

NOTE

ADMINISTRATIVE RECONSIDERATION

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INTRODUCTION

THE United States Code and the Code of Federal Regulations are replete with detailed provisions granting agencies engaged in adjudication the power to reopen their own final judgments. The question addressed in this Note is whether federal agencies can and should have the power to reconsider their final decisions in the absence of an express grant of authority in a statute or regulation. This Note will examine the extent to which an agency should be considered to possess an inherent power to reconsider by virtue of Congress's delegation of the general power to adjudicate.

The power to reconsider, often termed the power to "reopen" or "rehear," is the ability of an adjudicatory body to revisit its own prior final judgment.¹ Administrative reconsideration is thus differ-

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¹ See Kenneth Culp Davis, *Administrative Law Treatise* § 18.09, at 606 (1958). There are few comprehensive discussions of administrative reconsideration in the academic literature, and certainly no recent discussions. The most useful source for an analysis of the rationales for administrative reconsideration and the contexts in which it may arise is Tobias Weiss, *Administrative Reconsideration: Some Recent Developments* in New York, 28 *N.Y.U. L. Rev.* 1262, 1262–70 (1953). For a comparison of administrative res judicata and administrative reconsideration, see Kenneth Culp Davis, *Res Judicata in Administrative Law*, 25 *Tex. L. Rev.* 199, 236–39 (1947). The only article to address the specific question raised in this Note is E.H. Schopler,

ent from an appeal within the agency, which consists of review by a different, higher adjudicatory division. Nor does administrative reconsideration concern the power of an agency to modify orders before they become final; reconsideration by definition cannot occur until an adjudication is deemed a final judgment. The closest analogue, therefore, is Federal Rule of Civil Procedure 60(b), which grants federal district courts the power to reopen final judgments under certain circumstances.² This Note will thus consider agencies only in their adjudicatory capacities.³

The federal Administrative Procedure Act (“APA”) does not contain rules for reconsideration, although it does presume that agencies may be accorded the power to reconsider.⁴ Many state APAs, by contrast, provide procedures for administrative reconsideration that serve as default rules for all state agencies.⁵ The re-

Comment Note, Power of Administrative Agency to Reopen and Reconsider Final Decision as Affected by Lack of Specific Statutory Authority, 73 A.L.R.2d 939 (1960), discussed at length below.

² See Fed. R. Civ. P. 60(b) (setting out grounds for relief from a final judgment); see also *Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995) (comparing Rule 60(b), administrative reconsideration, and reconsideration by an arbitrator); *Prieto v. United States*, 655 F. Supp. 1187, 1193 (D.D.C. 1987) (noting that questions raised under Rule 60(b) are “analogous” to issues raised by administrative reconsideration).

³ See, e.g., *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 202–03 (2d Cir. 2004) (noting that administrative reconsideration precedents are irrelevant in rulemaking context); *Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 753 (D.C. Cir. 2001) (distinguishing between rulemaking and adjudication in administrative reconsideration). For the definitions of “rulemaking” and “adjudication,” see 5 U.S.C. § 551(5), (7) (2000).

⁴ In 5 U.S.C. § 704 (2000), the APA instructs that an agency action is final for the purposes of judicial review, notwithstanding “whether or not there has been presented or determined an application . . . for any form of reconsideration.” The APA thus assumes the possibility that agencies may be accorded the power to reconsider, but it does not itself grant this power. See also *Darby v. Cisneros*, 509 U.S. 137, 145 (1993) (discussing the relationship between § 704 and reconsideration). It is not clear why Congress did not provide general rules for administrative reconsideration in the APA. The best indication from the *Attorney General’s Manual on the Administrative Procedure Act* is that such rules may not have been necessary because Congress had already granted various agencies the power to reconsider. See Tom C. Clark, *Attorney General’s Manual on the Administrative Procedure Act* 104 (1947) (describing rules for administrative reconsideration in the Federal Power Act and Natural Gas Act).

⁵ See Ala. Code § 41-22-17 (2000); Alaska Stat. § 44.62.540 (2004); Ariz. Rev. Stat. Ann. § 41-1092.09 (2004); Cal. Gov’t Code § 11521 (West 1992); Colo. Rev. Stat. § 24-4-105 (2004); Conn. Gen. Stat. Ann. § 4-181a (West 1998); Idaho Code Ann. § 67-5246

consideration provisions in state APAs are highly specific, containing detailed guidelines for reconsideration procedures ranging from when petitions for reconsideration must be filed⁶ to the circumstances that provide agencies sufficient grounds for reopening a prior adjudication.⁷ While the federal APA does not confer upon federal agencies any power to reconsider, various enabling acts and federal statutory schemes contain similarly specific grants of reconsideration authority. Agencies may also grant themselves reconsideration authority pursuant to a delegated power to craft their own rules of administrative procedure.⁸

While there has been no systematic study of the frequency with which petitions for reconsideration are filed or granted in federal agencies, the large number of reconsideration provisions in federal statutes and agency rules suggests that reconsideration is by no means a rare occurrence. Furthermore, some federal statutes require parties to seek reconsideration as a precondition for seeking judicial review,⁹ and some litigants may find reconsideration strate-

(2001); Ind. Code Ann. § 4-21.5-3-31 (Michie 1996); Iowa Code Ann. § 17A.16 (West 2005); Kan. Stat. Ann. § 77-529 (1997); La. Rev. Stat. Ann. § 49:959 (2003); Mich. Comp. Laws Ann. § 24.287 (West 2004); Nev. Rev. Stat. Ann. § 233B.130(4) (Lexis 2005); N.H. Rev. Stat. Ann. §§ 541.3, 541.5 (1997); N.D. Cent. Code § 28-32-40 (1991); Okla. Stat. Ann. tit. 75, § 317 (West 2002); Or. Rev. Stat. § 183.482 (2003); Tenn. Code Ann. § 4-5-317 (1998) (amended 2000); Utah Code Ann. § 63-46b-13 (2004); Wash. Rev. Code Ann. § 34.05.470 (West 2003); Wis. Stat. Ann. § 227.49 (West 2001).

⁶ For example, the statutes in this area reveal a range of timing restrictions that are keyed either to the entry or service of the order—state APAs provide that petitions for reconsideration must be filed ten days after entry of the order (Okla. Stat. Ann. tit. 75, § 317(A)), ten days after service (Wash. Rev. Code Ann. § 34.05.470(1)), twenty days after entry (Iowa Code Ann. § 17A.16(2)), and twenty days after service (Wis. Stat. Ann. § 227.49(1)).

⁷ See, e.g., Ala. Code § 41-22-17(c)(6)–(7) (initial adjudication clearly erroneous, arbitrary or capricious); Ind. Code Ann. § 4-21.5-3-31(d) (clerical error by the agency); La. Rev. Stat. Ann. § 49:959(B) (fraud on the agency); Wis. Stat. Ann. § 227.49(3)(c) (availability of new evidence).

⁸ Whether agencies should have the power to promulgate their own rules for reconsideration is not a topic addressed in this Note. See *infra* note 217. For references to reconsideration provisions in federal statutes and regulations, see *infra* notes 209–14 and accompanying text. For a collection of reconsideration provisions, see C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced by Fraud*, 69 *Antitrust L.J.* 403, 455 n.234 (2001).

⁹ See, e.g., 5 U.S.C. § 7703(d) (2000) (providing that the Director of Office of Personal Management may not appeal the decision of the Merit Systems Protection Board unless he has petitioned the Board for reconsideration and the petition has been denied).

gically advantageous because it can sometimes toll the period for filing an appeal.¹⁰ All indications, therefore, are that reconsiderations are standard processes for agencies engaged in adjudication.

The question that this Note will address is the extent to which an agency may possess an inherent power to reconsider its final decisions in the absence of the express grants of statutory or regulatory authority described above. This Note will also discuss whether this inherent power to reconsider is justified. These questions arise when an agency seeks to revisit a prior final judgment, and a litigant protests that the agency lacks the power to reconsider because no statute or regulation provides for reconsideration or sets forth its attendant procedures. As this Note will confirm, federal courts have had to confront this issue in hundreds of cases, and nearly every state has addressed the question as a matter of state administrative law. In addition, agencies often must resolve this question themselves in the course of adjudications and internal appeals.¹¹

Despite the surprisingly large number of cases that have confronted the inherent power to reconsider, the question has received almost no scholarly attention. The only source to examine the issue in any detail is an annotation published in 1960, which, while perhaps a useful starting point for understanding the doctrine, is by no means comprehensive and is now fairly outdated.¹²

The ability of agencies to engage in reconsideration without a specific statutory or regulatory grant of authority is a topic worthy

¹⁰ See, e.g., *Bailey v. West*, 160 F.3d 1360, 1365–66 (Fed. Cir. 1998) (noting tolling provisions).

¹¹ The number of agency opinions referencing and citing the federal precedents discussed in Part I is voluminous. The frequency with which the inherent authority question presents itself is therefore far higher than the Federal Reporter would indicate. For examples of administrative decisions examining the inherent power to reconsider, see *Cypress Aviation*, 4 E.A.D. 390, 392 (1992) (“Administrative agencies . . . have an inherent authority to reconsider their decisions within a reasonably short period of time after they are rendered.”); *Cascade Coach Co.*, 206 N.L.R.B. 874, 876–77 (1973) (stating a similar rule). As most of these administrative opinions attempt to track the federal case law described in Part I, they will not be described in any significant detail in this Note. They are noted here as evidence that administrative reconsideration is a common agency practice.

¹² Schopler, *supra* note 1. This annotation discusses both federal and state cases together, and attempts to lay out several factors that may affect whether or not an agency is accorded the power to reconsider in the absence of an express reconsideration provision. *Id.* at 941–43. Virtually all of the discussion is dedicated to descriptions of various cases. See, e.g., *id.* at 943–48.

of further study, however, for reasons greater than that the topic has been left untouched for nearly half a century: Whereas federal courts scholarship has explored the inherent or “equitable” powers of Article III courts in some depth,¹³ the inherent powers of administrative agencies have received essentially no scholarly attention. Several scholars have suggested that various individual powers may be inherent, most notably the power to issue interpretative rules.¹⁴ Courts have similarly indicated that agencies may possess various inherent powers in addition to the inherent power to reconsider.¹⁵

¹³ For a sampling of such scholarship, see, for example, Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 *Harv. L. Rev.* 1010 (1924); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 *Tex. L. Rev.* 1805 (1995); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 *Iowa L. Rev.* 735, 843–49 (2001) (describing “pure ‘judicial powers,’” “implied indispensable powers,” and “beneficial powers”). The Supreme Court has addressed the extent of inherent judicial powers in a variety of contexts. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991) (inherent power to issue sanctions); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766–67 (1980) (inherent power to order attorneys fees); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962) (inherent power to dismiss for want of prosecution).

¹⁴ See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 *Harv. L. Rev.* 467, 485 (2002) (“[I]nterpretive rulemaking (and perhaps procedural rulemaking as well) has long been viewed as an ‘inherent’ power of all executive institutions.”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *Geo. L.J.* 833, 876 (2001) (“All administrative agencies have certain powers inherent in their status as units of the executive branch; all executive officers have inherent authority to interpret the law, and all executive units have authority to bind subordinate employees to instructions issued by the head of the office (and perhaps by the President as well). Given these inherent powers, virtually all units in the executive branch will at least occasionally render official interpretations of statutes, whether by issuing interpretative rules, agency manuals, or other informal guidelines.” (footnotes omitted)); see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (holding that where an agency lacks authority to engage in rulemaking or adjudication but is authorized to gather information and enforce the Fair Labor Standards Act through injunctions, the agency has the power to issue interpretative rules); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 *U. Chi. L. Rev.* 1383, 1390 n.14 (2004).

¹⁵ See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 319–20 (1979) (Marshall, J., concurring) (suggesting that agencies may have the inherent power to disclose information); *Gadda v. Ashcroft*, 377 F.3d 934, 948 n.8 (9th Cir. 2004) (recognizing the inherent power to discipline attorneys); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 954 (9th Cir. 2003) (Berzon, J., dissenting) (recognizing the inherent power to issue interpretative rules); *Ober v. Whitman*, 243 F.3d 1190, 1194–95 (9th Cir. 2001) (suggesting that agencies have the inherent authority to exempt de minimis violations from regulation); *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 274 n.12 (D.C. Cir. 1986) (recognizing the inherent authority to control dockets).

But the inherent powers of agencies remain both under-researched and under-theorized. This Note will provide an initial step in this direction, first by laying out the doctrine of administrative reconsideration, an area that courts have identified as an inherent power, and then by considering the kinds of arguments that point against recognizing such inherent authority in this specific context.

At the outset, it must be acknowledged that agencies do possess some amount of inherent power, at least for the same reason that many courts and commentators have said federal courts do: A system that required specific delineation of even the most minor exercises of power would unnecessarily hamstring agency operations.¹⁶ But because Congress in most cases has the authority to prescribe the specific mechanisms and rules for the exercise of various powers, the question is under what circumstances courts will find an inherent power, and whether such an inherent power seems appropriate. Using administrative reconsideration as an example, this Note will begin to examine these questions.

Part I of this Note will provide a comprehensive and systematic overview of the federal common-law doctrine of administrative reconsideration. It will argue that the default presumption evident in the case law is that when no statute or agency rule provides for reconsideration, federal agencies still possess the inherent power to reconsider their own adjudications, with some exceptions. Part I will be organized around the paradigmatic situations in which federal courts are more and less likely to adhere to this default presumption and will conclude with a brief overview of how state courts have addressed this same question as a matter of state administrative law. It will show that while some states agree with the federal default, slightly fewer than half follow the opposing rule that the power to reconsider is only available if expressly contained in a statute or agency rule of procedure.

Part II will consider whether the inherent power to reconsider is justified for federal agencies. This Note will present three main arguments to show that the inherent power to reconsider is not justified. First, and most importantly, while various Supreme Court

¹⁶ See Meador, *supra* note 13, at 1819–20; Pushaw, *supra* note 13, at 847; see also *Chambers*, 501 U.S. at 58 (Scalia, J., dissenting) (“Some elements of . . . inherent authority are so essential to ‘[t]he judicial Power,’ that they are infeasible . . .”).

precedents have been marshaled in support of an inherent power to reconsider, a more thorough reading of these cases indicates that they may in fact foreclose it. Second, by providing express reconsideration provisions in federal statutes and by delegating to agencies the power to devise their own procedures for adjudication, Congress has pervasively regulated in the field of administrative reconsideration to such an extent that an inherent power to reconsider should be heavily disfavored. Finally, an inherent power to reconsider is undesirable because it results in procedural uncertainty—without formal rules for reconsideration, litigants cannot depend on the finality of their adjudications, and the federal common law of administrative reconsideration described in Part I is too unreliable to provide any sort of predictability.

The Conclusion will set forth a more appropriate, yet modest, rule: Federal administrative agencies should only have the power to reconsider adjudications when that power has been expressly granted by Congress, or when an agency has promulgated a valid reconsideration procedure pursuant to its rulemaking processes.

I. A DOCTRINAL OVERVIEW: THE POWER TO RECONSIDER IS INHERENT IN THE POWER TO DECIDE

Nearly every federal court that has addressed the issue of reconsideration has adopted the default presumption that in the absence of specific statutory or regulatory authority, administrative agencies engaged in adjudication possess the inherent power to reconsider their own final decisions.¹⁷ Thus, agencies will generally have

¹⁷ See, e.g., *Macktal v. Chao*, 286 F.3d 822, 825–26 (5th Cir. 2002) (“[I]n the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.”); *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993) (“Even where there is no express reconsideration authority for an agency . . . the general rule is that an agency has inherent authority to reconsider its decision”); *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991) (“It is widely accepted that an agency may, on its own initiative, reconsider its . . . final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review.”); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (holding that “in situations where there are no statutory or administrative guidelines . . . this court will sustain the reconsidered decision of an agency”); *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) (“[I]n the absence of statutory prohibition . . . [t]he power to reconsider is inherent in the power to decide.”); *Davis*, *Administrative Law Treatise*, supra note 1, § 18.09, at 606 (“Every tribunal, judicial or administrative, has some power to correct its own errors or other-

the power to reconsider unless it is foreclosed by statute, by the agency's own regulations, or otherwise. The existence of a statute or regulation authorizing reconsideration is a sufficient, but not necessary, precondition for an agency to be able to reopen a final judgment.

