

ABSTRACT

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Making Consistency Consistent

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Abstract by Nicolas A. Reyes

This article discusses the concept of consistency as a doctrine of administrative law. In the introduction, the author explains that consistency is a legitimizing tenet of administrative action. At the same time, court mandated adherence to consistency of action may contravene innovative agency action based on reinterpretations of policy or circumstance. The author charges that despite the importance of consistency in administrative law, current doctrine has muddled the appropriate analytical paradigm that courts should employ to evaluate consistency of administrative action. Rather than apply generic overarching standards of review, this article argues courts that should focus their review of administrative action on the role of consistency within the specific statutory and regulatory settings of each case.

In the first section of this article, the author deduces that consistency is represented by the maxim that “like cases should be treated alike.” The article asserts that conceptual problems arise when this judicially created concept of consistency is applied to administrative action, where decisions are motivated by complex policy analysis and not necessarily consistency.

The root of the conceptual problem is explained in the second section of the article. Instead of clarifying the inherent conceptual problem that arises, the author asserts that the main source of incoherence and difficulty in the current doctrine is the link between consistency and the standards of judicial review created by the courts. The source of incoherence stems from judicially created standards that permit consistency to be either a factor that determines the intensity of judicial review or a substantive requirement imposed on agency conduct.

In the third section of the article, the author analyzes the relationship between the judicial decisions that consider consistency with four modalities of agency action, namely policy revision, rule consolidation, change of precedent, and departure from previous rule. In the fourth section of the article, the author proposes an alternative framework for the discussion of consistency. Having dispensed with the notion that consistency can be regulated by general standards of judicial review, the author posits four categories of considerations that courts should weigh when examining consistency.