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Agency Statutory Abnegation in the Deregulatory Playbook

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Abstract:

If an agency newly declares that it lacks statutory power previously claimed, how should such a move—what this article calls agency statutory abnegation—be reviewed? Given the array of strategies an agency might use to make a policy change or move the law in a deregulatory direction, why might statutory abnegation be chosen? After all, it is always a perilous and likely doctrinally disadvantageous strategy for agencies. Nonetheless, agencies from time to time have utilized statutory abnegation claims as part of their justification for deregulatory shifts. Actions by agencies during 2017 and 2018, under the administration of President Donald J. Trump, reveal an especially prevalent use of such statutory abnegation strategies. This article explains the agency statutory abnegation strategy, illustrating its variants with review of past and recent uses. It then distinguishes statutory abnegation claims from other agency actions and explanations that might appear to manifest or permit such a strategy, but actually involve doctrinally different and less problematic settings. Then, after distilling the key elements of doctrines governing agency policy change, or what is sometimes referred to as consistency doctrine, it reviews procedural and analytical hurdles agencies must surmount to succeed in a policy change. It closes by exploring how analysis of this strategic move reveals the inadequacy of, or perhaps the naïve publicly interested optimism behind, prevalent theories and linked normative claims about agency incentives, judicial roles, and political accountability. The article closes by analyzing the persistent judicial rejection of such strategies and the underlying normative vision they reflect about the balance of law and politics in the administrative state.

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Late in the administration of President Barack Obama, the United States Environmental Protection Agency promulgated final regulations constraining greenhouse gas pollution from power plants, another regulating refurbished trucks, and another dealing with oil and gas extraction pollution, among many other areas of regulation. Likewise, the Department of Agriculture newly regulated livestock handling practices. Immigration authorities took actions shielding immigrants from legal jeopardy or imminent deportation. Early in the new administration of Donald Trump, however, these agencies and numerous others not only sought to reverse course and roll back these actions, but did so with a previously rare rationale. Contrary to these agencies’ earlier claims of power and extensive legal and factual justifications, these same regulators in a deregulatory mode now claimed that the underlying statutes precluded those previous actions. The exact words for such disclaimers of power varied slightly—the form of regulation “exceeded [our] powers,” or was “contrary to the plain language of the statute,” or was rooted in “implausible” claims of statutory power, or was illegal because the agency in the past “rewrote unambiguous statutory terms”—but again and again these agencies did not just seek to adjust policy, but newly declared a diminished view of their own statutorily conferred powers. When an agency newly declares that it lacks statutory power previously claimed, how should such a move—what this article calls agency statutory abnegation—be reviewed? Does such a rationale for a surrender of agency power, as well as the usual accompanying reversal of policy views, change what courts should demand of agencies pursuing a policy change? Should the generally deregulatory valence of such statutory abnegation trigger some different agency justification burdens and judicial review expectations? Given the array of strategies an agency might use to make a policy change or move the law in a deregulatory direction, why might statutory abnegation be chosen? After all, as explored below, it is always a perilous and likely doctrinally disadvantageous strategy for agencies. Furthermore, if it is relied upon to the neglect of other justificatory rationales that current doctrine requires, policy change sought through statutory abnegation faces likely rejection in the courts.

Several well established propositions about agency power both illuminate and raise questions about the statutory abnegation deregulatory strategy. Agencies will ordinarily receive deference in their interpretations of laws they administer, and statutory abnegation involves, at its core, agency statutory interpretation. And, similarly, when agencies assess societal conditions and their own resources and decide how zealously to pursue their statutory tasks, they will also receive deference and sometimes almost no judicial scrutiny. In addition, agencies are seldom ordered to regulate in a particular way; most statutes leave agencies latitude to make pragmatic