The "inherent power" formulation appears to have originated in the 1950 case of *Albertson v. FCC*, where the D.C. Circuit an-

wise appropriately to modify its judgment, decree, or order."); *Schopler*, supra note 1, at 942 ("Some authorities have expressed the view that . . . an administrative agency exercising functions of a judicial nature has the inherent power to grant a rehearing or otherwise to reconsider a previous decision."); see also *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416–18 (6th Cir. 2004) (stating the general rule); *Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 786 (6th Cir. 2003) (same); *Cooley v. United States*, 324 F.3d 1297, 1305 (Fed. Cir. 2003) (same); *Chao v. Russell P. Le Frois Builder*, 291 F.3d 219, 229 n.9 (2d Cir. 2002) (same); *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (holding that the Bureau of Alcohol, Tobacco, and Firearms "inherently must possess" the power to suspend the importation of firearms under permits granted by BATF "[d]espite [the] absence of express authority"); *Rutherford v. United States*, 806 F.2d 1455, 1460 (10th Cir. 1986) (stating the general rule); *Sang Seup Shin v. INS*, 750 F.2d 122, 130 (D.C. Cir. 1984) (same); *Iowa Power & Light Co. v. United States*, 712 F.2d 1292, 1297 (8th Cir. 1983) (holding that the Interstate Commerce Commission could retroactively impose a higher tariff to correct a legal error); *Dawson v. Merit Sys. Prot. Bd.*, 712 F.2d 264, 267 (7th Cir. 1983) (stating the general rule); *Alberta Gas Chems. v. Celanese Corp.*, 650 F.2d 9, 12 (2d Cir. 1981) (holding that regardless of whether regulations so provided, the International Trade Commission had "the inherent power" to reopen adjudications procured by fraud); *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (stating the general rule); *United States v. Sioux Tribe*, 616 F.2d 485, 493 (Ct. Cl. 1980) (same); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) (same); *Ideal Basic Indus. v. Morton*, 542 F.2d 1364, 1368 (9th Cir. 1976) (recognizing the background principle of the general authority to reconsider); *Gratehouse v. United States*, 512 F.2d 1104, 1109 (Ct. Cl. 1975) (stating the general rule); *Biddle v. United States*, 186 Ct. Cl. 87, 100–01 (1968) (same); *Confederated Tribes v. United States*, 177 Ct. Cl. 184, 190 (1966) (same); *Dayley v. United States*, 169 Ct. Cl. 305, 308 (1965) (same); *Natural Res. Def. Council v. Dep't of Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002) (same); *Wheeling-Pittsburgh Steel Corp. v. Barnhart*, 229 F. Supp. 2d 539, 554 (N.D. W. Va. 2002) (same); *Elkem Metals Co. v. United States*, 193 F. Supp. 2d 1314, 1320 (Ct. Int'l Trade 2002) (same); *King v. Norton*, 160 F. Supp. 2d 755, 761 (E.D. Mich. 2001) (same); *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194, 1201 (D.S.D. 2000) (same), rev'd on other grounds, *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002); *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 612 (N.D. Cal. 1992) (same); *Prieto v. United States*, 655 F. Supp. 1187, 1191 (D.D.C. 1987) (same); *Faircrest Site Opposition Comm. v. Levi*, 418 F. Supp. 1099, 1105 n.3 (N.D. Ohio 1976) (same); *Arono, Inc. v. United States*, 49 Fed. Cl. 544, 549 (2001) (same); *Aubre v. United States*, 40 Fed. Cl. 371, 376 (1998) (same); *Vepco of Sarasota v. United States*, 26 Cl. Ct. 639, 645 (1992) (same); *Gibson v. United States*, 11 Cl. Ct. 6, 13 (1986) (same); *McAllister v. United States*, 3 Cl. Ct. 394, 398 (1983) (same).

nounced the often-cited maxim that “[t]he power to reconsider is inherent in the power to decide.”¹⁸ With the exception of a single dissenting opinion,¹⁹ this proposition has never been ratified by the Supreme Court, and as argued in Section II.A below, the limited Supreme Court precedent in this area, most notably *Civil Aeronautics Board v. Delta Air Lines, Inc.*, counsels against it.²⁰ Nevertheless, every circuit court of appeals that has addressed this issue has adhered to the rule that agencies have the inherent power to reconsider their own decisions, even where this power is not formally conferred by Congress or by the agency’s own rules of procedure.²¹ While the Sixth²² and Ninth Circuits²³ have hinted that they may re-

¹⁸ 182 F.2d 397, 399 (D.C. Cir. 1950).

¹⁹ *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 339 (1961) (Whittaker, J., dissenting) (“Although the Federal Aviation Act does not expressly provide for motions for reconsideration by the Board of its orders, it is clear . . . that the Board has power to provide for, and to entertain, such motions, for ‘[t]he power to reconsider is inherent in the power to decide.’” (quoting *Albertson*, 182 F.2d at 399) (alteration in original)).

²⁰ *Id.* at 321–22, 324 (1961).

²¹ See *supra* note 17 and accompanying text.

²² In *Bartlik v. Department of Labor*, Nos. 93-3616, 93-3834, 1994 WL 487174 (6th Cir. 1994), *rev’d en banc* on other grounds, 62 F.3d 163 (6th Cir. 1995), the Sixth Circuit determined that it lacked jurisdiction to hear an employee’s appeal, in part because the Secretary of Labor had no authority to undertake a reconsideration. The court cited *Civil Aeronautics Board v. Delta Air Lines, Inc.*, discussed at length, *infra* Section II.A, and held that “[f]rom the principle that an agency’s power of reconsideration must be firmly rooted in statutory language it necessarily follows that an agency has no inherent authority of reconsideration in the absence of statutory authority.” *Id.* at *3–4. Several years later, in *Simpson v. Department of Housing and Urban Development*, No. 95-4139, 1997 WL 103364, at *2 (6th Cir. 1997), the court once again cited *Delta Air Lines* and determined that the Department of Housing and Urban Development (“HUD”) lacked the power to reconsider an adjudication because “there is no congressional authorization for HUD to reopen the proceeding in this case.” The decision is, however, unpublished.

²³ In *Gorbach v. Reno*, 219 F.3d 1087, 1095–96 (9th Cir. 2000) (*en banc*), the court considered whether the power of the Immigration and Naturalization Service (“INS”) to naturalize persons as citizens included the power to revoke naturalizations obtained through fraud. In colorful terms suggestive of a disagreement with the dominant default rule, the *en banc* panel reversed the three-judge decision and held that the INS lacked this power:

The heart of the Attorney General’s argument is that the power to denaturalize is “inherent” in the power to naturalize. There is no reason why that should be so. There is no general principle that what one can do, one can undo. It sounds good, just as the Beatles’ lyrics “Nothing you can know that isn’t known/Nothing you can see that isn’t shown/Nowhere you can be that isn’t where you’re meant to be,”—sound good. But as Sportin’ Life said, “It ain’t necessarily so.” Congress has con-

visit the validity of this inherent power, these circuit court decisions are either unpublished, overruled, or otherwise unclear in their scope. The inherent power to reconsider thus appears to remain the accepted rule in all federal circuits.

It is not clear why the inherent power presumption has attracted such unequivocal support in federal courts. It is possible that the early decisions of the 1950s and 1960s reflected fleeting support for the expansive model of agency power promoted by James Landis.²⁴ His concept of agencies as apolitical experts naturally leads to more extensive agency powers, including, perhaps, the power to reconsider. The more modern decisions may simply reflect a desire for a consistent rule, so that agencies do not lack a power in one circuit that they have in another. In any event, virtually all circuits have agreed that agencies have some power to reconsider that does not stem from any statute or regulation.

Federal courts have been less clear about the exact rationale underlying the inherent power to reconsider. For the most part, courts seem to accept the inherent power baseline with little discussion. This may be due in no small part to the *Albertson v. FCC* decision, which described reconsideration as the corollary of the power to decide.²⁵ In the rare cases where justifications are provided, they typically reference a need for agency flexibility and an interest in achieving the correct result.²⁶ Cases that involve more

firming the traditional inherent power of United States District Courts to vacate their own judgments. But there is no statutory confirmation of any inherent power the Immigration and Naturalization Service may have to vacate its judgments The formula the government urges, that what one can do, one can undo, is sometimes true, sometimes not. A person can give a gift, but cannot take it back. . . . Whether the Attorney General can undo what she has the power to do, naturalize citizens, depends on whether Congress said she could.

Id. at 1095 (footnotes omitted). It is unclear at this point whether *Gorbach* in fact represents a departure from the default rule of inherent authority to reconsider. First, it is arguable that the holding is limited to the context of reconsiderations that implicate certain constitutionally-based rights, such as citizenship; the language of the opinion strongly points in this direction. See *id.* at 1098–99. Second, a concurring opinion indicated that agencies generally do have the inherent power to reconsider their final judgments. See *id.* at 1102 (Thomas, J., concurring).

²⁴ See generally James M. Landis, *The Administrative Process* (1938).

²⁵ 82 F.2d 397, 399 (D.C. Cir. 1950).

²⁶ See, e.g., *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972):

It is often the case that reconsideration of a prior decision . . . is absolutely essential to the even administration of justice. . . . [R]econsideration is often the

unusual circumstances occasionally offer more specific justifications. For instance, in cases where the first adjudication was tainted by misrepresentation, courts have said reconsideration is justified to prevent fraud from being perpetrated on the agency.²⁷

It is also not entirely clear what federal courts mean when they term the power to reconsider “inherent.” It is possible that courts are implicitly referencing a pre-APA common-law background where agencies may have possessed certain equitable powers, not unlike the powers Article III courts possessed prior to the adoption of Federal Rule of Procedure 60.²⁸ Alternatively, and perhaps more likely, it is possible that courts are implying the power to reconsider from Congress’s conferral of adjudicatory powers upon agencies in the first instance, a possibility suggested by the *Albertson* Court’s framing of the proposition. On this view, the power is “inherent” insofar as the power to issue adjudications includes the power to revisit them. In any case, the use of the term “inherent power” may be somewhat misleading, because no one can—or does—seriously doubt that Congress has the power to restrict an agency’s ability to reconsider. Indeed, if agencies do have a plenary power to reconsider that is derived from their pre-APA origins, any statute providing reconsideration procedures is in effect a restriction. If Congress can curtail it, it is somewhat strange to say the power to reconsider is “inherent.”

sole means of correcting errors of procedure or substance. There may also be instances when unmistakable shifts in our basic judgments about law or policy necessitate the revision or amendment of previously established rules of conduct.

The sufficiency of possible justifications for the inherent power to reconsider is addressed in Section II.D.

²⁷ See, e.g., *Elkem Metals Co. v. United States*, 193 F. Supp. 2d 1314, 1321 (Ct. Int’l Trade 2002).

²⁸ See, e.g., *Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995) (“In recognition of the fallibility of earthly lawgivers, every court, and every administrative agency that exercises adjudicative authority[] has been understood to have (at least until the matter is regularized in rules, such as [Federal Rule of Civil Procedure] 60) the *inherent* power to reconsider its decisions . . .” (emphasis added)); see also 2 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2854, at 239 (2d ed. 1995) (noting that Federal Rule of Civil Procedure 60(a) expressly recognized “a power that the courts always have had”). The argument that pre-APA common law can provide the basis for an inherent power to reconsider is considered in Section II.B.

Setting aside these difficulties with the way that courts have formulated the power to reconsider, it makes sense to think about the inherent power as a default rule. A reading of the relevant cases indicates that federal courts begin with the premise that agencies have the inherent power to reconsider their own adjudications but, in a variety of contexts, have determined that the presumption of inherent power does not hold. The objective of this Part is to examine closely the contours of the doctrine to provide a comprehensive overview of the situations where federal courts are more and less likely to find that an agency has the inherent power to reconsider.

While the case law is not a hallmark of consistency,²⁹ federal courts are generally less likely to accord an agency the inherent power to reconsider in four main circumstances: (1) when the agency's motive for reconsideration is to effectuate a change in policy; (2) when the agency has not reconsidered its decision within a reasonable time period; (3) when parties have relied heavily on the initial adjudication; and (4) when a statute or agency regulation already provides for a more limited form of reconsideration. Courts are more likely to recognize an inherent power to reconsider when the four above factors are not present (hence the default nature of the presumption),³⁰ and definitely permit reconsideration in cases of (1) administrative or clerical error; (2) fraud on the agency; and (3) legal error allegedly committed by the agency.

This Part explores and describes all of these various categories in further detail, giving examples from particular cases.³¹ It concludes with a brief overview of state law in this area, with particular focus on the division among state courts over whether state agencies possess an inherent power to reconsider. This disagreement among the states regarding the proper default presumption provides a natural segue into Part II, which examines whether the inherent power to reconsider is justified for federal agencies.

²⁹ Davis, *Administrative Law Treatise*, supra note 1, § 18.09, at 607 ("Usually the search for a basic principle to guide reopening is futile . . .").

³⁰ See, e.g., *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002) ("An agency's inherent authority to reconsider its decisions is not unlimited."); *Belville Mining Co. v. United States*, 999 F.2d 989, 998 (6th Cir. 1993) ("[A]n agency possesses inherent authority to reconsider administrative decisions, subject to certain limitations.").

³¹ Unless otherwise noted, all cases involve situations where the court acknowledges that neither statutes nor regulations explicitly confer upon the agency the power to reconsider. In addition, all cases involve a final judgment.

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A. Situations Where the Inherent Power Default Rule Generally Applies

Courts generally will allow agencies to reconsider their own decisions in the absence of the factors described in Section I.B below. In addition, there are several contexts in which courts have affirmatively stated that agencies have an inherent ability to reconsider.

1. Clerical Error by Agencies or Parties

Federal courts agree that agencies have the inherent power to reconsider to correct their own inadvertent administrative errors.³² In fact, courts have occasionally treated this area as doctrinally distinct from the larger question of inherent authority.³³ The doctrine

³² See, e.g., *Eifler v. Office of Workers' Comp. Programs*, 926 F.2d 663, 666 (7th Cir. 1991) ("An agency's power to reconsider its decision for the purpose of correcting its mistakes has many times been said to be inherent . . ."); *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984) ("[A]gencies have an inherent power to correct their mistakes . . ."); see also *Gorbach v. Reno*, 219 F.3d 1087, 1102 (9th Cir. 2000) (Thomas, J., concurring) (stating general rule); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 n.2 (Fed. Cir. 1995) (same); *City of Long Beach v. Dep't of Energy*, 754 F.2d 379, 387 (Temp. Emer. Ct. App. 1985) (same); *Alberta Gas Chem. v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981) (same); *Howard Sober, Inc. v. ICC*, 628 F.2d 36, 41–42 (D.C. Cir. 1980) (holding that the ICC has an inherent power to reconsider to correct clerical error in certificate of public convenience and necessity); *United States v. Civil Aeronautics Bd.*, 510 F.2d 769, 773 (D.C. Cir. 1975) (recognizing the general rule); *Nat'l Ass'n of Trailer Owners v. Day*, 299 F.2d 137, 139 (D.C. Cir. 1962) (same).

At least in the D.C. Circuit, the inherent power to reconsider applies only when an agency is engaged in adjudication, not in the rulemaking context. See *Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 753 (D.C. Cir. 2001). At least one other circuit seems to disagree. See *Chlorine Inst. v. OSHA*, 613 F.2d 120, 123–24 (5th Cir. 1980) (suggesting that the clerical-error doctrine applies to rulemaking). The D.C. Circuit's position is in some tension with the general rule that agencies have the inherent power to issue interpretative rules, see *supra* note 14, because under *Utility Solid Waste Activities Group*, while an agency cannot reconsider to correct a clerical error in a regulation, it presumably may still issue an interpretative rule identifying and clarifying the clerical error. It is unclear whether the formal distinction between the two processes is particularly meaningful from the perspective of an inherent power.

³³ See, e.g., *Int'l Paper Co. v. FERC*, 737 F.2d 1159, 1164 (D.C. Cir. 1984) (describing a "ministerial error doctrine").

has also been extended to cover clerical errors committed by parties before the agency.³⁴

Unlike much of the common law of administrative reconsideration, the Supreme Court appears to have confronted this issue. In *American Trucking Ass'ns v. Frisco Transportation Co.*, the Interstate Commerce Commission (“ICC”) approved the acquisition of a trucking company by a railroad.³⁵ During agency proceedings, the ICC indicated its intention to impose several restrictions on the combined entity in its approval of the purchase and made Frisco aware of its plans. When Frisco’s certificate of public convenience and necessity was issued as a final decision approving the acquisition, however, the agency inadvertently failed to include the restrictions in the certificate. Accordingly, over five years after the initial adjudication, the ICC reopened the matter to fix the alleged error. While Frisco was apparently aware that an error had occurred, it nevertheless argued that the ICC lacked the authority to reopen the proceeding because Congress had not conferred on it the power to reconsider. The Court concluded that the omission of the restriction was a clerical error³⁶ and that the ICC had the power to reopen the case to resolve it: “In fact, the presence of authority in administrative officers and tribunals to correct such errors has long been recognized—probably so well recognized that little discussion has ensued in the reported cases.”³⁷ While the Court did loosely locate the ICC’s authority to reconsider in its broad enabling act,³⁸ subsequent cases have considered *American Trucking* authority for the proposition that agencies have the inherent power to correct their own ministerial errors,³⁹ perhaps because the ICC

³⁴ See, e.g., *Macktal v. Chao*, 286 F.3d 822, 825–26 (5th Cir. 2002) (holding that the Administrative Review Board in the Department of Labor had the inherent authority to reconsider a default judgment when a litigant had accidentally filed its brief with a different adjudicatory body within the agency).

