has stayed its own ruling on the CPP's merits after the election of President Trump and DOJ and EPA arguing for retaining that litigation stay while other actions undoing or replacing the CPP were underway. *See supra* note 60 (quoting advocacy for maintaining the stay while other regulatory actions are considered). Thus, it too involves an ongoing stay of Reg1 without any finalized rescission or replacement action, but without a Supreme Court or D.C. Circuit opinion actually explaining the grounds for a stay. *See* Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425 (2016) (criticizing and questioning legality of Supreme Court's unexplained stay of the CPP regulation).

198. This was true in the two opinions in another Wyoming case, Wyoming v. Zinke, 871 F.3d 1133, 1145–46 (10th Cir. 2017), where the majority and a partial concurrence and dissent, *id.* at 1146–47 (Hartz, J.), took into account concerns about wasteful efforts over an earlier rule in the process of a likely rescission or revisions. The case is briefly discussed *supra* in note 87.

over."[199] Between a president's exhortations to undo a regulation and the agency's final, fully reasoned response, much can happen. And until the full process and opportunities for study and engagement are provided in accordance with enabling acts and the APA's terms, neither the agency nor other stakeholders can fully know the stakes and legal merits of a new agency action.[200] And revelation of substantial risks or costs of a policy shift might change the political calculus, even if several possible policy changes could likely surmount judicial review hurdles.[201] Courts policing the boundaries of agency power and compliance with law governing an action often are just reviewing the rationality under governing law and implicated facts of largely political choices. That an agency might have legal room to change policy is not enough for courts to rubber stamp an agency policy abandonment; such a plan cannot reveal if the agency would be able politically, legally, and factually to justify some actually proposed and explained choice. Judicial review of such choices remains the heart of "arbitrary and capricious" review, as long established by *Overton Park* and its progeny.[202]

One lingering question is whether this article is calling for an impossible burden of the equivalent of full agency rulemaking in any court or regulatory document short of a new final rescission or replacement action. Neither court decisions nor this article are suggesting quite so much. Whatever the action and underlying agency claims, the agency should need to back its contentions with reasonable specificity commensurate with the action so stakeholders and reviewing courts can assess if the agency is just making conclusory claims or actually has identified a true regulatory flaw or "good reasons" for a policy change. So, for example, the D.C. Circuit in

199. *How people started saying 'It ain't over till it's over'*, BBC NEWS (Sept. 23, 2015), https://www.bbc.com/news/magazine-34324865 [https://perma.cc/UPJ9-77FV] (discussing genesis of this saying).

200. For example, a special entrepreneurial visa program that was shelved was claimed by immigration officials to involve no reliance interests because it had not fully come into operational effect. The court and litigants, however, identified actions that had already been taken in anticipation of its impending operational effective date. Nat'l Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 10, 19–20 (D.D.C. 2017). *See also* Vidal v. Nielsen, 279 F. Supp. 3d 401, 429–33 (E.D.N.Y. 2018) (discussing conclusory and unbalanced litigation risk agency arguments and reliance interests arising due to DACA that the conclusory DHS rescission failed to analyze).

201. Commenters focused on agency disclosure of substantial lives that would be lost after the CPP's rescission and replacement were proposed. *See supra* note 39 (discussing analysis revealing over a thousand new lost lives under a replacement rule for the CPP). Similarly, the proposed rescission of a rule regarding workplace tips caused a political firestorm and eventual political retreat when the agency's own analysis was reported to anticipate a substantial shift of wealth from tipped workers to management. *See supra* note 86 and accompanying text.

202. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971) (setting forth steps required for APA "arbitrary and capricious" review and stating that even if agency has looked at correct "relevant factors" and acted within the "scope" of authority that could allow for a "range of choices," court must still ensure choice made was "on the facts" not a "clear error of judgment").