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2 All of these actions are presented in Part I, infra.
3 See infra at notes 65, 112-13 and accompanying text.
4 See infra at note 89 and accompanying text.
5 See infra at note 95 and accompanying text.
6 See note 107 and accompanying text.
7 See infra notes 122, 137-42, and 184-215 and accompanying text (discussing deference doctrines and abnegation); see generally Richard J. Pierce, The Future of Deference, 84 GEO. WASH. L. REV. 1293 (2016) (discussing numerous deference regimes and latitude for policy changes with new administrations).
8 See infra at notes 120-21 and accompanying text (discussing unreviewability and relation to abnegation).
judgments about regulatory choices, even when they are rooted in some required statutorily provided criteria. Moreover, modern cases seem to grant a “plus” factor to regulatory approaches that harness market mechanisms, are sensitive to costs and benefits, or provide regulatory targets or states handling regulatory implementation with flexibility. And, by definition, agency statutory abnegation claims analyzed here involve agency policy changes; long established law states that an agency’s initial regulatory views are not frozen in stone. Policy change is not legally suspect.

These well-established propositions about agency power and judicial review might, upon a superficial initial analysis, seem to lead to a next, logical proposition that agencies should be granted broad latitude to engage in statutory abnegation. However, the line of cases that collectively create the body of consistency doctrine squarely rejects any argument for less rigorous judicial review. This is not to claim that abnegation is itself illegal; as analyzed below, however, it is unusual, usually disadvantageous, and as wielded with regulatory rollbacks often involves little accompanying agency effort to comply with well established administrative law precepts and judicial expectations guiding agency actions and, especially, policy change. Abnegation strategies have tended to involve settings where, if the agency’s claim of no power is correct and where agencies do not proffer rationales rooted in their expertise, agencies receive zero deference. Agencies can pursue policy change and may even have room to rely on statutory abnegation as part of such policy shifts. But consistency doctrine and a web of related law reject—or at least seem to reject— the legal adequacy of statutory abnegation that relies only on a new and power-shrinking law interpretation to justify an agency policy change. One variant on statutory abnegation might possibly lead reviewing courts to demand less of agencies, but this variant, which is discussed below, would be a rare and unlikely setting; it is not now subject to any doctrinal carveout from usual agency obligations.

Nonetheless, agencies from time to time have utilized statutory abnegation claims as part of their justification for deregulatory shifts. The George W. Bush administration sought to justify its policy change and inaction on climate change with an abnegation claim. Actions by agencies during 2017 and 2018, under the administration of President Donald J. Trump, have revealed an especially prevalent use of such statutory abnegation strategies. They are often explained, at least in part, as undertaken to comply with overtly deregulatory executive orders or to conform to the policy preferences of the President. Courts reviewing past and recent statutory abnegation

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9 See Anne Joseph O’Connell, Agency Rulemaking and Political Transitions, 105 Nw. U. L. Rev. 471, 483 (2011) (observing that agencies creating and revising policies usually have latitude for a “range of choices”).
11 William W. Buzbee, The Tethered President: Consistency and Contingency in Administrative Law, 98 BOSTON UNIV. L. REV. 1349, 1366-68, 1392-1401 (2018) (discussing expectation of agency policy adjustments and law governing such changes, with focus on centrality of agency comparative attention to facts and reasoning in pursuing a change).
12 Id.; infra at notes 144-83 and accompanying text (applying these cases to abnegation strategies) and infra at Part III.b.vi (reviewing cases rejecting adequacy of agency actions relying on abnegation-based deregulation).
13 See infra at notes 175-78 and accompanying text
14 See infra at notes 39-116 and accompanying text.
claims, however, have generally rejected such policy shifts, finding the actions legally inadequate and inconsistent with doctrinal hurdles. They have refused to review such statutory abnegation rationales with any lessened burden of agency justification.

This article explains the agency statutory abnegation strategy, illustrating its variants with review of past and recent uses. It then distinguishes statutory abnegation claims from other agency actions and explanations that might appear to manifest or permit such a strategy, but actually involve doctrinally different and less problematic settings. Then, after distilling the key elements of consistency doctrine that governs judicial review of agency policy change, it reviews procedural and analytical hurdles agencies must surmount to succeed in a policy change. These cases, plus other foundational administrative law cases like Chevron, undoubtedly give agencies room to pursue policy changes. But these cases repeatedly affirm and explain doctrinal hurdles that agencies must surmount when and if they seek to change policy. Many of these hurdles have generally been neglected or only glancingly addressed by agencies utilizing variants on a statutory abnegation claim. This disjuncture between agency justifications for statutory abnegation claims and doctrinal hurdles explains why agency actions including statutory abnegation claims have often met with failure.