³⁵ 358 U.S. 133 (1958).

³⁶ *Id.* at 143. The ICC had compiled an “exhaustive report” describing a history of the proceedings, the ICC’s internal procedures, and how the error likely occurred. *Id.* at 138–39.

³⁷ *Id.* at 145.

³⁸ *Id.*

³⁹ See, e.g., *Gorbach v. Reno*, 179 F.3d 1111, 1122 (9th Cir. 1999) (noting that in *American Trucking*, “the Court recognized the [ICC]’s inherent authority to correct judgments with clerical errors and judgments that were issued due to inadvertence or mistake”), *rev’d en banc* on other grounds, 219 F.3d 1087 (9th Cir. 2000); *Gun South*,

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had no specific statutory or regulatory provision governing reopening for error.

The cases do suggest, however, that an unsubstantiated claim of error may not suffice; courts occasionally view an agency's assertion of clerical error as a pretext for an unlawful policy change,⁴⁰ a topic addressed more fully in Section I.B, below. As the Court in *American Trucking* noted, "the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies."⁴¹

2. *Fraud Perpetrated on the Agency*

There is equally little disagreement that despite the absence of statutory or regulatory authority, an agency has the inherent power to order reconsideration when its initial determination was tainted by fraud.⁴² When parties misrepresent themselves before an agency in order to obtain a favorable final judgment, courts have held that the agency has an essentially plenary power to reconsider.

For example, in *Elkem Metals Co. v. United States*, the International Trade Commission ("ITC") initially determined that foreign competitors were selling ferrosilicon, an iron alloy used in the production of steel and cast iron, at less than fair value in the United States, and that these sales were causing material injury to the domestic ferrosilicon industry.⁴³ Accordingly, the ITC issued anti-dumping orders against certain countries. More than four years

Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989) (citing *American Trucking* for the proposition that agencies can "reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration").

⁴⁰ See, e.g., *Int'l Paper Co. v. FERC*, 737 F.2d 1159, 1164-66 (D.C. Cir. 1984) (describing the clerical-error doctrine as one of "limited character," and rejecting a claim by the Federal Energy Regulatory Commission ("FERC") of alleged error on the grounds that the agency did not fully explain how the error occurred, and because the parties had little knowledge that a mistake had been made).

⁴¹ 358 U.S. at 146.

⁴² See, e.g., *Gorbach*, 179 F.3d at 1123 ("There is nothing remarkable about recognizing an agency's power to reopen and reconsider its own decisions, especially those arguably obtained by fraud."); *Alberta Gas Chem. v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981) ("It is hard to imagine a clearer case for exercising th[e] inherent power [to reconsider] than when a fraud has been perpetrated on the tribunal in its initial proceeding.").

⁴³ 193 F. Supp. 2d 1314, 1317 (Ct. Int'l Trade 2002).

later, after the disclosure of a price-fixing conspiracy among U.S. ferrosilicon producers, Brazilian ferrosilicon producers petitioned the ITC for reconsideration on the grounds that the data presented to the ITC by the domestic producers had improperly distorted the agency's initial adjudication. The ITC ordered reconsideration and rescinded the antidumping orders. The domestic producers challenged the decision on the grounds that Congress had not conferred upon the ITC any powers of reconsideration; the foreign producers countered that the ITC possessed an inherent authority to reconsider.⁴⁴ The Court of International Trade, while acknowledging the absence of statutory authority, agreed with the standard default rule that agencies have the inherent power to reconsider,⁴⁵ and noted further that "[a] finding that the ITC has the authority to reconsider a final determination is particularly appropriate where after-discovered fraud is alleged."⁴⁶ As in the context of clerical errors, however, courts remain concerned about the use of fraud as a pretext.⁴⁷

3. Legal Error by the Agency

Courts also have been willing to accord federal agencies the inherent power to reconsider when agencies allege that their initial decision was legally erroneous.⁴⁸ The decisions in this area seem to

⁴⁴ Id. at 1320.

⁴⁵ Id. ("[F]ederal agencies have the power to reconsider their final determinations.").

⁴⁶ Id. at 1321.

⁴⁷ See, e.g., *Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987) (recognizing the possibility of fraud as a pretext).

⁴⁸ See, e.g., *McAllister v. United States*, 3 Cl. Ct. 394, 400 (1983) (holding that "if [the agency] had failed to properly apply the regulations or had otherwise acted contrary to regulation or statute," the inherent power default presumption would apply); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) ("[R]econsideration is often the sole means of correcting errors of procedure or substance."); see also *Citizens Against the Pellissippi Parkway Extension v. Mineta*, 375 F.3d 412, 416-18 (6th Cir. 2004) (holding that it was abuse of discretion for the district court not to issue a voluntary remand to an agency because the agency has the inherent authority to correct legal defects); *Iowa Power & Light Co. v. United States*, 712 F.2d 1292, 1294, 1297 (8th Cir. 1983) (holding that the ICC had the inherent authority to reconsider a railroad rate that was the product of "legal error"); *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194, 1202-03, 1206-13 (D.S.D. 2000), rev'd on other grounds sub nom. *Rosebud Sioux Tribe v. McDivitt*, 286 F.2d 1081 (8th Cir. 2002) (concluding that

fall into two distinct categories that track missteps in the decision-making process and misinterpretations of substantive law. Both are forms of substantive legal error that may be challenged under the APA's substantial evidence or arbitrary and capricious tests.⁴⁹

First, courts allow reconsiderations after determining that the initial adjudication is susceptible to challenges as a result of serious gaffes in the decisionmaking process. For example, in *Belville Mining Co. v. United States*, the Sixth Circuit allowed an agency to reconsider its initial determination in part because the agency itself had realized that its final judgment had been made so casually that "a court challenge would probably result in a finding that the decision was unlawfully arbitrary and capricious."⁵⁰ The court noted specifically that the initial adjudication was only nine sentences long and was based exclusively on the oral advice of an agency staff attorney and one district court case.⁵¹ The assumption in *Belville Mining* appears to be that when adjudications are made in a haphazard manner, an agency should be allowed to reconsider. The exact rationale for such a rule is not immediately obvious, as the implication is that the adjudication would eventually be challenged by those subject to it. Perhaps granting an agency the power to reconsider allows it to preempt a possible challenge, conserve judicial resources, and retain more control over the revised adjudication.

Second, courts allow reconsiderations when agencies allege that they have misinterpreted or misapplied the substantive law at issue. In these cases, the initial decisionmaking processes were presumably sound. Instead, reconsideration is said to be available because the agency relied on a legal position that it no longer considers proper. The distinction between these cases and cases discussed in Section I.B that reject reconsideration when it is used as a guise for a policy reversal is very difficult to grasp, an issue discussed later in this Section. Nevertheless, the decisions indicate that courts will allow reconsideration for at least some substantive legal error.

the agency lacked the inherent authority to reconsider in part because its initial adjudication was not arbitrary and capricious).

⁴⁹ 5 U.S.C. § 706(2)(A), (E) (2000).

⁵⁰ 999 F.2d 989, 998 (6th Cir. 1993).

⁵¹ *Id.* at 999.

For example, in *King v. Norton*, members of a Michigan Indian tribe sought to amend their tribal constitution to alter the tribe's membership requirements.⁵² Pursuant to a provision in the tribal constitution, an election on a proposed amendment could only occur after the Secretary of Interior had received a petition signed by one-third of the tribe members in each tribal voting district. The plaintiffs requested that the Secretary of Interior indicate the number of signatures from each district that would be required. The Bureau of Indian Affairs ("BIA") made a determination, and based on the BIA's figures, it was concluded that the requisite number of signatures had been obtained. One month later, however, the BIA rescinded its initial adjudication and determined that more signatures were needed than initially indicated. Proponents of the amendment to the tribal constitution contended that the BIA lacked the authority to issue a new adjudication with new signature requirements, and the district court noted that it "ha[d] not identified any express authorization permitting reconsideration."⁵³ Nevertheless, the court accepted the BIA's argument that an inherent power to reconsider was necessary because the BIA had not given proper deference to the tribe's interpretation of its own constitution, and because a district court opinion interpreting a similar provision in a different tribal constitution suggested a different outcome.⁵⁴ Thus, the court recognized the BIA's inherent power to reconsider because it found that the BIA's initial determination was potentially legally erroneous.

Quite similarly, in *Gun South, Inc. v. Brady*, the Eleventh Circuit held that the Bureau of Alcohol, Tobacco and Firearms ("BATF") had the inherent authority to reconsider permits allowing Gun South to import certain semi-automatic rifles, on the grounds that the BATF may have erroneously determined that the rifles fell within the statutory definition of firearms with a "sporting purpose."⁵⁵ In both *Gun South* and *King*, even though the initial adjudications were not issued haphazardly like the adjudication in *Belville Mining*, the courts recognized the inherent authority to

⁵² 160 F. Supp. 2d 755 (E.D. Mich. 2001).

⁵³ Id. at 760.

⁵⁴ Id. at 758-59, 762.

⁵⁵ 877 F.2d 858, 859, 862 (11th Cir. 1989).

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reconsider because the agency had selected a legally tenable interpretation that it subsequently disavowed.

Courts have justified both of these lines of cases on the ground that there is an interest in the agency reaching the “right”⁵⁶ or “correct” result.⁵⁷ There are, however, several reasons to question whether courts should recognize in agencies the inherent power to reconsider legal errors, even if an inherent power to reconsider is itself otherwise justified. First, as discussed below in Section I.B, courts typically do not allow reconsideration when it appears that the agency is attempting to reverse a policy. The distinction between an unlawful policy reversal and the lawful correction of substantive legal error is not clear. A more detailed criticism of this distinction, or lack thereof, is made in Section I.B. Thus, while it may be consistent to disallow reconsideration for policy switches but to allow it to compensate for decisionmaking processes that were less than thorough, correcting substantive legal error often seems identical to making a policy change.

Second, allowing an agency to correct for legal error creates bad incentives. These situations arise due to the agency’s own failings in making the original legal determination. Affirmatively according an agency the power to reconsider in this context may in some cases reward the agency for its initial procedural blunders or interpretative vacillation. Of course, agencies surely have some pressure to get the decision right on the first try. The point is that the rule advanced in this line of cases reduces the costs of a legally incorrect decision. Moreover, if agencies can seek reconsideration on the grounds of legal insufficiency, it seems likely that more decisions will be reconsidered than would actually be found to violate the APA, because in the reconsideration context agencies have a reverse incentive to argue the demerits of their own adjudications. In other words, an agency can give itself a second chance at an adjudication by successfully convincing itself that its own original determination was somehow erroneous.

Third, if an initial adjudication is, in fact, the product of slapdash decisionmaking or is substantively incorrect, it can still always be

⁵⁶ See *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993).

⁵⁷ *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193–94 (2d Cir. 1991).

challenged on these grounds regardless of whether reconsideration is allowed.⁵⁸ On this view, reconsideration may not be necessary to reach the “correct result.” To be sure, an agency may prefer reconsideration for procedural reasons or may believe that reconsideration gives it greater control over the process, as suggested above. Nevertheless, the point is that errors can be challenged outside of a reconsideration proceeding.

Finally, in the context of federal district court reopening of final judgments, courts have held fairly consistently that Federal Rule of Civil Procedure 60(b) does not afford relief for most legal errors.⁵⁹ While these four considerations would seem to raise concerns about whether agencies should be able to reconsider for legal error in the absence of an authorizing statute or regulation, it appears that courts generally allow agencies to reconsider on this basis when a reconsideration is so characterized.

B. Situations Where the Inherent Power Default Rule May Not Apply

This Section describes the paradigmatic situations where federal courts have been unwilling to adhere to the default presumption that administrative agencies have the inherent power to reconsider. A review of the relevant case law suggests that courts are less willing to allow an agency the power to reconsider in four primary contexts: (1) when an agency uses reconsideration to reverse an earlier policy; (2) when reconsideration does not occur within a reasonable time period; (3) when important reliance interests are at stake; and (4) when statutes or regulations provide for a narrower power to reconsider. These four paradigm cases seem to be based on two primary considerations. The first three instances are based on a no-

⁵⁸ See *Chicago & N.W. Ry. Co. v. United States*, 311 F. Supp. 860, 872 (N.D. Ill. 1970) (Marovitz, J., dissenting):

If the [agency’s] error is serious, that is, not based on substantial evidence [or is arbitrary and capricious], then the aggrieved party may gain relief in court. . . . [M]ajor administrative errors can be corrected under the [judicial review provisions of the APA] and minor errors or changes of evaluation are not sufficiently important to require or permit renewed administrative consideration.

⁵⁹ See, e.g., *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003) (“[L]egal error, without more’ does not warrant relief under [Rule 60(b)].” (quoting *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988))); *Gleash v. Yuswak*, 308 F.3d 758, 761 (7th Cir. 2002) (“[L]egal error is not a proper ground for relief under Rule 60(b).”).

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tion of ex post fairness, or perhaps procedural due process. The fourth situation is grounded in a theory of authority (or statutory interpretation) that prevents an agency from assuming a more extensive power to reconsider when Congress, or the agency through its rulemaking powers, has crafted a narrower reconsideration provision.

1. Improper Motive: Reconsideration as a Guise for Effecting a Policy Reversal

Courts are often unwilling to allow an agency the inherent power to reconsider when it appears that reconsideration was motivated by the agency's desire to change its policies.⁶⁰ Among the factors that courts have considered as evidence of improper policy reversals are changes in presidential administrations⁶¹ or administrative personnel,⁶² and when the reconsideration is based largely on an agency's more recent and contrary decision in a separate, but analogous, matter.⁶³

This line of cases appears to stem from the Supreme Court's analysis in *United States v. Seatrain Lines*.⁶⁴ Seatrain was a common

⁶⁰ See, e.g., *Belville Mining Co.*, 999 F.2d at 998 (6th Cir. 1993) (recognizing the general proposition); *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46, 53–54 (D.C. Cir. 1953) (“[A] decision may not be repudiated for the sole purpose of applying some quirk or change in administrative policy”); *Corus Staal BV v. Dep’t of Commerce*, 259 F. Supp. 2d 1253, 1257 (Ct. Int’l Trade 2003) (recognizing the general proposition); *McAllister v. United States*, 3 Cl. Ct. 394, 402 (1983) (rejecting reconsideration where “the sole basis for the reversal of the [initial] determination . . . was that the agency decided to change its official mind”). But see *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (“There may also be instances when unmistakable shifts in our basic judgments about law or policy necessitate the revision or amendment of previously established rules of conduct.”).

⁶¹ See, e.g., *Coteau Props. Co. v. Dep’t of Interior*, 53 F.3d 1466, 1469–70 (8th Cir. 1995) (disallowing reconsideration made soon after a change in presidential administration).

⁶² See, e.g., *Solar v. Pension Benefit Guar. Corp.*, 504 F. Supp. 1116, 1123 (S.D.N.Y. 1981) (disallowing reconsideration made soon after a change in agency personnel). But see *Belville Mining Co.*, 999 F.2d at 998 (6th Cir. 1993) (upholding reconsideration despite an acknowledged change in agency personnel).

⁶³ See, e.g., *Upjohn Co. v. Pa. R.R. Co.*, 381 F.2d 4, 5 (6th Cir. 1967) (rejecting reconsideration where “the [agency’s] only basis for reversal of its prior decision [was] that, after some three years of elapsed time in a proceeding in another matter with the same factual situation, it has adopted a different policy, and therefore seeks to apply retroactively its new policy”).