Clean Air Council looked closely to see whether the rulemaking record supported agency resort to the special review provisions of Section 307(d) of the Clean Air Act; the court engaged on the facts to assess the agency's claim of special space for staying the original action while the agency pursued a more complete deregulatory shift.[203] Courts should look for such specificity and also accompanying agency actions consistent with claims of industry hardship and need for a rapid agency response. As Justice Kennedy highlighted in his consistency opinions, courts should not have to guess at the grounds for a policy shift, or speculate about old and new relevant facts relevant to the old and new agency action.[204] And if an agency cannot succinctly explain why it thinks an earlier regulation should be stayed, rescinded or replaced, then it has not yet done the homework adequate to justify any special relief or judicial acceptance of a vaguely justified policy shift or possible stay request.[205]

The presumption against a potentially indefinite suspension of a finalized and fully effective regulation remains a sound one. As reflected in the string of court losses during the Trump administration and occasional earlier decisions involving splintered and lightly justified deregulatory shifts, final regulations should remain in effect until validly replaced with the full process required by enabling acts and the APA. To allow otherwise would upend key rule of law tenets, positive law strictures on policy change, and the "morality" of administrative law doctrine that—due to decades of mutually reinforcing caselaw—emphasizes participatory process, transparency, and well justified agency reasoning.[206]

203. Clean Air Council v. Pruitt, 862 F.3d 1, 8–10 (D.C. Cir. 2017) (finding agency factual claims were inaccurate and did not justify triggering of Section 307(d)).

204. FCC v. Fox Televisions Stations, Inc., 556 U.S. 502, 536–37 (Kennedy, J., concurring); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016).

205. Courts look askance at haste and shoddy reasoning as grounds to reject a policy reversal. *See, e.g.*, Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 760 (3d Cir. 1982) (seeing "sharp changes" as a "danger signal" and stating "it makes sense to scrutinize the procedures employed by the agency all the more closely when the agency has acted, within a compressed time frame" to reverse itself); Public Citizen v. Steed, 733 F.2d 93, 104–05 (D.C. Cir. 1984) (tracing long history of agency delay, then action, then reversal and then demands for "quantitative perfection" for action as supporting finding that policy reversal to deregulate was arbitrary and capricious). Internal inconsistency regarding claims of hardship and cost also can lead to judicial rejection. California v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054, 1072 (N.D. Cal. 2018) (finding constraining of comment unlawful due to lack of consistency in agency justifying rule suspension with claims about original regulation's "cost and complexity to industry" while agency denied opportunity for comment on financial and economic burdens associated with the change). *But see* Casa de Md. v. U.S. Dep't of Homeland Security, 284 F. Supp. 3d 758, 773 (D. Md. 2018) (declining to hold DACA rescission arbitrary and capricious due to court acceptance of Department argument that it "belie[ved] it was unlawful and subject to serious legal challenge").

206. Sunstein & Vermeule, *supra* note 167 (identifying array of core administrative law doctrines as more reflective of "morality" of administrative law's core tenets than rooted in positive law); Metzger, *supra* note 167 (observing how much of administrative law has developed in common law-like fashion in light of core aspirations and including consistency doctrine and agency obligations to respond to expert

CONCLUSION

Agencies seeking to reverse course and undo their own earlier regulations, especially if recent regulations issued under a different administration's leadership, will unavoidably need to make strategic choices in both the courts and in devising their own regulatory actions. Some degree of splintering of deregulatory process is inevitable. The question for the agency and for reviewing courts is when and how the agency should have to justify its regulatory reversal with legal and factual reasoning. This article has shown how Trump era deregulatory splintering actions have often lacked factual and legal engagement. They also have often sought to shortcircuit the usual regulatory procedures and transparent deliberation and explanation required for making a policy change. In reviewing such actions and similar occasionally deregulatory shirking under previous administrations, most courts have rightly refused to allow litigation or regulatory stays to undo an otherwise effective regulation. They expect preceding notice-and-comment process, full engagement on the law and facts, and agency reasoned decisionmaking hewing to the requirements of positive law and consistency doctrine precedents. A few courts, to the contrary, have provided relief that effectively stays an earlier finalized action, but before the agency has justified the new action. This article argues that these minority courts err. Still effective regulations should be implemented and remain in effect unless the agency or other challengers make a strong showing of legal or factual infirmity and engage in clear and persuasive comparative analysis of relevant facts, science, and legal reasoning. Mere changes in preference or presidential predilections or orders should not suffice.

Policy change is usually possible, but to ensure agency accountability and legality, agencies should have to go through the full procedures required by positive law, engage with statutory criteria, and justify the change. This may slow change down, but stakeholders would know what is at stake, and the agency and president would either get credit or blame for the change. Unreasoned and unjustified policy reversals achieved through deregulatory splintering are rightly viewed with skepticism.

criticisms as examples); Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633 (2018) (arguing that congressional procedures imposed on agencies are intended to further the public trust through fairness, rationality, and checking of politicized abuses or corruption in ways that Congress often cannot ensure of itself).