But this doctrinal disadvantage makes the statutory abnegation strategy all the more puzzling. If—as is true—bare statutory abnegation claims often weaken agency power over targets of regulation, reduce agency discretion, are doctrinally disadvantageous, and appear destined in most instances for eventual judicial rejection, why might agencies nonetheless persist in utilizing such a strategy? The recent prevalence of this strategic move reveals the inadequacy of, or perhaps the naïve publicly interested optimism behind, prevalent theories and linked normative claims about agency incentives, judicial roles, and political accountability.

This article’s analysis reveals often neglected risks posed by politically influenced regulatory actions, especially if linked to the President. Statutory abnegation strategies often reflect obeisance to the president or executive branch political appointees’ preferences, but at the price of undercutting or ignoring equally if not more important sources of regulatory legitimacy and political accountability. Agencies utilizing this strategy have offered slender legal reasoning, little attention to statutory criteria, avoided past reasoning, and shown little or no engagement with on-the-ground impacts of the old and new policy choice. Current doctrine gives agencies no space to ignore such “contingencies,” namely the science, data, empirical assessments and past agency reasoning justifying regulatory actions. Politicized justifications and actions that are likely motivated by electoral advantage or hierarchical obedience to political leadership, but

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15 See infra at Part III.b.vi.
16 As explained below, abnegation claims can involve complete disavowal of power to occupy a regulatory area at all, or a narrower claim that a past assertion of authority or particular regulatory action was legally precluded. Abnegation is not asserted if an agency is just claiming it has found a better way to regulate, or it thinks the past action is vulnerable to being held arbitrary and capricious. See infra a Parts I.a. and I.b.
17 I explore the role of such contingencies in the body of consistency doctrine and how they constrain and shape efforts to change policy in Buzbee, The Tethered President, supra note 11.
which disregard statutory requirements and these doctrinally created hurdles, come at a considerable price in the form of lost political accountability.

This statutory abnegation strategy does, however, fit within political-economic theories that call for analysis of regulatory structures and actions with attention to all players’ regulatory incentives, especially pervasive tensions between expert or technocratic roles, on the one hand, and politically sensitive or motivated policymaking and interest group entreaties. Situating this move and its apparent rationales within this political economic theory literature, especially Positive Political Theory, illuminates the appeal for statutory abnegation proponents, at least in some political-economic environments, of this often losing legal strategy.18 By viewing abnegating agencies and presidents as acting in a political and legally constrained environment that is dynamic and involves regulatory actors’ interactions, this puzzling strategy becomes easier to understand.19 Agency actions lacking legal merit may not reflect unintended legal error, but knowing pursuit of electoral benefits. Agencies, and presidents under whom they serve, can generate substantial electoral and perhaps political party benefits through statutory abnegation claims and repeatedly touted deregulatory policy reversal efforts, even if illegal, largely symbolic, and providing only transitory relief. Courts, however, with their focus on the law and the need for well justified agency “reasoned decisionmaking,” have remained focused on the procedural and legal inadequacies of agency statutory abnegation claims. Some degree of policy changes will usually be possible, but courts are likely to—and should--continue to force agencies to hew to statutory criteria and procedures, full engagement with the new and old actions’ legal and factual underpinnings and reasoning, and burdens of justification.20 This body of consistency doctrine integrates and reflects respect for the multiple forms of political accountability that remain central to the legitimacy of the administrative state. Giving politically or presidentially induced regulatory reversals some major “plus” when reviewed in court would reward actions that may intentionally reflect disregard for the substantive, procedural, and judicial doctrine-based expectations for agencies seeking to make a deregulatory policy change.