⁶⁴ 329 U.S. 424, 429 (1947).

carrier of goods by water. The ICC granted Seatrain certificates of convenience and necessity to transport “commodities generally” over two water routes. A year and a half later, the ICC reopened the proceeding on its own motion, cancelled the original certificates, and issued new certificates limiting Seatrain’s operations over the two routes to the transport of only specified commodities, such as liquid cargoes. The District Court found that the ICC lacked the power to reconsider the initial certificates, and the Supreme Court affirmed, noting that the ICC had statutory authority to revoke motor carrier certificates, but not water carrier certificates.⁶⁵ The Court went on to address the ICC’s motives. When Seatrain’s initial certificates were approved, the ICC had interpreted the term “commodities generally” to include all freight car shipments.⁶⁶ The ICC reopened the Seatrain matter only after its decision in a separate case, which announced that “commodities generally” did not include water carriage of railcars. The reconsideration was not appropriate because “it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the [other] case.”⁶⁷ At the very least, then, *Seatrain Lines* would seem to stand for the proposition that agencies are less likely to have the power to reconsider when reconsideration is used to change the policies announced in the initial adjudication.

A more recent example is *Coteau Properties Co. v. Department of Interior*.⁶⁸ Coteau applied for a coal mining permit and, under applicable statutes, could not receive the permit if it was owned and controlled by an entity that engaged in mining operations in continuous violation of state or federal mining laws.⁶⁹ A labor union contended that Basin Electric Power, which was allegedly operating in violation of various mining laws, controlled Coteau. Pursuant to the Surface Mining Control and Reclamation Act, a state agency found that Basin did not control Coteau, a decision that the director of the federal Office of Surface Mining, Reclamation, and

⁶⁵ Id. at 426–28, 430–31.

⁶⁶ Id. at 429.

⁶⁷ Id.; see also *Watson Bros. Transp. Co. v. United States*, 132 F. Supp. 905, 909 (D. Neb. 1955), *aff’d*, 350 U.S. 927 (1957).

⁶⁸ 53 F.3d 1466 (8th Cir. 1995).

⁶⁹ Id. at 1469.

Enforcement (“OSM”) affirmed.⁷⁰ Six days later and immediately following a change in presidential administrations, the new acting director of OSM withdrew the previous director’s approval and seven months later issued a contrary final decision.⁷¹ In finding the acting director’s action to be arbitrary and capricious, the Eighth Circuit rejected precedent allowing an inherent power to reconsider because “OSM indeed decided that the withdrawn decision was doubtful in the light of *changing policies*.”⁷²

Despite cases like *Coteau Properties* and the arguable relevance of *Seatrains Lines*, federal courts are often reluctant to reject reconsiderations as unlawful policy changes⁷³ and in many cases, as described above, are affirmatively willing to allow an inherent power to reconsider when agencies are allegedly correcting legal error.⁷⁴ The line between policy changes and legal error is far from obvious. For instance, it is unclear why the OSM’s reconsideration of Coteau’s mining application to revisit the meaning of the regulatory terms “owns and controls” is a policy change,⁷⁵ but the BATF’s reconsideration of Gun South’s rifle permits to reassess the legal meaning of the statutory term “sporting purpose” is the correction of a legal error.⁷⁶ Nevertheless, to the extent that a court can determine that a reconsideration is driven by a desire to change policies rather than a good faith attempt to address a legal error, it appears that it would be less likely to recognize an inherent power to reconsider.

The distinction between policy reversal and legal error is also in tension with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷⁷ As the Supreme Court made evident in *Chevron*, the distinction between interpreting ambiguous grants of statutory au-

⁷⁰ Id. at 1470.

⁷¹ Id.

⁷² Id. at 1478–79 (emphasis added).

⁷³ See *Belville Mining Co. v. United States*, 999 F.2d 989, 998 (6th Cir. 1993).

⁷⁴ See id. at 999.

⁷⁵ *Coteau Props.*, 53 F.3d at 1478–79.

⁷⁶ *Gun South, Inc. v. Brady*, 877 F.2d 858, 862–63 (11th Cir. 1989).

⁷⁷ 467 U.S. 837 (1984). *Chevron* established the now-familiar two-step test for judicial deference to agency statutory construction, premised on the understanding that “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” Id. at 843–44.

thority and creating policy can be entirely collapsible.⁷⁸ An agency's duty to ascribe legal meaning to statutory terms is very often coterminous with its delegated authority to select among a range of competing policy choices. In other words, when an agency reconsiders for substantive legal error, its revised decision represents a change in policy, because as *Chevron* contemplates, agencies engage in policymaking through statutory interpretation. The implication is that the rationale for a doctrinal distinction between policy reversals and legal errors in the context of administrative reconsideration is not entirely clear.

2. Unreasonable Timing

Federal courts are less willing to invoke the inherent power default presumption when agencies have not reconsidered their initial decisions in a timely fashion.⁷⁹ This inquiry arises because the acceptance of an inherent power to reconsider is an admission that there are no statutory or regulatory procedures to guide either agencies or courts. Thus, courts that accept an inherent power to reconsider have been forced to adopt and apply judge-made tests for timeliness. While a few opinions contain language suggesting that agencies should have the power to reconsider regardless of the amount of time that has passed,⁸⁰ most courts have adopted the general rule that reconsideration must occur within a "short and reasonable time period."⁸¹ As described below, this has not resulted

⁷⁸ See, e.g., Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. Chi. L. Rev. 636, 660 (1999) ("*Chevron* appears to rest on the suggestion . . . that the decision how to read ambiguities in law involves no brooding omnipresence in the sky but is an emphatically human judgment about policy or principle.>").

⁷⁹ How a court defines the relevant time period that is being assessed is discussed *infra* notes 114–19 and accompanying text.

⁸⁰ See, e.g., *Crager v. United States*, 25 Cl. Ct. 400, 411 (1992) ("Although [the agency's] *de novo* review was not really conducted within a short time, this court still believes that effective, unbiased *de novo* review of agency action should be promoted, regardless of the time which has lapsed."); *Biddle v. United States*, 186 Ct. Cl. 87, 98–99 (1968) (holding that where the agency has not promulgated rules for reconsideration, where the initial adjudication created no vested rights, and where reconsideration promotes the purposes of the regulations, an agency has an unlimited amount of time to entertain a petition for reconsideration).

⁸¹ See, e.g., *Cooley v. United States*, 324 F.3d 1297, 1305 (Fed. Cir. 2003) ("Reconsideration of an agency's decision must arise within a reasonable period of time . . ."); *Chao v. Russell P. Le Frois Builder*, 291 F.3d 219, 230 (2d Cir. 2002) (Pooler, J., dissenting) (holding that reconsideration must be conducted "reasonably

in a particularly predictable slate of decisions. Nevertheless, some of these courts have indicated that a reasonable time period “would be measured in weeks, not years.”⁸²

The “weeks, not years” principle, however, appears to be the approximation of a guideline as opposed to a hard and fast test.⁸³ Instead, federal courts have adopted two main approaches for determining whether a time lapse is reasonable. First, a small minority of courts have held that where a statute or regulation provides time limitations for appeals, reconsiderations must proceed according to those same time requirements.⁸⁴ On this view, the timing rules for appeals are grafted into the reconsideration context. Other courts have explicitly rejected this approach.⁸⁵

Second, and more commonly, courts that apply the “short and reasonable” rule have attempted to rely on multi-factored balancing tests to determine what is timely. A review of the cases indicates that the factors considered are: (1) the complexity of the decision;⁸⁶ (2) whether the decision was based on fact or

promptly”); *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002) (“Reconsideration must . . . occur within a reasonable time after the first decision . . .”); see also *Citizens Against the Pellissippi Parkway Extension v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) (stating the general rule); *Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995) (same); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (same).

⁸² See, e.g., *Belville Mining Co.*, 999 F.2d at 1000 (6th Cir. 1993) (“[A]bsent unusual circumstances, the time period would be measured in weeks, not years.” (quoting *Gratehouse v. United States*, 512 F.2d 1104, 1109 (Ct. Cl. 1975))); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) (same); *Gratehouse v. United States*, 512 F.2d 1104, 1109 (Ct. Cl. 1975) (same); *King v. Norton*, 160 F. Supp. 2d 755, 761 (E.D. Mich. 2001) (same); *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 613 (N.D. Cal. 1992) (same).

⁸³ See *infra* notes 94–111 and accompanying text (indicating that federal courts have upheld reconsiderations that spanned several years).

⁸⁴ See, e.g., *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) (holding that where a statute did not provide for reconsideration, parties could seek reconsideration “by implication . . . within the twenty days allowed for an appeal”).

⁸⁵ See, e.g., *Gibson v. United States*, 11 Cl. Ct. 6, 14 (1986) (rejecting the view that petitions for reconsideration must be filed within the time limit for filing appeals because “[r]egardless of the time period for appeal created by the regulation, the . . . agency had the inherent, discretionary power to consider appeals submitted to [it]”).

⁸⁶ See *Belville Mining Co.*, 999 F.2d at 1001; *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 194 (2d Cir. 1991); *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194, 1202 (D.S.D. 2000), *rev’d* on other grounds *sub nom.* *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002).

law;⁸⁷ (3) whether the agency acted according to its general procedures for review;⁸⁸ (4) whether parties had relied upon the initial decision;⁸⁹ (5) whether the agency acted in bad faith by advancing a pretextual explanation to justify reconsideration;⁹⁰ (6) whether the agency provided notice of its intent to reconsider the initial decision;⁹¹ and (7) the probable impact of an erroneous agency decision absent reconsideration.⁹² It is not entirely clear how some of these factors relate to timing, and courts have not been explicit in illuminating their connection. For instance, a reconsideration made under a bad faith pretext would not necessarily be any worse were it made after a lengthier time span. Similarly, a legally erroneous decision would presumably have the same impact absent reconsideration regardless of when reconsideration was undertaken. Nevertheless, these eight factors appear to be the primary ones referenced by federal courts examining the timing between adjudication and reconsideration.

Despite the general agreement that reconsideration must proceed within a “short and reasonable time,” the use of multiple fac-

⁸⁷ See *Belville Mining Co.*, 999 F.2d at 1001; *Dun & Bradstreet Corp. Found.*, 946 F.2d at 194; *Rosebud Sioux Tribe*, 104 F. Supp. 2d at 1202; *C. J. Langenfelder & Son v. United States*, 341 F.2d 600, 605 (Ct. Cl. 1965).

⁸⁸ See *Belville Mining Co.*, 999 F.2d at 1001; *Dun & Bradstreet Corp. Found.*, 946 F.2d at 194; *Rosebud Sioux Tribe*, 104 F. Supp. 2d at 1202; see also *Elkem Metals Co. v. United States*, 193 F. Supp. 2d 1314, 1322 (Ct. Int'l Trade 2002) (upholding reconsideration made over four years after the initial adjudication on the grounds that the agency's statutory provisions governing oversight of past adjudications created the situation that reconsiderations would likely occur “if at all, at a time somewhat remote from the original investigations”).

⁸⁹ See *Belville Mining Co.*, 999 F.2d at 1001; *Nat'l Ass'n of Trailer Owners v. Day*, 299 F.2d 137, 139–40 (D.C. Cir. 1962); *Rosebud Sioux Tribe*, 104 F. Supp. 2d at 1202; *McAllister v. United States*, 3 Cl. Ct. 394, 398 (1983).

⁹⁰ See *Belville Mining Co.*, 999 F.2d at 1001; *King v. Norton*, 160 F. Supp. 2d 755, 761 (E.D. Mich. 2001); *Rosebud Sioux Tribe*, 104 F. Supp. 2d at 1202; *Crager v. United States*, 25 Cl. Ct. 400, 411 (1992) (upholding the inherent power to reconsider where the agency was not “biased”).

⁹¹ See *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002); *McAllister*, 3 Cl. Ct. at 398. But see *Sudarsky v. City of New York*, 779 F. Supp. 287, 298 n.7 (S.D.N.Y. 1991) (finding that reconsideration one month after the initial decision was timely, even though the plaintiffs were not given notice that the agency was reconsidering its decision).

⁹² See *Belville Mining Co.*, 999 F.2d at 1001–02 (upholding an eight-month reconsideration period and noting that without a reconsideration, “the probable result would be surface mining and the denuding of thousands of acres of national forest property”); *Rosebud Sioux Tribe*, 104 F. Supp. 2d at 1202.

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tors to measure timeliness has resulted in a less than predictable set of rules.⁹³ At the extremes, there appears to be more agreement. Courts have thus rejected reconsiderations initiated twenty-seven,⁹⁴ sixteen,⁹⁵ and fourteen years⁹⁶ after the initial adjudication. Similarly, courts have upheld reconsiderations made within three days⁹⁷ and have usually upheld reconsiderations initiated within one month,⁹⁸ although there is at least one exception.⁹⁹ The area in between is less consistent. For example, federal courts have rejected periods of five months¹⁰⁰ and nine months¹⁰¹ as unreasonable, yet have upheld three months,¹⁰² four months,¹⁰³ and eight months¹⁰⁴ as reasonable. Oddly, two years has been held to be both reasonable¹⁰⁵ and unreasonable.¹⁰⁶ And while eleven months,¹⁰⁷ one year,¹⁰⁸ six-

⁹³ As noted supra notes 79, courts are not necessarily consistent in how they define the relevant time period to be measured. A more extended discussion of this issue is found at infra notes 114–19 and accompanying text. Even if courts adhered to the same metric, however, the case law would not reveal a set of rules that is more appreciably definite. This is because the disparity in time periods that courts have upheld or rejected far exceeds the disparity created by different time measurements.

⁹⁴ *Gabbs Exploration Co. v. Udall*, 315 F.2d 37, 41 (D.C. Cir. 1963).

⁹⁵ *Umpleby v. Udall*, 285 F. Supp. 25, 28 (D. Colo. 1968).

⁹⁶ *Aubre v. United States*, 40 Fed. Cl. 371, 376–77 (1998).

⁹⁷ *Klein v. Peterson*, 6 U.S.P.Q.2d (BNA) 1556, 1556–57 (D.D.C. 1988).

⁹⁸ See *Macktal v. Chao*, 286 F.3d 822, 824, 826 (5th Cir. 2002) (holding that an approximately thirty-day period was reasonable); *Mazaleski v. Treusdell*, 562 F.2d 701, 720–21 (D.C. Cir. 1977) (same); *Ideal Basic Indus., Inc. v. Morton*, 542 F.2d 1364, 1366–68 (9th Cir. 1976) (same); *Nat'l Ass'n of Trailer Owners v. Day*, 299 F.2d 137, 139–40 (D.C. Cir. 1962) (same); *King v. Norton*, 160 F. Supp. 2d 755, 761 (E.D. Mich. 2001) (same); *Sudarsky v. City of New York*, 779 F. Supp. 287, 298 n.7 (S.D.N.Y. 1991) (same).

⁹⁹ *McAllister v. United States*, 3 Cl. Ct. 394, 396, 398 (1983) (holding that a reconsideration decision made thirty-two days after the initial decision was unreasonable where the plaintiff had relied on the initial decision and the agency was aware of the plaintiff's reliance, and where the agency gave no notice of its plans to reconsider).

¹⁰⁰ *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194, 1202 (D.S.D. 2000), rev'd on other grounds sub nom. *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002).

¹⁰¹ *Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987).

¹⁰² *Bookman v. United States*, 453 F.2d 1263, 1264–66 (Ct. Cl. 1972).

¹⁰³ *Confederated Tribes v. United States*, 177 Ct. Cl. 184, 193 (1966).

¹⁰⁴ *Belville Mining Co. v. United States*, 999 F.2d 989, 1001–02 (6th Cir. 1993).

¹⁰⁵ *Crager v. United States*, 25 Cl. Ct. 400, 403–04, 411 (1992).

¹⁰⁶ *Gratehouse v. United States*, 512 F.2d 1104, 1110 (Ct. Cl. 1975).

¹⁰⁷ *Gubisch v. Brady*, 49 Fair Empl. Prac. Cas. (BNA) 1063, 1071 (D.D.C. 1989) (measuring from initial adjudication to final decision).

¹⁰⁸ *C. J. Langenfelder & Son, Inc. v. United States*, 341 F.2d 600, 604 (Ct. Cl. 1965).

teen months,¹⁰⁹ and three years¹¹⁰ have been held unreasonable, four and a half years¹¹¹ has been deemed acceptable. In addition, courts that have remanded for additional factual findings because they are unable to decide the issue did so when the period in question was three years,¹¹² and again when it was only eighty-one weekdays.¹¹³ The pattern that emerges is that a “short and reasonable time” has no objective limits, and cases appear to use the several factors outlined above as the basis for an equitable determination.