Part I defines statutory abnegation, reviews agency uses of this strategy, and distinguishes it from several other ways agencies may seek to change policy or achieve deregulatory ends. Part II assesses agency statutory abnegation from a doctrinal perspective, showing how its recent uses have generally flunked doctrinal requirements for agencies hoping to achieve a policy change. Part III explores why agency abnegation might nonetheless be pursued and even be a rational choice when viewed through the lens of political benefits, although often destined for eventual

19 Rodriguez, supra note 18 at 6 (identifying these variables as the core enrichment on rational actor theory provided by PPT).
20 As observed by Professor Seidenfeld, agencies will always be influenced by politics, but review of their actions does, and must, focus on legality under the law and in light of underlying science, facts, data, and reasoning. Mark Seidenfeld, The Irrelevance of Politics for Arbitrary and Capricious Review, 90 WASH. U.L.Q. 141 (2012). See also Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 YALE L.J. 2, 6-8 (2009) (sympathetically viewing “place for politics” in regulatory policymaking, but stating evidence and statutory criteria limit room for presidential influence).
legal defeat both due to the generally rarity of statutes completely precluding agency actions in an area or when utilized without regard to APA and consistency doctrine-based requirements. But long before then, presidents, responsive agencies, and regulatory targets favoring regulatory rollbacks may see multiple benefits of such unlawfully pursued policy changes. This part closes by exploring the multiple forms of political accountability that normally constrain agencies and that, when ignored by agencies, have led reviewing courts to reject actions rooted in abnegation claims.

I. Agency Statutory Abnegation Defined and Distinguished

Administrative agencies engage in a multitude of actions in several different modes, most of which involve some degree of policymaking. Modern agency policymaking occurs in the setting of notice and comment rulemaking, through issuance of guidance and other policy documents without notice and comment process, and through enforcement actions, linked adjudications, and resulting orders.\(^{21}\) In all of these settings, agencies both apply procedural and substantive policy choices set by Congress in enabling legislation and implement and often adjust further agency-set policies.\(^{22}\) Some agency actions truly just involve application of policy earlier set by Congress or the agency, but some degree of policy creation, choice, and often change is a common and unexceptional occurrence.\(^{23}\) In any of these procedural modes, an agency can reveal a policy change based on statutory abnegation. This part introduces agency statutory abnegation and distinguishes it from other sorts of agency actions.

Agency statutory abnegation strategies have occasionally been asserted in the past, most famously in the actions during the George W. Bush administration by the Environmental


\(^{22}\) For analyses of agency latitude for policy change and consistency doctrine, see Buzbee, supra note 11 (analyzing need for agencies to address contingencies underlying old and new action and array of doctrines shaping consistency doctrine); Yoav Dotan, Making Consistency Consistent, 57 Admin. L. Rev. 995, 1029-30 (2005) (focusing upon procedural modes generating old and new policy; Randy J. Kozel & Jeffrey A. Pojanowski, Administrative Change, 59 UCLA L. Rev. 112, 115 (2011) (analyzing latitude for agency policy change and distinguishing between “expository” policy declarations rooted in language and “prescriptive” reasoning based on policy choices, and arguing for different levels of judicial scrutiny in light of nature of change mode); see also Daniel J. Hemel & Aaron L. Nielson, Chevron Step One-and-a-Half, 84 U. Chi. L. Rev. 757 (2017) (analyzing agency errors about their authority, possible motivations, and judicial responses under “Prill” doctrine, Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985)). Hemel and Nielson are not focused on agencies denying themselves powers, or agency reversals about their views, as is this article, but they offer insights into agency motivations, including agency claims of no statutory choice, and values served by current doctrine rejecting actions founded on power errors. They disagree with scholars questioning the value of such remands to agencies to act based on a correct understanding of their power. See id. at 760-61 (responding to Nicholas Bagley, Remedial Restraint in Administrative Law, 117 Colum. L. Rev. 253, 296-302 (2017)).

\(^{23}\) See Gillian E. Metzger, Embracing Administrative Common Law, 80 Geo. Wash. L. Rev. 1293, 1359-70 (2012) (comparing agencies’ and courts’ institutional competence and administrative law’s development in common law-like manner); O’Connell, supra note 9 at 479-86 (analyzing political transitions and resulting agency regulatory changes).
Protection Agency (EPA) leading to the Supreme Court decision in *Massachusetts v. EPA*. But agency statutory abnegation claims became increasingly prevalent during 2017 and 2018 as part of an array of deregulatory actions or rapidly implemented policy shifts by numerous agencies. Many are explained as part of agency responses to Executive Order 13,771, issued by President Trump, that calls for agencies to eliminate two regulations for each new regulation, plus ensure regulatory actions result in no new net costs. Other such actions followed more specific presidential orders or memoranda, while some emerged from agencies with no advance public involvement of the White House.