An interesting aspect of this varied array of cases relates to the time period that courts are actually measuring. Most courts consider the relevant time period to be the time between the initial final judgment and the agency’s notice of reconsideration, rather than the time between the initial adjudication and the date when that decision is actually reversed or modified.¹¹⁴ The difference is not insignificant: in many cases, an agency will issue a notice of reconsideration and not issue a new final decision until months or years later. For example, in *Belville Mining Co. v. United States*,¹¹⁵ the Sixth Circuit identified as the relevant time period and upheld an eight-month lapse between the initial adjudication and notice of reconsideration, but the agency did not issue a reversal until some four months after giving notice.¹¹⁶ Similarly, in *Ideal Basic Industries, Inc. v. Morton*,¹¹⁷ the Ninth Circuit upheld a reconsideration where notice was given within one month, but actual reversal did not occur until over two years later.¹¹⁸ It is not entirely clear which period is the more relevant one, and in fact, statutes with reconsid-

¹⁰⁹ *Gubisch*, 49 Fair Empl. Prac. Cas. (BNA) at 1071 (measuring from initial adjudication to reversal).

¹¹⁰ *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 613 (N.D. Cal. 1992).

¹¹¹ *Elkem Metals Co. v. United States*, 193 F. Supp. 2d 1314, 1322–23 (Ct. Int’l Trade 2002).

¹¹² See *Cooley v. United States*, 324 F.3d 1297, 1305–06 (Fed. Cir. 2003).

¹¹³ See *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 194–95 (2d Cir. 1991).

¹¹⁴ See, e.g., *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002); *Elkem Metals Co.*, 193 F. Supp. 2d at 1322.

¹¹⁵ 999 F.2d 989 (6th Cir. 1993).

¹¹⁶ *Id.* at 992, 1001–02.

¹¹⁷ 542 F.2d 1364 (9th Cir. 1976).

¹¹⁸ *Id.* at 1366–68.

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eration provisions rely on both time periods.¹¹⁹ What should be noted, however, is that by focusing the inquiry upon the period between the initial decision and the notice of reconsideration, federal courts are often under-representing the amount of time that affected parties remain uncertain about the status of their initial adjudication.

3. *Reliance Interests*

Courts have stated frequently that reliance by parties on the initial adjudication is a factor weighing against an inherent power to reconsider.¹²⁰ Many courts have stated, somewhat contrarily, that reliance interests will never preclude reconsideration when the agency is attempting to correct legal error.¹²¹ Some courts have required litigants to additionally prove that the agency had knowledge of their reliance.¹²² Tellingly, in no case has a federal court used reliance as the sole basis for a determination that the inherent power default presumption does not apply, and courts seem to decide cases on other grounds whenever possible.¹²³ The most likely

¹¹⁹ Compare 15 U.S.C. § 45(b) (2000) (providing that the Federal Trade Commission (“FTC”) must determine whether to alter or reverse an order not later than 120 days after the date of the request), with 15 U.S.C. § 3416(a)(2) (2000) (providing that under the Natural Gas Policy Act, the Federal Energy Regulatory Commission must act upon a petition for rehearing within thirty days).

¹²⁰ See, e.g., *Confederated Tribes v. United States*, 177 Ct. Cl. 184, 191 (1966) (warning that an inherent power to reconsider “is especially dangerous if there has been reliance on the assumed finality of the decision”); *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194, 1201 (D.S.D. 2000) (declining to accord the BIA the inherent authority to reconsider its approval of a lease of tribal land, in part because the developers had “already spent more than \$5,000,000 in reliance on [the Bureau’s] action[s]”), *rev’d* on other grounds *sub nom. Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1081 (8th Cir. 2002); see also *Citizens Against the Pellissippi Parkway Extension v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) (suggesting that “detrimental reliance on the previous [adjudication]” might justify a district court decision refusing to grant a voluntary remand to an agency where the agency would otherwise have the inherent power to reconsider).

¹²¹ See, e.g., *Belville Mining Co. v. United States*, 999 F.2d 989, 999 (6th Cir. 1993) (declining to consider a reliance claim on the ground that the initial adjudication was legally erroneous); *King v. Norton*, 160 F. Supp. 2d 755, 761 (E.D. Mich. 2001) (“[D]etrimental reliance by a party will not prevent an agency’s reconsideration of a decision if the initial decision is in fact erroneous.”).

¹²² See *McAllister v. United States*, 3 Cl. Ct. 394, 398 (1983).

¹²³ See, e.g., *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 604, 613 (N.D. Cal. 1992) (basing the decision on grounds of improper timing, despite the fact that the party had

explanation is that many cases in the administrative reconsideration context involve parties who have relied a great deal on an initial adjudication. Ruling against an agency on the grounds of party reliance makes it difficult to distinguish the many cases that have rejected reliance and upheld the inherent power to reconsider.

A few cases have, however, invoked reliance as a significant factor counseling against recognition of the inherent power to reconsider. For example, in *Prieto v. United States*, Prieto, a member of an Indian tribe, purchased fifty-five acres of land alongside an interstate highway, intending to use the property for billboard advertising purposes.¹²⁴ Prieto applied to the BIA to have the land accepted into trust pursuant to the Indian Reorganization Act, in order to exempt the land from certain property taxes and environmental laws. The BIA approved the purchase and trust application, but two years later reopened the proceeding and determined that the land did not qualify for trust status.¹²⁵ The court held that the inherent authority default did not apply, in part because Prieto and other third parties had relied on the initial adjudication: Prieto built storage facilities on the property, obtained the necessary state and tribal permits, and had entered into an agreement with a billboard advertising firm, which itself had expended over \$150,000 on the project.¹²⁶ Still, despite cases like *Prieto*, courts appear reluctant to address reliance claims, and while a reliance argument may help to overcome the inherent power default, it will be unlikely to do so on its own.

4. *The Existence of a Reconsideration Provision in a Statute or Regulation*

The canon of construction *expressio unius est exclusio alterius*—the inclusion of one thing indicates the exclusion of the other—provides the basis for another paradigmatic situation where courts are reluctant to grant agencies the inherent power to reconsider: namely, those contexts where statutes or regulations already pro-

spent over \$1 million in promotion and marketing and had entered a long-term royalties contract valued at \$3.3 million, all in reliance on the issuance of a certification of label approval for “Black Death Vodka”).

¹²⁴ 655 F. Supp. 1187, 1188 (D.D.C. 1987).

¹²⁵ *Id.* at 1188–90.

¹²⁶ *Id.* at 1189, 1192.

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vide for a more limited form of administrative reconsideration.¹²⁷ In these cases, courts find that a statute or regulation overrides the inherent power default. For example, in *Jeager v. Simrany*, a statute provided that the Commissioner of Immigration, upon a finding of fraud, had the authority to reconsider certain certificates associated with naturalization, but did not provide for the revocation of “certificate[s] of lawful entry.”¹²⁸ The Ninth Circuit rejected the Commissioner’s attempt to reconsider a certificate of lawful entry and acknowledged that, barring the statute, the Commissioner probably would have had the inherent power to revoke the certificate in question: “[I]n the absence of the specific provisions . . . the Commissioner, under his general powers of regulation, could provide for the cancellation of all the various certificates . . . but in view of the limitations inherent in the specific provisions of that section, that power cannot be held now to exist.”¹²⁹

A more recent example is *Chao v. Russell P. Le Frois Builder, Inc.*¹³⁰ The Occupational Safety and Health Agency (“OSHA”) issued citations to Russell for workplace safety violations. Under the relevant provisions of the Occupational Safety and Health Act, an employer could file a timely notice of contest with the Occupational Safety and Health Review Commission (“OSHRC”), but if the employer failed to file a timely notice of contest, OSHA’s cita-

¹²⁷ See, e.g., *Gorbach v. Reno*, 219 F.3d 1087, 1093–94 (9th Cir. 2000) (holding that the Attorney General lacked the inherent authority to reconsider naturalizations, in part because she had the more limited power to cancel “certificates of citizenship,” and because express provisions for denaturalization were contained elsewhere in the statute); *Chen v. GAO*, 821 F.2d 732, 737–38 (D.C. Cir. 1987) (holding that the Personnel Appeals Board of the Government Accounting Office lacked the plenary authority to reconsider erroneous decisions where regulations “limited [the Board’s] rehearing authority to reversing initial decisions only for lack of substantial evidence”); *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984) (speculating that while “inherent or implicit authority might exist in the abstract,” the EPA did not have the inherent authority to reconsider for error when Congress has provided a statutory mechanism for correcting error); *Vollinger v. Merrill Lynch & Co.*, 198 F. Supp. 2d 433, 439 (S.D.N.Y. 2002) (holding that the EEOC lacked plenary authority to reconsider statutes of limitations determinations where EEOC regulations provided for reopening of such decisions in specified circumstances only); see also *Chicago & N.W. Ry. Co. v. United States*, 311 F. Supp. 860, 870 (N.D. Ill. 1970) (Marovitz, J., dissenting) (arguing that the ICC’s enabling act and rules provided the exclusive methods for reopening).

¹²⁸ 180 F.2d 650, 652 (9th Cir. 1950).

¹²⁹ *Id.* at 653.

¹³⁰ 291 F.3d 219 (2d Cir. 2002).

tion would be deemed a final order of OSHRC.¹³¹ Russell failed to file a timely notice of contest because a Russell secretary had misplaced the OSHA citation behind a seat in her automobile. The OSHA citation was therefore deemed a final decision by OSHRC. Russell sought, and was granted, a reconsideration of this initial decision.¹³² The Second Circuit acknowledged the inherent power default, but concluded that statutory language providing that a final OSHRC order shall “not be subject to review by any court or agency” evinced a legislative intent to preclude the inherent power.¹³³ Thus, in both *Jeager* and *Russell P. Le Frois*, but for the existence of narrow statutory provisions for reconsideration, the agency would have had an inherent power to reconsider.

Strikingly, however, courts occasionally do accord agencies the broad inherent power to reconsider despite the existence of narrower reconsideration provisions in statutes or regulations. For example, in *Gun South, Inc. v. Brady*, the Eleventh Circuit held that the BATF had the inherent authority to reconsider licensing determinations made pursuant to the Gun Control Act, even though the agency had promulgated procedures for reconsideration under related statutes, such as the Arms Export Control Act.¹³⁴ Similarly, in *Confederated Tribes v. United States*, the then-Court of Claims upheld an agency’s sua sponte reconsideration more than three years after its initial determination, despite the fact that the agency’s rules of procedure provided that motions for reconsideration could be made only by parties (and not the agency) within thirty days of the contested adjudication.¹³⁵

Perhaps more perplexingly, courts have used the existence of express reconsideration procedures in other statutes as evidence of a congressional policy supporting an inherent power to reconsider.¹³⁶ The more plausible inference would seem to be that the ex-

¹³¹ 29 U.S.C. § 659(a)–(c) (2000).

¹³² *Russell*, 291 F.3d at 225.

¹³³ *Russell*, 291 F.3d at 229 n.9. The court noted that the statutory term “any” included review by OSHRC itself, and dismissed Russell’s argument that the word “review” contemplated only review of the determination of an inferior tribunal. *Id.*

¹³⁴ 877 F.2d 858, 863–64 (11th Cir. 1989).

¹³⁵ 177 Ct. Cl. 184, 189–90 (1966).

¹³⁶ See, e.g., *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (citing reconsideration provisions in various federal statutes as support for the proposition that agencies have the inherent authority to reconsider).

istence of reconsideration provisions in other statutes is evidence that Congress did not intend to allow reconsideration in the statute at issue.¹³⁷ In any event, cases of this nature and cases such as *Gun South* and *Confederated Tribes* together suggest that while courts often find that the inherent power default is overcome when reconsideration procedures are already provided by statute or regulation, there are exceptions.

*C. An Overview of State Law: Disagreement over the
Inherent Power to Reconsider*

While federal courts agree nearly unanimously that agencies have the inherent authority to reconsider their adjudications in the absence of specific statutory or regulatory authorization, state courts applying state law are divided on the issue. Indeed, several state court decisions have openly recognized that there is considerable division among the states on this question.¹³⁸ This doctrinal split at the state level suggests that despite its apparent adoption in virtually every circuit, the federal default presumption and its exceptions described earlier in this Part might not be as inevitable as they may seem. Moreover, an examination of how states have resolved the question posed by this Note provides a useful segue into Part II, which examines whether the inherent power default is justified in the federal system.

The basic doctrinal issue at the state level is the same as that in the federal system: In each case, courts have considered whether or not agencies possess the inherent power to reconsider. Over two-thirds of the states have addressed this issue, and slightly more than half of these states adhere to the federal default presumption that in the absence of statutory authority, administrative agencies still possess the power to reconsider.¹³⁹ Slightly less than half have

¹³⁷ This argument is considered in greater detail in Section II.B.

¹³⁸ See, e.g., *Murdock v. Perkins*, 135 S.E.2d 869, 874 (Ga. 1964) (“[T]here is a difference of opinion among various state courts as to whether an administrative agency exercising functions of a judicial nature has the inherent right to grant a rehearing”); *Phelps v. Sallee*, 529 S.W.2d 361, 365 (Ky. 1975) (noting division among state courts); *Career Servs. Review Bd. v. Utah Dep’t of Corr.*, 942 P.2d 933, 945 (Utah 1997) (same).

¹³⁹ See *Baldwin County Comm’n v. Ala. Envtl. Mgmt. Comm’n*, 526 So. 2d 564, 566 (Ala. 1988); *Wammack v. Indus. Comm’n*, 320 P.2d 950, 954 (Ariz. 1958); *Mid-South Rd. Builders, v. Ark. Contractors Licensing Bd.*, 946 S.W.2d 649, 652 (Ark. 1997);

selected the opposing default position: an agency has the power to reconsider only if it has been conferred by the state legislature or created by the agency pursuant to its rulemaking powers.¹⁴⁰ As one state supreme court explained in this regard, “Administrative agencies and their executive officers are creatures of statute and

McCarty v. Bd. of Trs. of the Little Rock Police Pension Fund, 872 S.W.2d 74, 82 (Ark. Ct. App. 1994); Moschetti v. Bd. of Zoning Adjustment, 574 P.2d 874, 875 (Colo. Ct. App. 1977); Henry v. Dep’t of Labor, 293 A.2d 578, 581 (Del. Super. Ct. 1972); Peoples Gas Sys. v. Mason, 187 So. 2d 335, 338 (Fla. 1966); Russell v. Dep’t of Bus. & Prof’l Regulation, 645 So. 2d 117, 119 (Fla. Dist. Ct. App. 1994); Cardinali v. Town of Berwick, 550 A.2d 921, 921 (Me. 1988); Calvert County Planning Comm’n v. Howlin Realty Mgmt., 772 A.2d 1209, 1223 (Md. 2001); Stowe v. Bologna, 592 N.E.2d 764, 767 (Mass. App. Ct. 1992); Anchor Cas. Co. v. Bongards Coop. Creamery Ass’n, 91 N.W.2d 122, 124–26 (Minn. 1958); In re Minn. Pub. Util. Comm’n, 417 N.W.2d 274, 281–82 (Minn. Ct. App. 1987); Geiger v. Miss. State Bd. of Cosmetology, 151 So. 2d 189, 191 (Miss. 1963); City of Lincoln v. Twin Platte Natural Res. Dist., 551 N.W.2d 6, 8 (Neb. 1996); L & T Corp. v. City of Henderson, 654 P.2d 1015, 1017 (Nev. 1982); Ruvoldt v. Nolan, 305 A.2d 434, 440–41 (N.J. 1973); In re Cadgene Family P’ship, 669 A.2d 239, 243 (N.J. Super. Ct. App. Div. 1995); Sullivan County Harness Racing Ass’n v. Glasser, 283 N.E.2d 603, 607 (N.Y. 1972); Cincinnati Sch. Dist. Bd. of Educ. v. Hamilton County Bd. of Revision, 721 N.E.2d 40, 44 (Ohio 2000); Boydston v. Liberty N.W. Ins. Corp., 999 P.2d 503, 506 (Or. Ct. App. 2000); In re Denisewich, 643 A.2d 1194, 1197–98 (R.I. 1994); Bennett v. City of Clemson, 358 S.E.2d 707, 708–09 (S.C. 1987); Career Servs. Review Bd. v. Utah Dep’t of Corr., 942 P.2d 933, 945–46 (Utah 1997); In re Quackenbush, 16 P.3d 638, 643 (Wash. 2001) (en banc); see also Guam Dep’t of Pub. Safety v. Guam Civil Serv. Comm’n Bd., No. CIV.A.810033A, 1982 WL 30789, at *2 (D. Guam App. Div. 1982).