In its strong form, agency statutory abnegation involves the following attributes. Acting against a backdrop of unchanged statutory law, an agency reexamines its powers under that law. In a break from past agency power claims and, usually, related actions, the agency newly declares that it no longer has authority it previously asserted. This is an act of agency “abnegation”—self-denial of authority—because, without any congressional statutory change or adverse court ruling mandating change, the agency is denying itself statutory power previously claimed.

Such statutory abnegation strategies have been utilized by agencies in several different forms. In its most unadorned, bare form, an agency reverses an action or policy and explains the action as compelled by its new view that it lacks (and earlier lacked) the authority previously claimed. The deregulatory move is from an action based on a claim of power, to new abnegation of the previous claim of power. Other forms of abnegation are at times less boldly asserted, but many are really just making a limited claim of a particular past overreach, or a more limited claim about a constrained set of regulatory options, or are accompanied by a fallback claim of a mere preference for a different statutory read.

But abnegation is quite different from the more standard agency proffer of a different policy that is described as *also* an option under existing law. In that more typical setting, the agency asserts that language provides room for context-specific agency exercise of discretion and, in light of new assessment of facts, science, and regulatory options, gives the agency room to choose from several reasonable policy choices. Often both the old policy and the new policy are presented as permissible options, at least as a matter of language. With statutory abnegation, in contrast, an agency is denying it had statutory power to do as it did in the past and disavowing future assertion of such power. This Part now turns to analysis of a cross section of examples of

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25 See infra at Part I.a (reviewing such uses).
27 See infra at Part I.a (reviewing array of abnegation actions and discussing actions following regulation-specific president memoranda or orders).
28 The general assumption is that agencies will prefer statutory interpretations that preserve their discretionary powers. Hemel & Nielson, supra note 22 at 762 (reviewing scholarship making this assumption); Gillian E. Metzger, *Foreword, 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 5-6, 24-28, 31-38, 71-72 (2017) (reviewing and challenging claims about inappropriate agency uses of discretion or excess agency power claims).
29 This was the setting of *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 853-66 (1984) (reviewing history of EPA’s approaches and reasons for its judicially upheld policy change). Neither the agency nor Supreme Court viewed the agency’s new policy as mandated or its old views as illegal.
agency policy changes rooted in statutory abnegation claims and then distinguishes variants of abnegation and other agency policy change strategies.

a. Statutory abnegation examples

Perhaps the most famous example of agency abnegation occurred in the agency actions leading to the Supreme Court’s Massachusetts v. EPA decision rejecting EPA declination to regulate greenhouse gas emissions (GHGs). EPA had not regulated GHGs, but two general counsel had previously written memoranda and provided responses to congressional inquiries that declared EPA had such authority. When the administration of President George W. Bush denied a petition to regulate GHGs from motor vehicles, it offered an array of justifications for its statutory abnegation conclusion. Some rationales related to presidential authority and claims of policy prioritization discretion, but its primary claim was that it could not regulate GHGs as an “air pollutant” despite the Clean Air Act’s broad statutory language. Breaking from its earlier general counsel memoranda, EPA--under its new statutory abnegation view--said the statute had a different, more local focus and Congress could not have intended regulation of a gas generally not perceived as a pollutant and that caused effects on a global scale. Much of its analysis and legal Federal Register argument relied on the Brown & Williamson decision, asserting EPA could not claim such economically significant authority without a clearer delegation from Congress. EPA did not analyze the effects of its declination to act, but because the past EPA claims of power had not been accompanied by regulatory actions subject to some new rollback, the agency did not have effects of past and new actions to compare.

As further analyzed below, the Supreme Court in Massachusetts rejected the agency’s new statutory abnegation claim and the agency’s reliance on the agency’s and president’s discretionary and politically related choices about resource priorities. The Court stated the agency had to choose whether to act based on statutory criteria, as now construed by the Court and correctly understood. And the Court called for agency analysis of underlying science and climate change effects in light of those statutory criteria.