¹⁴⁰ See Sulkosky v. Morrison-Knudsen, 919 P.2d 158, 163 (Alaska 1996); Suryan v. Alaska Indus. Bd., 12 Alaska 571, 573 (D. Alaska 1950); Bonnell v. Med. Bd., 82 P.3d 740, 742 (Cal. 2003); Olive Proration Program Comm. for Olive Proration Zone No. 1 v. Agric. Prorate Comm’n, 109 P.2d 918, 921 (Cal. 1941); Murdock v. Perkins, 135 S.E.2d 869, 874–75 (Ga. 1964); Cook v. Jordan Bradley Supply Co., 394 S.E.2d 400, 401 (Ga. Ct. App. 1990); Yamada v. Natural Disaster Claims Comm’n, 513 P.2d 1001, 1004–05 (Haw. 1973); Weingart v. Dep’t of Labor, 521 N.E.2d 913, 919–20 (Ill. 1988); Pearce Hosp. Found. v. Ill. Pub. Aid Comm’n, 154 N.E.2d 691, 695 (Ill. 1958); Zomer v. W. River Farms, Inc., 666 N.W.2d 130, 132 (Iowa 2003); Franklin v. Iowa Dep’t of Job Serv., 277 N.W.2d 877, 881 (Iowa 1979); Phelps v. Sallee, 529 S.W.2d 361, 365 (Ky. 1975); Kennecott Copper Corp. v. Employment Sec. Comm’n, 432 P.2d 109, 113 (N.M. 1967); Armijo v. Save ‘N Gain, 771 P.2d 989, 993–94 (N.M. Ct. App. 1989); Olson v. Borough of Homestead, 443 A.2d 875, 878 (Pa. Commw. Ct. 1982); Denton County Elec. Coop., Inc. v. Pub. Util. Comm’n, 818 S.W.2d 490, 492–93 (Tex. App. 1991); Sexton v. Mount Olivet Cemetery Ass’n, 720 S.W.2d 129, 145–46 (Tex. App. 1986); Appalachian Reg’l Health Care, Inc. v. W. Va. Human Rights Comm’n, 376 S.E.2d 317, 321 (W. Va. 1988); Rosenberger v. City of Casper Bd. of Adjustment, 765 P.2d 367, 369 (Wyo. 1988); Hupp v. Employment Sec. Comm’n, 715 P.2d 223, 225 & n.3 (Wyo. 1986).

delegates of the Legislature. . . .’ [A]bsent specific statutory authority, an administrative agency cannot reopen a closed proceeding.”¹⁴¹

As in the federal system, state courts that have adopted the inherent power to reconsider affirmatively invoke it in cases of agency ministerial error,¹⁴² fraud,¹⁴³ and legal error.¹⁴⁴ Some states appear to have adopted a much more limited inherent power default that applies, for example, only when there has been a material change of circumstances.¹⁴⁵ Other state courts have instead gone beyond the federal doctrine and affirmatively allowed the inherent power presumption to hold in certain types of cases where federal courts generally have not. For instance, some state courts have said that the inherent default presumption affirmatively applies when new evidence is available¹⁴⁶ or when the agency has changed its mind.¹⁴⁷

Similarly, states following the inherent power default generally have found the inherent power precluded in the same situations as federal courts. Thus, some state courts are less willing to allow agencies the inherent power to reconsider when the decision appears to be a policy reversal,¹⁴⁸ when statutes or regulations already provide for a more limited form of reconsideration,¹⁴⁹ when parties have relied on the initial adjudication,¹⁵⁰ or when the reconsidera-

¹⁴¹ *Appalachian Reg'l Health Care, Inc. v. W. Va. Human Rights Comm'n*, 376 S.E.2d 317, 320–21 (W. Va. 1988) (quoting *Mountaineer Disposal Serv., Inc. v. Dyer*, 197 S.E.2d 111, 112 (W. Va. 1978)).

¹⁴² See *Taylor v. Dep't of Prof'l Regulation*, 520 So.2d 557, 560 (Fla. 1988); *Mutschler v. N.J. Dep't of Env'tl. Prot.*, 766 A.2d 285, 292 (N.J. Super. Ct. App. Div. 2001); *Clark v. Hansen*, 631 P.2d 914, 915 (Utah 1981); *In re Quackenbush*, 16 P.3d 638, 643–44 (Wash. 2001) (en banc).

¹⁴³ See *Mid-South Rd. Builders, Inc. v. Ark. Contractors Licensing Bd.*, 946 S.W.2d 649, 652 (Ark. 1997); *Aronson v. Brookline Rent Control Bd.*, 477 N.E.2d 182, 185–87 (Mass. App. Ct. 1985).

¹⁴⁴ See *Ramponi v. Bd. of Selectmen*, 533 N.E.2d 226, 228 (Mass. App. Ct. 1989).

¹⁴⁵ See *Grillo v. Zoning Bd. of Appeals*, 537 A.2d 1030, 1032 (Conn. 1988).

¹⁴⁶ See *Gonzalez v. Jones*, 495 N.Y.S.2d 802, 803–04 (N.Y. App. Div. 1985); *Perrotti v. Solomon*, 657 A.2d 1045, 1048–49 (R.I. 1995); *Career Servs. Review Bd. v. Utah Dep't of Corr.*, 942 P.2d 933, 945–46 (Utah 1997).

¹⁴⁷ See *Henry v. Dep't of Labor*, 293 A.2d 578, 581 (Del. Super. Ct. 1972).

¹⁴⁸ See *Calvert County Planning Comm'n v. Howlin Realty Mgmt., Inc.*, 772 A.2d 1209, 1223 (Md. 2001) (“What is *not* permitted is a ‘mere change of mind’ on the part of the agency.”).

¹⁴⁹ See *Suryan v. Alaska Indus. Bd.*, 12 Alaska 571, 573–74 (D. Alaska 1950).

¹⁵⁰ See *Miller v. Bd. of Teachers Pension & Annuity Fund*, 432 A.2d 560, 563 (N.J. Super. Ct. App. Div. 1981).

tion was not undertaken in a timely fashion.¹⁵¹ In addition, several state cases provide grounds for rebutting the inherent power presumption that are not evident in federal cases. For example, state courts have found the inherent power to reconsider precluded when the agency's enabling act contains express provisions for judicial review,¹⁵² when statutes expressly authorize the agency to develop rules for rehearings and the agency has failed to do so,¹⁵³ and when the reconsideration is issued to cure procedural defects in the original adjudication that the agency could have addressed when it reviewed the case initially.¹⁵⁴

The states that have rejected the inherent power to reconsider have given a number of reasons for departing from the federal rule. Most common are concerns about unchecked agency power. As the Supreme Court of Georgia noted, "there would be no limitation upon the exercise of the power, no provisions for appropriate procedure, . . . it could be exercised at any time after the original decision was made, and as many times as the [agency] wished . . ." ¹⁵⁵ This criticism of the inherent power to reconsider is addressed more fully in Section II.C below. In addition, several state courts have rejected the federal rule on the grounds that there is an incompatibility between the concepts of agencies as creatures of legislatures and agencies possessing inherent powers that do not come from statutes.¹⁵⁶ Still other states have disallowed the inher-

¹⁵¹ See *Peoples Gas Sys., Inc. v. Mason*, 187 So. 2d 335, 338–40 (Fla. 1966); *Stowe v. Bologna*, 592 N.E.2d 764, 768 (Mass. App. Ct. 1992); *Indursky v. Bd. of Trs. of Pub. Employees' Ret. Sys.*, 349 A.2d 86, 91 (N.J. Super. Ct. App. Div. 1975); *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 502 N.E.2d 590, 597 (Ohio 1986).

¹⁵² See *Baldwin County Comm'n v. Ala. Env'tl. Mgmt. Comm'n*, 526 So. 2d 564, 566–67 (Ala. 1988); *Olive Proration Program Comm. for Olive Proration Zone No. 1 v. Agric. Prorate Comm'n*, 109 P.2d 918, 921 (Cal. 1941).

¹⁵³ See *Ayala v. Hill*, 664 P.2d 238, 242 (Ariz. Ct. App. 1983).

¹⁵⁴ See *Preston v. Coughlin*, 562 N.Y.S.2d 867, 869 (N.Y. App. Div. 1990).

¹⁵⁵ *Murdock v. Perkins*, 135 S.E.2d 869, 875 (Ga. 1964); see also *Suryan v. Alaska Indus. Bd.*, 12 Alaska 571, 573–74 (D. Alaska 1950) ("There must be an end to litigation. If it were held that the [agency] had this power, it would be wholly unrestrained . . .").

¹⁵⁶ See, e.g., *Pearce Hosp. Found. v. Ill. Pub. Aid Comm'n*, 154 N.E.2d 691, 695 (Ill. 1958); *Denton County Elec. Coop. v. Pub. Util. Comm'n*, 818 S.W.2d 490, 492 (Tex. App. 1991) ("Administrative agencies are creatures of statute and have no *inherent* authority.").

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ent power on the basis of reliance interests in the initial adjudication.¹⁵⁷

Aside from the various doctrinal expansions and contractions that are revealed when comparing state and federal law, what is most interesting about state case law in this area is the divergence over the proper default. The next Part examines whether the inherent power default is justified in the federal system.

II. AN EVALUATION OF THE INHERENT POWER TO RECONSIDER

This Part presents three main arguments against the inherent power to reconsider, and at the very least shifts the burden to those who believe it can be justified. The arguments may have broader impact as well. As part of the project of providing an initial foray into inherent agency powers, these are the kinds of arguments that might be considered when examining other inherent powers.

First, while various Supreme Court precedents have been marshaled in support of an inherent power to reconsider, these cases lend little support to the proposition. A more thorough reading indicates that they may in fact foreclose it.

Second, even if administrative agencies possess a pre-APA common-law power to reconsider at least until a reconsideration provision has been codified, the fact that both Congress and agencies have provided so many detailed rules for reconsideration in various statutes and regulations suggests that any such background power no longer exists. On this view, the network of reconsideration provisions in statutes and administrative regulations has resulted in the regulation of administrative reconsideration to such a pervasive extent that broader inherent powers to reconsider should be heavily disfavored.

Third, and finally, an inherent power to reconsider is normatively unattractive because it results in significant procedural uncertainty. The inherent power to reconsider is necessarily an admission that formal rules do not exist. The federal common law described in Part I that has built up around the concept of an “inherent power” is also too unreliable to provide any sort of depend-

¹⁵⁷ *Yamada v. Natural Disaster Claims Comm’n*, 513 P.2d 1001, 1007 (Haw. 1973); *Appalachian Reg’l Health Care v. W. Va. Human Rights Comm’n*, 376 S.E.2d 317, 320–21 (W. Va. 1988).

able guidelines. The result is that an inherent power to reconsider prevents litigants from depending on the finality of their adjudications.

These three arguments lead to the conclusion that administrative agencies should only have the power to reconsider when Congress has granted this power expressly, or when an agency has promulgated a valid reconsideration regulation pursuant to its rulemaking powers. An inherent power to reconsider should not exist. This Part concludes by anticipating the most obvious defenses of the inherent power to reconsider and suggests why they are insufficient to surpass the burden created by the three arguments advanced in this Part.

A. Supreme Court Precedent

The Supreme Court has never ratified the proposition that administrative agencies possess the inherent authority to reconsider their adjudications in the absence of express statutory or regulatory authority. Nevertheless, many federal courts have attempted to locate the inherent power to reconsider in *Civil Aeronautics Board v. Delta Air Lines, Inc.*,¹⁵⁸ a case decided by the Court in 1961, and a smaller number have found support in *United Gas Improvement Co. v. Callery Properties*,¹⁵⁹ decided four years later. Neither of these cases, however, provides support for an inherent power to reconsider. More importantly, *Delta Air Lines* strongly suggests the very opposite: The power to reconsider must come from Congress, or from the rulemaking process. This conclusion finds further support in two other cases: *United States v. Seatrail Lines*¹⁶⁰ and *Butte, Anaconda & Pacific Railway v. United States*.¹⁶¹ The argument advanced here is that the stronger inference from the limited Supreme Court precedent in this area is that with the possible exception of reconsiderations that address clerical error or perhaps fraud, agencies may not reconsider their decisions in the absence of express statutory or regulatory authorization.

¹⁵⁸ 367 U.S. 316 (1961).

¹⁵⁹ 382 U.S. 223 (1965).

¹⁶⁰ 329 U.S. 424 (1947).

¹⁶¹ 290 U.S. 127 (1933).

I. Delta Air Lines and Seatrain Lines

A number of federal courts have used *Delta Air Lines* as authority for the inherent power default.¹⁶² In *Delta Air Lines*, the Civil Aeronautics Board (“CAB”) granted Delta certificates of public convenience and necessity to operate several flights from Florida and Georgia to the Great Lakes region.¹⁶³ Pursuant to a reconsideration regulation promulgated by the CAB under its rulemaking power, several regional airlines filed petitions for reconsideration challenging the breadth of Delta’s certificate.¹⁶⁴ Over five months after Delta’s certificates had taken effect, the CAB issued a new order barring operation of certain routes that had been approved in the initial determination and that Delta had already begun to fly.¹⁶⁵ This reconsideration was done without formal notice or a hearing.¹⁶⁶ The Court noted that the CAB acknowledged that its reconsideration regulation was not authorized by statute, but declined to decide the case on this ground: “[The CAB] admit[s] that there is no express statutory authority for the Board to entertain petitions for reconsideration . . . but they assert, *and we assume arguendo* they are correct, that the Board has implied power to accept such petitions.”¹⁶⁷ The Court decided the case on the narrower ground that the CAB could not reconsider its initial decision without notice and a hearing.¹⁶⁸

While the *Delta Air Lines* Court did not reach the issue addressed in this Note, it did offer fairly extensive commentary on the power to reconsider, which at the very least suggests that the inherent power to reconsider does not easily follow from its decision. The Court began with what has since become the primary excerpt used by lower federal courts to justify the inherent power default:

¹⁶² See, e.g., *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002); *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193–94 (2d Cir. 1991); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972); *Aubre v. United States*, 40 Fed. Cl. 371, 376 (1998); see also *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993).

¹⁶³ *Delta Air Lines*, 367 U.S. at 317–18, 320.

¹⁶⁴ *Id.* at 318–19. For the reconsideration provision, see *id.* at 318 n.2.

¹⁶⁵ *Id.* at 320.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 325–26 (emphasis added).

¹⁶⁸ *Id.* at 327.

Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other. Since these policies are in tension, it is necessary to reach a compromise¹⁶⁹

This passage has been taken by lower federal courts to mean that it is their responsibility to fashion a rule that mediates between these competing interests. The reasoning of the Second Circuit is typical: “[A]n agency may, on its own initiative, reconsider . . . its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review. . . . This policy balances the desirability of finality against the general public interest in attaining the correct result in administrative cases.”¹⁷⁰

Delta Air Lines does not suggest, however, that courts should resolve the competing interests of finality and accurate decisionmaking with something approximating the inherent power default and its attendant doctrinal arms. Rather, it is a balance that must be struck by Congress, either through legislation or delegation to an agency. Several arguments support this interpretation of *Delta Air Lines*. First, strong language in the opinion indicates that the Court believed reconsideration procedures should be determined by the legislature. Immediately after setting forth its dueling interests framework, the Court expressed doubt that the CAB’s reconsideration regulation was “a happy resolution of [the] conflicting interests.”¹⁷¹ The Court went on: “[T]he fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.”¹⁷² The opinion concluded in similarly forceful terms: “[W]e think that both administrative and judicial feelings have been opposed to the proposition that the agencies may expand their powers of reconsideration without a solid foundation in the language of the statute.”¹⁷³ The implication is that the conferral of adjudicatory

¹⁶⁹ Id. at 321–22.

¹⁷⁰ *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193–94 (2d Cir. 1991) (citations omitted).

¹⁷¹ *Delta Air Lines*, 367 U.S. at 322.

¹⁷² Id.

¹⁷³ Id. at 334.

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power upon an agency does not include the power to reconsider.¹⁷⁴ The dissent notably disagreed, arguing that “the power to reconsider is inherent in the power to decide.”¹⁷⁵ This remains the only Supreme Court opinion to accept the inherent power default.