Agency statutory abnegation claims became common in a wave of 2017 and 2018 deregulatory actions by agencies under the Trump administration’s leadership. Many of these abnegation claims were accompanied by little or no engagement with facts, science, studies, or findings.

31 Id. at 510-11.
32 Id. at 511-15 (reviewing Bush administration denial rationales).
33 Id.
34 Id.
35 68 Fed. Reg. at 529 (discussed in Massachusetts, 549 U.S. at 511-13).
36 As discussed below, under the State Farm case, which provided governing law at the time and remains a major framing case today, an agency changing policy needs to fully address past rationales, past and current facts, and justify its change. See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (State Farm). In Massachusetts, there were contrary interpretations of the Clean Air Act but no past regulation of GHGs and effects to assess.
37 Massachusetts, 549 U.S. at 528-33.
38 Id. at 528-36.
previously viewed as relevant to the previous action, often provided only summary engagement with contrary and earlier legal views of its own, and included little analysis of on-the-ground effects of the new claim of no power. The abnegation claims are, for purposes of this article, separate from the absence of accompanying analysis and justifications; it appears, however, that avoidance of this considerable burden may partly explain agency reliance on abnegation claims.\footnote{As discussed infra at Part III.b, agencies interested in quick and potential enduring deregulatory change may see several political benefits if their use of abnegation claims prove successful. But an agency could claim it lacks statutory power and still provide analysis comporting with the requirements of consistency doctrine. See Part II (exploring the doctrinal answer to abnegation strategies both if used alone and if used with agency provision of analysis required by consistency doctrine).
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Although recent agency statutory abnegation actions are many, a substantial but partial sample is described here, including analysis of some of the highest visibility, politically salient actions.\footnote{ADD FN ABOUT COMPETING CLAIMS ABOUT LARGE NUMBER OF DEREGULATORY ACTIONS CLOSE TO PUBLICATION TIME, OR USE NY TIMES OR WHITE HOUSE AND REG THINKTANK TALLIES.}

A few others resulting in court decisions are discussed at the close of the article in analysis of reasons for the many judicial rejections of a series of Trump administration policy shifts utilizing variants of abnegation claims.

For example, in the immigration arena, the Department of Homeland Security in 2018 ended the Temporary Protected Status (TPS) of two nations’ citizens living as immigrants in the United States.\footnote{Compare Department of Homeland Security, Extension of the Designation of El Salvador for Temporary Protected Status [TPS], 81 Fed. Reg. 44645 (July 8, 2016) (extending TPS status due to safety risks from initial TPS-triggering earthquake event but noting other statutorily specified sources of risks to safety to explain extending TPS status) with Secretary of Homeland Security Kirstjen M. Nielson Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018) (announcing termination of TPS status because “original conditions . . . no longer exist” and stating therefore “under the applicable statute, the current TPS designation must be terminated”); Department of Homeland Security, Termination of Designation of Haiti for Temporary Protected Status, Notice, 83 Fed. Reg. 2648 (Jan. 18, 2018) (terminating status because “the conditions for the designation . . . relating to the 2010 earthquake . . . are no longer met” and limiting analysis to the effects of that one event); with Department of Homeland Security, Extension of the Designation of Haiti for Temporary Protected Status, Notice, 82 Fed. Reg. 23830 (May 24, 2017) (extending TPS and in explanation discussing lingering earthquake effects but other risks to safety, including other storm events, agricultural harvest problems, weak public health system, cholera epidemic, lack of safe water, extreme poverty, corruption, and government instability).
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In those actions, however, the Department of Homeland Security not only changed its longstanding interpretation of the underlying statute to justify the actions, but in another breach of agency policy change obligations, it also failed to acknowledge that shift or to address additional risks to immigrant safety that it had earlier viewed as legally relevant to TPS status.\footnote{Id. Agencies making a policy change are required to declare such a change and justify it. They cannot silently make a policy change or consistently vacillate in a way reflecting the absence of any policy. See Buzbee, The Tethered President, supra note 11 at 1401-03 (discussing these obligations).
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It is hence unclear if it was aware of the policy change it was making. In 2018 it stated that it “must” return TPS status immigrants when the original triggering condition ends; under previous administrations and even in two early Trump administration actions, the agency considered all of the criteria that can justify TPS designations for a nation in deciding whether to continue the TPS status, not just the initial triggering event.\footnote{Id.. For further review of this regulatory history in challenge to revocation of TPS status for Haitians, see Complaint, NAACP v. Department of Homeland Security, Civ. Action 18 Civ. 239 (D.Md.) (filed Jan. 24, 2018).}

In the new actions claiming it “must” return emigrees due to the termination of risks from safety from the initial triggering event, and in
accompanying statements that the “law does not allow” consideration of other conditions, the Department did not discuss what would happen to these previously TPS designees upon return to their countries.\(^44\) Statutorily specified categories of risk that had earlier justified TPS extensions were in 2018 apparently no longer viewed as relevant.\(^45\)

In a higher visibility action that also linked to presidential campaign promises to take a harder line on immigration into the United States, the Trump administration in 2017, through a legal opinion of the Attorney General and then action by the Department of Homeland Security (DHS), declared it would abandon the Obama administration’s Deferred Action for Childhood Arrivals (DACA) program.\(^46\) The DACA program was not a finalized notice-and-comment regulation, but instead a factually and legally explained policy of regulatory forbearance that DHS claimed was permissible under relevant statutory and administrative law.\(^47\) This program provided long-term immigrants who had arrived as children and lacked a criminal record with a general policy of enforcement forbearance and a path to employment without risk to the immigrants—often referred to as “Dreamers”---or risk to employers of such DACA beneficiaries.\(^48\) The Obama administration had justified this program with reference to precedents supporting such agency forbearance and prioritization of activities, as well as statutory language providing this latitude.\(^49\) And, in explaining itself, it discussed the children’s plight and ways DACA would be sound policy and comply with the law.\(^50\)

The DHS in its 2017 reversal relied only on a brief Attorney General statement rooted substantially on constitutional law views and a brief DHS statement that DACA had violated the law.\(^51\) The agency did not engage with the policy and factual underpinnings of the earlier policy, nor did it address doctrines previously relied upon to justify agency prioritization of dangerous immigrants. This DHS 2017 policy change revoking the DACA policy, like several other 2017 and 2018 agency stay and postponement actions that sidestepped the usual policy change process, was judicially rejected in several substantially similar decisions for being rooted in legal error, lacking adequate explanation, and also for flunking consistency doctrine in failing to fully engage with earlier

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\(^{44}\) Ramos v. Nielsen, slip op. at 10-11, 2018 WL 4778285 (N.D. CA. Oct. 3, 2018) (faulting DHS for not acknowledging its “substantive and highly consequential” policy shift in “eliminating consideration of intervening conditions not directly related to the originating condition” and, after citing consistency doctrine precedents, noting lack of “explanation” and attention to “reliance interests”).

\(^{45}\) This change in agency practice and the policy change it reflected resulted in two court decisions indicating, in preliminary rulings on a motion to dismiss and then for a preliminary injunction, that these unacknowledged policy shifts were likely illegal under the APA due to how they did not disclose and explain the policy shift. Ramos v. Nielsen, 2018 Westlaw 4778285 (N.D. CA. Oct. 3, 2018) (granting injunction motion and reviewing APA claims); Ramos v. Nielsen, 321 F. Supp.3d 1083 (N.D.CA. 2018) (denying motions to discuss and explaining why agency policy shifts without explanation and justification violated APA requirements).


\(^{47}\) Deferred Action for Childhood Arrivals Program (June 15, 2012) (announced in memorandum of Secretary of Homeland Security Janet Napolitano), discussed in Regents, slip op. at 6-9.

\(^{48}\) Id. (describing the program).

\(^{49}\) Id. at 8-9.

\(^{50}\) Id.

\(^{51}\) Id. at 12-13 (reviewing the rescission’s stated legal grounds).
factual considerations. This and other judicial analyses of statutory abnegation-based policy shifts are analyzed in greater depth below.