Second, the *Delta Air Lines* Court’s treatment of *United States v. Seatrain Lines* is further evidence that the inherent power default likely contravenes *Delta Air Lines* rather than follows from it. As described in Section I.B.1 above, the Court in *Seatrain Lines* held that the ICC lacked the statutory authority to reconsider water carrier certificates, and suggested that reconsiderations that appeared to be policy reversals stood on even less certain ground.¹⁷⁶ The Court in *Delta Air Lines*, referring to *Seatrain Lines* as “the decision which is analytically most relevant,”¹⁷⁷ invoked *Seatrain Lines* as support for its “creature of Congress” starting point.¹⁷⁸ Furthermore, the Court held that *Seatrain Lines* stood for the proposition that the power to reconsider must come from Congress: “[T]he Court [in *Seatrain Lines*] spoke in general terms of the rule that supervising agencies desiring to change existing certificates must follow the procedures ‘specifically authorized’ by Congress and cannot rely on their own notions of implied powers in the enabling act.”¹⁷⁹ Most critically for the inherent power presumption, it described *Seatrain Lines* as “overruling the Interstate Commerce Commission’s contention that it had inherent power to reconsider effective certificates.”¹⁸⁰

Finally, it is not surprising that the recent cases in the Sixth Circuit that challenge the validity of the inherent power default, dis-

¹⁷⁴ The implication is not necessarily that an agency cannot grant itself the power to reconsider pursuant to a statutory provision according it general rulemaking power over its own procedures. In *Delta Air Lines*, the Court did not have to answer this question because other portions of the statute provided limitations and guidelines for modifications, suspensions, and revocations of licenses. 367 U.S. at 323–24. These provisions prevented the agency from passing a reconsideration regulation that conflicted with the statute, which is precisely what the agency had done.

¹⁷⁵ *Id.* at 339 (Whittaker, J., dissenting) (quoting *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)).

¹⁷⁶ *United States v. Seatrain Lines*, 329 U.S. 424, 428–30 (1947).

¹⁷⁷ *Delta Air Lines*, 367 U.S. at 333.

¹⁷⁸ *Id.* at 322.

¹⁷⁹ *Id.* at 333–34, quoting *U.S. v. Seatrain Lines*, 329 U.S. 424, 432 (1947).

¹⁸⁰ *Id.* at 328–29.

cussed in Part I,¹⁸¹ rely heavily on *Delta Air Lines*. In *Bartlik v. Department of Labor*,¹⁸² the Sixth Circuit rejected the inherent default rule, holding that it “is at odds with the Supreme Court’s directive in *Delta Air Lines*.”¹⁸³ It explained that the competing policies of finality and reaching the correct result were not to be determined by a judicially crafted default presumption: “These interests are balanced by Congress when it explicitly provides for and circumscribes agency reconsideration.”¹⁸⁴ The decision was overruled on other grounds.¹⁸⁵ Several years later, in an unpublished opinion, the Sixth Circuit again declined to follow the inherent power default, relying entirely on “[t]he lesson of *Delta*.”¹⁸⁶ These two Sixth Circuit decisions indicate that at least where the agency has not promulgated a valid regulation providing for reconsideration, the proper reading of *Delta Air Lines* is that Congress must itself provide the power to reconsider.

In sum, contrary to the way in which it has been invoked by lower federal courts, *Delta Air Lines* does not provide support for the prevailing default rule that agencies can reconsider their decisions in the absence of statutory or regulatory authority. As argued above, the more probable inference is that it proscribes such a default position. Given the strong language in the opinion tending to suggest that the power to reconsider must be rooted in a statute, the *Delta Air Lines* Court’s interpretation of *Seatrail Lines*, and the fact that the Sixth Circuit has recently found the inherent power default incompatible with *Delta Air Lines*, *Delta Air Lines* has at best been ignored by most lower federal courts, and at worst been misconstrued.

¹⁸¹ For an overview of these cases, see *supra* note 22.

¹⁸² 1994 WL 487174 (6th Cir. 1994), *rev’d en banc* on other grounds, 62 F.3d 163 (6th Cir. 1995).

¹⁸³ *Id.* at *3 n.3.

¹⁸⁴ *Id.* at *3.

¹⁸⁵ *Bartlik v. Dep’t of Labor*, 62 F.3d 163 (6th Cir. 1995) (*en banc*).

¹⁸⁶ *Simpson v. Dep’t of Hous. and Urban Dev.*, No. 95-4139, 1997 WL 103364, at *2 (6th Cir. 1997).

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2. *United Gas Improvement Co. v. Callery Properties, Inc.*

A smaller number of lower federal courts have invoked *United Gas Improvement Co. v. Callery Properties, Inc.*¹⁸⁷ as support for an inherent power to reconsider.¹⁸⁸ These courts have relied on only a single line in the opinion: “An agency, like a court, can undo what is wrongfully done by virtue of its order.”¹⁸⁹ Whatever the attractiveness of the quotation, *United Gas Improvement* provides no support for the inherent power default, and is in fact largely irrelevant to the question.

United Gas Improvement concerned the ability of the Federal Power Commission to order gas companies to furnish refunds to customers who had been charged under erroneously high rates prescribed by the Commission. The Commission initially granted several Louisiana gas producers certificates of public convenience and necessity, and specified the applicable rates for gas contracts.¹⁹⁰ The rates were challenged by consumers, and the Supreme Court, vacating the judgment of the Third Circuit, remanded the case to the agency for consideration in light of another Supreme Court decision. The Commission thereafter adjusted the rates, and ordered the gas producers to refund customers for the excess of the proper price they had already collected under the earlier rates.¹⁹¹ The Court rejected the gas producers’ claim that the Commission lacked the power to order refunds:

While the Commission has no power to make reparation orders, its power to fix rates under [the applicable statute] being prospective only, it is not so restricted where its order . . . has been overturned by a reviewing court. . . . [J]udicial review at times results in the return of benefits received under the upset adminis-

¹⁸⁷ 382 U.S. 223 (1965).

¹⁸⁸ See, e.g., *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989); *Iowa Power & Light Co. v. United States*, 712 F.2d 1292, 1297 (8th Cir. 1983). In addition, at least one state court dissenting opinion has used *United Gas Improvement* as support for an inherent power to reconsider. See *Rosenberger v. City of Casper Bd. of Adjustment*, 765 P.2d 367, 372 (Wyo. 1988) (Urbigkit, J., dissenting).

¹⁸⁹ *United Gas Improvement Co.*, 382 U.S. at 229.

¹⁹⁰ *Id.* at 225.

¹⁹¹ *Id.* at 226.

trative order. An agency, like a court, can undo what is wrongfully done by virtue of its order.¹⁹²

Thus, the Court upheld the Commission's refund scheme.

The *United Gas Improvement* Court's reasoning provides no support for the proposition that agencies possess the inherent power to reconsider. To the extent that a refund order can be analogized to a reconsideration, the Court did not hold that the agency had an inherent power to order refunds. Instead, it construed the Natural Gas Act to allow refunds when they were made by the Commission in light of a court order.¹⁹³ By concluding that the Commission was not "so restricted" in this regard, it had no occasion to determine whether the agency possessed a broader power to issue refunds in the absence of a judicial mandate.

More importantly, *United Gas Improvement* is entirely irrelevant because it concerns ratemaking, which the APA characterizes as rulemaking, not adjudication.¹⁹⁴ As the Second Circuit has recently made clear, the series of administrative reconsideration precedents reviewed in Part I of this Note are limited to the context of adjudication: "[T]hese cases . . . simply recognize the power to reconsider decisions reached in individual cases by agencies in the course of exercising quasi-judicial powers, which are distinct from the legislative powers and their attendant procedures involved in rulemaking."¹⁹⁵ For these reasons, *United Gas Improvement* is not good authority for the inherent power to reconsider.

¹⁹² Id. at 229 (quotations and citations omitted).

¹⁹³ Cf. *SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943) (*Chenery I*) (finding the grounds relied upon by the Securities and Exchange Commission ("SEC") insufficient to support a reorganization order); *SEC v. Chenery Corp.*, 332 U.S. 194, 200–01 (1947) (*Chenery II*) (upholding the same order when the SEC reconsidered case in light of judicial order and reached same decision on different grounds).

¹⁹⁴ The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates, . . . prices, . . . or practices bearing on any of the foregoing." 5 U.S.C. § 551(4) (2000) (emphasis added). "Rulemaking" is defined as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

¹⁹⁵ *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 202–03 (2d Cir. 2004); see also Schopler, *supra* note 1, at 941 (limiting its discussion to judicial or quasi-judicial functions).

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3. *Butte, Anaconda & Pacific Railway Co. v. United States*

Butte, Anaconda & Pacific Railway Co. v. United States, a somewhat dated and apparently all-but-forgotten case, provides further evidence that Supreme Court precedent counsels against the inherent power to reconsider.¹⁹⁶ *Butte* concerned payments made by the federal government to railroads for deficits incurred during a period when the President took control of railroad operations in the United States. The railroads argued that they had suffered financial harm when the President later relinquished control, and in the Transportation Act of 1920, Congress provided that railroads would be reimbursed for “deficits” incurred during this period.¹⁹⁷ Accordingly, the ICC determined that the *Butte, Anaconda & Pacific Railway* was entitled to approximately \$500,000. Two years later, after the reimbursement had been distributed to *Butte* stockholders and reinvested, the ICC reopened the proceeding and demanded that the railroad return the reimbursement, on the ground that the ICC had “misconstrued the word ‘deficit,’ so as improperly to extend the scope of [the statute].”¹⁹⁸

Writing for the Court, Justice Brandeis held that the ICC lacked the authority to reopen the matter because Congress had not provided for administrative reconsideration or judicial review: “Since Congress has not provided a method of review, neither the Commission nor a court has power to correct the alleged error after payment [is] made”¹⁹⁹ Noting that the meaning of the statutory term “deficit” had been the subject of much debate, Brandeis held that the reconsideration was “‘merely a revision of judgment in respect of matters of opinion,’” and not a mistake.²⁰⁰ Despite his strong suspicion that the agency was in fact effectuating a policy change, Brandeis cast the opinion much more broadly, holding that since “Congress did not provide a method of review . . . it intended

¹⁹⁶ *Butte, Anaconda & Pac. Ry. Co. v. United States*, 290 U.S. 127 (1933). The case has not been cited by either the Supreme Court or any lower federal courts in the reconsideration context. Only the Supreme Court of Hawaii found it relevant when determining that Hawaii law did not include the inherent power to reconsider. *Yamada v. Natural Disaster Claims Comm’n*, 513 P.2d 1001, 1006 (Haw. 1973).

¹⁹⁷ *Butte, Anaconda & Pac. Ry. Co.*, 290 U.S. at 137.

¹⁹⁸ *Id.* at 134.

¹⁹⁹ *Id.* at 136.

²⁰⁰ *Id.* at 135 (quoting *United States v. Great N. Ry. Co.*, 287 U.S. 144, 151 (1932)).

to leave the Government, as well as the carrier, remediless whether the error be one *of fact or of law*.”²⁰¹ The ICC was apparently powerless to reconsider under any circumstances.

It is unsurprising that *Butte* has remained largely unearthed, as it predates the APA and its procedural reforms, and is somewhat foreign to the modern tendency, buttressed by the APA, to presume the availability of judicial review.²⁰² Nevertheless, *Butte* lends some additional support to the contention that the Supreme Court precedent in the area of administrative reconsideration points more strongly against the validity of the inherent power default than in favor of it.

4. Has the Supreme Court Entirely Foreclosed the Inherent Power to Reconsider?

While much of the inherent power doctrine created in the lower federal courts finds little support in the Supreme Court precedents discussed in this Section, it is arguable that reconsideration to correct clerical error, and perhaps to address fraud, is not foreclosed. In *American Trucking Associations v. Frisco Transportation Co.*,²⁰³ discussed at length in Section I.A.1, the Court held that the power to correct clerical errors “has long been recognized.”²⁰⁴ While the Court did find tenuous support for this power in a statutory provision, lower courts have read the opinion as allowing reconsideration for clerical error regardless of statutory authorization,²⁰⁵ a fair reading of the case.²⁰⁶

To the extent that cases such as *Delta Air Lines* evince distaste for administrative reconsideration not only because of implications

²⁰¹ Id. at 143 (emphasis added).

²⁰² See, e.g., *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (describing “the strong presumption that Congress intends judicial review of administrative action” (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986))); *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (asserting that “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review”) (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80).

²⁰³ 358 U.S. 133 (1958).

²⁰⁴ Id. at 145.

²⁰⁵ See supra note 39, and cases cited therein.

²⁰⁶ The Sixth Circuit, in rejecting the inherent power default, also admitted that ministerial error could likely be addressed without statutory or regulatory authorization. *Bartlik v. Dep’t of Labor*, 1994 WL 487174, at *3 n.3 (6th Cir. 1994), rev’d en banc on other grounds, 62 F.3d 163 (6th Cir. 1995).

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about agency power but also as a matter of possible due process concern, the clerical error cases can be reconciled because parties may expect that an agency will reopen an adjudication to address an administrative mistake. This is because the correction of ministerial errors may have a certain historical legacy that other types of reconsiderations do not. As the *American Trucking* Court itself noted, “the presence of authority in administrative officers and tribunals to correct such errors has long been recognized—probably so well recognized that little discussion has ensued in reported cases.”²⁰⁷ The danger of a surprise reopening therefore seems to be lessened in the clerical error context. While the Court has not addressed fraud in the context of administrative reconsideration, it would seem that the same rationale would hold, with perhaps even greater force. Moreover, in the context of Article III courts, the Supreme Court has not hesitated to recognize inherent judicial powers that allow judges to punish parties for misrepresentations and foul play.²⁰⁸

B. Pervasive Regulatory Framework

The second argument against the inherent power to reconsider is that by providing express reconsideration provisions in federal statutes and by delegating to agencies the power to devise their own procedures for adjudication, Congress has pervasively regulated in the field of administrative reconsideration to such an extent that broader “inherent” powers to reconsider not conferred by statute or regulation should be heavily disfavored. Indeed, the United States Code and the Code of Federal Regulations contain hundreds of reconsideration provisions that are tailored to particular agencies, statutory schemes, and agency actions.²⁰⁹ Many of

²⁰⁷ *American Trucking*, 358 U.S. at 145.

²⁰⁸ See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) (inherent power to issue sanctions); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980) (inherent power to order attorneys fees); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629 (1962) (inherent power to dismiss for want of prosecution).

²⁰⁹ A comprehensive citation to these provisions would last for pages. For several examples, see 5 U.S.C. § 5335(c) (2000) (government employees may seek reconsideration of agency determination that employee has not performed to an acceptable level of confidence); 15 U.S.C. § 45(b) (2000) (reconsiderations by the FTC); 15 U.S.C. § 3416(a)(2) (2000) (procedures for reconsideration for actions by FERC under the Natural Gas Policy Act); 16 U.S.C. § 8251(a) (2000) (reconsideration proce-

these provisions carefully describe both the time limits for filing and considering petitions for reconsideration²¹⁰ and the grounds for reopening.²¹¹ Others provide extremely detailed rules for the consideration of new evidence,²¹² the filing of answers to petitions for reconsideration,²¹³ and even the maximum page length for motions to reconsider.²¹⁴ The implication is that even if administrative agencies did possess some kind of “inherent” common-law power to reconsider when engaged in quasi-judicial actions, as Judge Posner has suggested,²¹⁵ the better argument is that the existence of such a detailed

dures for FERC under the Federal Power Act); 7 C.F.R. § 1.146 (2005) (reconsideration procedures for adjudications by the Department of Agriculture); see also *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) (noting that a review of agency enabling acts “reveals a wide variety of detailed provisions concerning reconsideration, each one enacted in an attempt to tailor the agency’s discretion to the particular problems in the area”); Davis, *Administrative Law Treatise*, supra note 1, § 18.09, at 606–08 (offering several examples).

²¹⁰ 15 U.S.C. § 45(b) (2000) (FTC must determine whether to alter, modify or set aside a final judgment no later than 120 days after the filing of a petition for reconsideration); 15 U.S.C. § 3416(a)(2) (2000) (parties must file petitions for reconsideration of actions under the Natural Gas Policy Act within thirty days of the initial adjudication, and FERC must act upon the petition within thirty days after it is filed or petition is considered denied); 47 U.S.C. § 405(a) (2000) (petition for reconsideration for adjudication by the Federal Communications Commission (“FCC”) must be filed within thirty days from the date of public notice); 7 C.F.R. § 1.146(a)(3) (2000) (petition for reconsideration must be filed within ten days after service of decision on party seeking reconsideration).

²¹¹ 15 U.S.C. § 45(b) (2000) (FTC may order a reconsideration when “conditions of fact or of law have so changed as to require such an action or if the public interest shall so require”); 33 U.S.C. § 922 (2000) (deputy commissioner may reconsider compensation awards under the Longshore and Harbor Workers’ Compensation Act “on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner”); 20 C.F.R. § 261.2(c) (2004) (benefits decisions by the Railroad Retirement Board may be reconsidered when, among other reasons, the initial adjudication was obtained by fraud or a person previously thought to be dead is found alive).

²¹² See, e.g., 47 U.S.C. § 405(a) (2000) (FCC) (allowing FCC to consider only evidence that has been newly discovered or is newly available or which the Commission “believes should have been taken in the original proceeding”).

²¹³ See, e.g., 10 C.F.R. § 2.711(b) (2005) (timing rules for filing answers to petitions for reconsideration for adjudications entered by the Nuclear Regulatory Commission).

²¹⁴ See, e.g., 17 C.F.R. § 201.470(b) (2004) (motions for reconsideration for adjudications by the SEC may not exceed fifteen pages).

²¹⁵ *Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995) (“In recognition of the fallibility of earthly lawgivers . . . every administrative agency that exercises adjudicative authority [] has been understood to have (at least until the matter is regularized in rules . . .)

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statutory and regulatory web fairly precludes any such broader ability to reconsider.

There are three possible responses to this pervasive regulatory framework argument. The first, suggested by Judge Posner above, is that Congress may be operating with the inherent power to reconsider as the baseline. On this view, statutes or regulations providing rules for administrative reconsideration are in effect limitations on a plenary power to reconsider. While this view may be plausible, several considerations mitigate against it. Most notably, the Supreme Court itself has already recognized the relevance of widespread statutory and regulatory reconsideration provisions to the validity of the inherent power default. In *Delta Air Lines*, after surmising that “the determinative question is not what the [agency] thinks it should do but what Congress has said it can do,” the Court indicated that

This proposition becomes clear beyond question when it is noted that Congress has been anything but inattentive to this issue in the acts governing the various administrative agencies. A review of these statutes reveals a wide variety of detailed provisions concerning reconsideration, each one enacted in an attempt to tailor the agency’s discretion to the particular problems in the area.²¹⁶

According to *Delta Air Lines*, then, agencies are more likely to lack broad non-statutory powers in the reconsideration context because Congress has actively provided detailed statutory rules to govern reconsiderations. The large number of reconsideration provisions that have been promulgated by agencies pursuant to their delegated power to devise rules of administrative procedure would seem to only further buttress this claim.²¹⁷ In addition to the impli-

the inherent power to reconsider its decisions”); see also 2 Wright et al., *Federal Practice and Procedure*, supra note 28, § 2854, at 239 (noting that Rule 60(a) of the Federal Rules of Civil Procedure expressly recognized “a power that the courts always have had”).

²¹⁶ *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961).

²¹⁷ It is possible to go further and contend that agencies should be precluded from developing their own rules of reconsideration because Congress’s extensive regulation in the area indicates an intention to occupy the field. This contention is not made here because it appears that agencies often develop rules of procedure that are similar to rules provided by Congress in various statutory schemes. In addition, many enabling

cations of *Delta Air Lines*, the view that Congress operates against the backdrop of an inherent power to reconsider seems less likely given both the quantity and specificity of the various reconsideration statutes and regulations.

The second argument against the pervasive regulatory framework claim is that Congress may be considered to have acquiesced in the inherent power to reconsider because it has not overruled it by statute. On this view, when Congress does provide for reconsideration in statutes, it is expressing disapproval with the inherent power to reconsider in a particular instance, but not more generally. This argument also seems less plausible given the relevant Supreme Court precedent and the sheer quantity of reconsideration statutes and regulations. It also suffers from the problem that interpreting legislative inaction does not yield obvious conclusions.²¹⁸ Congressional inaction may suggest congressional approval, but it may just as easily reflect procedural impediments in the legislative process, an inability to isolate the issue, or an interest in avoiding the problem.

Third, it might be contended that the pervasive regulation of administrative reconsideration might indicate an intention on the part of Congress that reconsideration be generally available. On this view, the various statutory and regulatory provisions indicate a policy in favor of reconsideration which should be applied even where no specific statute or regulation provides for it. At least one court has adopted this reasoning.²¹⁹ The problem with this argument, in addition to the fact that it seems to contravene the inference that the Supreme Court made in *Delta Air Lines*, is that the more plausible inference from the existence of reconsideration provisions in other statutes is that Congress did not want to allow

acts grant agencies the authority to develop rules of procedure, which suggests that Congress may not intend to foreclose agencies from developing their own formal reconsideration policies. In any event, whether agencies should be precluded from developing rules of reconsideration is a different question from whether courts should be reluctant to grant an inherent power against the backdrop of a network of both statutory and regulatory reconsideration provisions.

²¹⁸ See *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (“[C]ongressional inaction is a canard.”); William N. Eskridge, Jr. et al., *Cases and Materials on Legislation* 1034 (2001) (discussing the Supreme Court’s inconsistent treatment of congressional inaction).

²¹⁹ *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972).

reconsideration in the statute at issue. This is especially the case given the diversity of details in the universe of reconsideration provisions.²²⁰ It is difficult to infer a general policy in favor of reconsideration when the restrictions imposed by Congress and the agencies in the context of administrative reconsideration differ in so many ways. And in any event, if Congress did in fact want reconsideration to be generally available, it could have easily included a general reconsideration provision in the APA, as many state legislatures have done. For these reasons, the pervasive regulation argument described above seems more persuasive.

Lastly, it may be noted that the pervasive regulation argument is by no means novel, and is found in analogous contexts. Courts may be willing to conclude that state laws are preempted in a field where the federal government has legislated in a detailed and extensive manner.²²¹ Similarly, the Court has held that a private right of action to enforce constitutional rights, commonly known as a *Bivens* action,²²² is not available when Congress has created an “elaborate remedial scheme” as part of a “massive and complex welfare benefits program.”²²³ These examples from other areas of law support the claim made in this Section.

C. Procedural Uncertainty

The third argument against the inherent power to reconsider is that it generates considerable uncertainty with regard to the practices and procedures that agencies must follow when conducting reconsiderations. This is because the inherent power default is invoked in precisely those situations where agencies do not have formalized procedures for reopening adjudications. By granting agencies the power to reconsider independent of statutes or regula-

²²⁰ See supra notes 209–14 and accompanying text for several examples.

²²¹ See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (“[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” (quotations omitted)). For a discussion of field preemption, see Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 227 (2000).

²²² *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²²³ *Schweiker v. Chilicky*, 487 U.S. 412, 414, 429 (1988).

tions, federal courts essentially allow agencies to make up the rules as they go along. This was the primary reason advanced by the Supreme Court of California when it rejected the inherent power default as a matter of state administrative law:

But the rule . . . that a[n] . . . [agency] has no such power in the absence of express authorization, is sound and practical. If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? . . . These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure.²²⁴

Nor has a reliable body of federal common law developed to fill this void. While Part I provided an overview of the contours of the law in this area, even the most crystalline aspects of the doctrine provide poor substitutes for the guidance afforded by an express reconsideration provision, such as, for example, a provision that instructs an agency to order a reconsideration within twenty days of the filing of a petition. How long an agency may wait before initiating a reconsideration, what grounds are proper for ordering reconsideration, and whether notice and an opportunity for a hearing are required are only a few of the questions left open by an ad-hoc approach to agency reconsideration.

Federal courts have not hesitated to recognize this infirmity. Indeed, many of the cases are laced with judicial suspicion about the lack of formal agency procedures in reconsideration proceedings.²²⁵ Other courts have been even more forthright. For example, after upholding the power of the Postal Service to reconsider a refund

²²⁴ *Heap v. City of Los Angeles*, 57 P.2d 1323, 1324 (Cal. 1936). This argument has been made in other state courts as well. See, e.g., *Career Servs. Review Bd. v. Utah Dep't of Corrs.*, 942 P.2d 933, 949 (Utah 1997) (Howe, J., dissenting) (criticizing the adoption of the inherent power default because it "introduces uncertainty and chaos into practicing before administrative agencies in this state").

²²⁵ See *Elkem Metals Co. v. United States*, 193 F. Supp. 2d 1314, 1324 (Ct. Int'l Trade 2002) (implying a hearing requirement into the inherent power to reconsider after noting that the agency "had no statutory or regulatory guidance as to how the proceedings were to be conducted").

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determination in the absence of an authorizing statute or regulation, the Second Circuit noted its reluctance:

[W]e hasten to express our discomfort with governmental agencies that either fail or refuse to promulgate rules concerning reconsideration of their decisions. We believe that the absence of such rules at the agency level can result in administrative unfairness to individual claimants. Indeed, it is quite clear that an agency without these kinds of rules has the potential to give claimants the proverbial run-around.²²⁶

The court in *Confederated Tribes v. United States* adopted the inherent power default with similar reservations: “Objections to the non-statutory right of reconsideration center on the fear that this right could become a free-wheeling legal device lacking any limitations on its usage.”²²⁷ While these and other like statements appear designed to induce agencies to promulgate more formalized reconsideration procedures, federal courts seem unaware that their holdings in fact produce the very opposite result. By granting agencies the inherent power to reconsider, federal courts have provided a significant disincentive for agencies to adopt reconsideration provisions or to seek such provisions from Congress, because the judicially crafted inherent power to reconsider provides the ultimate in agency flexibility.

D. Defending the Inherent Power Default

Perhaps surprisingly, the rationale for the inherent power to reconsider has not been fully vetted in the case law. Moreover, any rationale that depends on some conception of the fundamental or “inherent” powers of any adjudicatory body, including agencies, seems foreclosed by both the relevant Supreme Court case law in the administrative reconsideration context, and by the fact that both Congress and agencies have provided for detailed rules to govern most reconsiderations. Nevertheless, it seems that proponents of an inherent power to reconsider could still point to three counter-arguments. First, it may be contended that an inherent

²²⁶ *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 195 (2d Cir. 1991).

²²⁷ 177 Ct. Cl. 184, 190 (1966).

power to reconsider is necessary to give the agency the maximum flexibility to reach what *Delta Air Lines* called “the right result.”²²⁸ Second, the inherent power could prevent needless appeals to Article III courts because an agency could resolve the issue on its own. Finally, it might be argued that allowing an inherent power to reconsider would be consistent with the other inherent powers that agencies already presumably possess. Each of these arguments is addressed in turn, and as argued below, none of them is sufficient to meet the burden presented by the three arguments outlined above.

First, it might be contended that an agency should have an inherent power to reconsider because it will give the agency as much flexibility as possible to achieve the “right” result in each case. On this view, if an agency has arrived at what it later considers the “wrong” result in its initial adjudication, it should be able to revisit the adjudication to cure the alleged error. Indeed, this is most likely analogous to the probable rationale for including formal procedures for reconsideration in statutes or agency rules of procedure. As a 1953 article addressing administrative reconsideration stated at the outset: “Re-examination and reconsideration are among the normal processes of intelligent living.”²²⁹

There are several problems with this rationale. First, agencies could still retain a large amount of flexibility by promulgating a broad power to reconsider in their rules of administrative procedure, as many agencies have already done. Promulgating such a rule would provide notice to litigants, and would be unlikely to detract from the agency’s flexibility to reach the correct result. In fact, adopting express rules for reconsideration might give the agency even greater flexibility, because agencies could avoid altogether those aspects of the federal common-law doctrine described above that are less favorable to agency flexibility. For example, agencies would not have to contend that their reconsiderations proceeded within a “reasonable period of time” because they could simply draft a rule that allows them ample time to reconsider. Second, while an inherent power to reconsider may allow agencies a greater opportunity to reach the correct result, it provides a disin-

²²⁸ 367 U.S. 316, 321 (1961).

²²⁹ Weiss, *supra* note 1, at 1262.

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centive to reach that correct result in the initial adjudication. To the extent that an inherent power to reconsider increases flexibility, it must be weighed against the costs of having to issue a revised adjudication. Finally, the flexibility rationale must also be balanced against the costs imposed on parties, namely, the lack of finality, and the procedural uncertainty described above. Given both the costs imposed on agencies and litigants and the relative ease of drafting an equally flexible reconsideration power in the rulemaking process, the flexibility argument does not seem particularly strong.

Second, it might be contended that the inherent power to reconsider is justified because if agencies could not reconsider their own adjudications, litigants would be forced to appeal to Article III courts. On this view, the inherent power to reconsider prevents agencies from imposing costs on courts and results in fewer total litigation costs, because agencies can presumably reconsider an adjudication with which they are familiar and that is within their area of expertise at a lower cost than a reviewing court. This argument may also be cast in terms of agency flexibility, but because it is addressed specifically to the costs imposed by judicial review of agency actions, it is better considered as a judicial economy claim.

There are several problems with this defense of the inherent power to reconsider. First, once again, the argument proves too much because it does not explain why agencies could not achieve the same policy goal by simply promulgating an express rule for reconsideration, or by asking Congress to create one for them. The judicial economy justification may thus be a justification for a power to reconsider, but is not a solid defense of any sort of *inherent* power to reconsider, because the policy goal could still be achieved by an express reconsideration provision. Second, if it is true that litigants can more cheaply relitigate their dispute before the agency than seek review in an Article III court, it is unclear how many litigants who would take advantage of the inherent power to reconsider would also seek judicial review in the absence of reconsideration. In other words, litigants who would seek reconsideration may not seek judicial review if reconsideration is unavailable because the litigation costs of judicial review are likely higher. This suggests that the judicial costs supposedly saved by an inherent power to reconsider may not be so great. For these rea-

sons, both the scope of the problem purportedly addressed by the inherent power to reconsider and the ability to achieve the same goal via statute or administrative rule make the judicial economy justification unpersuasive.

Third, supporters of an inherent power to reconsider could argue that agencies often engage in actions that have little basis in statutory or regulatory authority, and so reconsiderations should be treated no differently. On this view, reconsiderations are indistinguishable from the other types of inherent powers that agencies may normally exercise.²³⁰

There are several responses to this, aside from the fact that inherent agency powers have probably not been studied enough to know how well the power to reconsider fits among other asserted inherent powers. First, as argued in Section II.A, the Supreme Court's musings in the area of administrative reconsideration suggest a general aversion to the inherent power to reconsider. Second, the sharp division of state court authority on the question of an inherent power to reconsider as a matter of state administrative law indicates that the power to reconsider is often not considered inherent, and so has been distinguished from other possible inherent powers by a large number of courts. Third, conceptually, the power to reconsider seems different from other possible inherent powers that might be invoked on the rationale asserted in the Introduction to this Note, namely, that inherent powers are necessary to grease the wheels of administrative decisionmaking and provide for fluid and efficient agency action. Examples would include typical litigation management like docket ordering, creation of discovery rules, and so on.²³¹ But the power to reconsider a final judgment that may have been originally issued many years earlier seems like a power that goes beyond filling the interstices of a statutory or regulatory procedural framework for litigation. Moreover, even federal courts have their power to reconsider final judgments regularized in a formal rule of civil procedure.²³² All of these arguments

²³⁰ See *supra* notes 14–15 and accompanying text for examples of other possible inherent agency powers.

²³¹ See, e.g., Meador, *supra* note 13, at 1805.

²³² See *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000) (en banc) (“If the power of courts to vacate their own judgments needs confirmation by an express rule approved by Congress, it is too much to infer an analogous power in [an agency].”).

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suggest that there is reason to believe that the power to reconsider has more import than a standard inherent power invoked to keep an agency operating in a seamless manner.

CONCLUSION

The inherent power to reconsider is worth reconsidering. It finds little support in Supreme Court precedents, and these precedents may in fact foreclose it; it is arguably precluded by the pervasive network of reconsideration provisions found in hundreds of statutes and regulations; and it leads to uncertainty over both the status of an initial adjudication and the procedures that will be used in a reconsideration proceeding. The more appropriate default rule, and one that has been adopted by many states for their state agencies, is that agencies only have the power to reconsider when that power is expressly provided in a statute, or when an agency has used its rulemaking powers to promulgate formal reconsideration provisions. This rule is entirely modest. It still allows both Congress and agencies themselves to confer broad powers of reconsideration and retain much of the flexibility associated with the inherent power to reconsider. It also improves accountability by requiring either Congress or agencies to provide for administrative reconsideration through standard legislative or administrative processes rather than by achieving the same result through litigation.

To be sure, Congress could eliminate much of the confusion by adding procedures for reconsideration to the APA, which could serve as default rules unless and until either Congress or agencies provide otherwise. In the meantime, federal courts are advised to shift course, and protect litigants who have successfully obtained favorable adjudications by limiting the ability of agencies to reconsider at will. Perhaps this measured adjustment will invite more inquiry into the broader topic of inherent agency powers.