The United States Environmental Protection Agency (EPA) repeatedly utilized statutory abnegation rationales in a series of 2017 and 2018 regulatory reversals. In late 2017, EPA proposed to repeal its Clean Power Plan (CPP). The CPP regulation was finalized in 2015 under Obama administration leadership and was designed to limit greenhouse gas emissions (GHGs) from power plants due to their climate impacts. The CPP was issued following three Supreme Court decisions that affirmed EPA authority to regulate GHGs, one of which specifically referenced the Clean Air Act provision—Section 111(d)—as providing EPA authority to regulate existing power plant emissions. Furthermore, EPA had in a separate finalized and judicially upheld rulemaking extensively documented climate science and associated health and environmental “endangerments” resulting from GHG emissions and climate change. That finding, plus the Court’s precedents, had been viewed by EPA as triggering a mandatory duty to regulate due to “shall” language in Section 111(d). It justified its consideration of power plants’ utilization of fuel shifts and trading strategies—sometimes referred to as “generation shifting” regulating “beyond or outside the fenceline” --in setting its CPP pollution targets due to EPA’s view that it always considers the particular attributes of the polluting industry being regulated. Since power plants work in the setting of a interconnected and integrated grid and, under state law regimes, were already reducing GHG emissions and meeting energy demands cost-effectively through off-site (or “beyond the fenceline”) strategies, EPA thought it should take them into account in devising the CPP. EPA also referenced and took into account the electric power sector’s arguments in the mid-2000s that EPA, when potentially acting under Section 111(d) to regulate mercury emissions, could and should take into account such interconnectedness and the

52 Id. The second rejection was in Vidal v. Nielson (also labelled New York v. Trump), Amended Memorandum & Order & Preliminary Injunction, slip op., 24-26 (16-CV-4756 (NGG) (JO) (E.D.N.Y. Feb. 13, 2018) (finding agency DACA reversal was rooted in legal error); at 36-45 (finding the agency committed factual errors, failed to offer logical legal reasoning, and did not analyze “reliance” interests as required by consistency doctrine precedents).
54 Id. at 1075 (reviewing the Endangerment Finding) (citation omitted).
55 CPP, supra note 53 at 64707-25 (summarizing legal history and basis for the design of the CPP). In the CPP, EPA explained its approach as consistent with past rulemakings that required pollution control in light of each industries’ particular attributes. It emphasized that power plants were already adjusting pollution levels through utilization of the integrated energy grid. Id. at 64723-27, 64758-60, 64768-69.
56 CPP, supra note 53 at 64677 (discussing interconnected grid and CPP design); 64758-85 (extensively discussing language-based arguments for EPA’s approach and characteristics of power plants and the grid and industry reliance on interconnected grid to explain “beyond-the-source” approach).
57 Id.; see also Gabriel Pacyniak, Making the Most of Cooperative Federalism: What the Clean Power Plan Has Already Achieved, 29 GEORGETOWN ENVTL. L. REV. 301, 320-25, 334-40 (2017) (discussing statutory grounds for CPP, state commenters seeking to have CPP build on already existing state level regulation, and importance of flexibility for states and power plants).
flexibility it provided.\textsuperscript{60} In early 2017, at the tail end of the Obama Administration, EPA denied a series of petitions to reconsider the CPP.\textsuperscript{61} EPA looked at underlying conditions, trends, and costs and found that EPA’s CPP conclusions remained sound.\textsuperscript{62} EPA found that clean energy trends had in fact accelerated more than expected and at lower cost than initially predicted in the CPP.\textsuperscript{63}

Under new leadership and following the change to the Trump Administration’s leadership, EPA proffered a different read of the statute, focusing on regulated industry hardships. EPA claimed consistency with an earlier EPA “inside the fenceline” approach to sources regulated under Section 111(d).\textsuperscript{64} Based on EPA’s new view of the Clean Air Act’s “text, structure, purpose, and legislative history,” as well as the “agency’s historical understanding,” EPA said (in its Proposed Repeal) that the “CPP exceed[ed] the EPA’s statutory authority” and was “not within the bounds of our statutory authority.”\textsuperscript{65} EPA initially proposed a complete repeal of the CPP, but without committing to any replacement rule.\textsuperscript{66} It cited a few consistency doctrine precedents and sought to limit public comment.\textsuperscript{67} In offering this new power-limiting read of the statute, EPA did not cite other relevant statutory language previously viewed as key to EPA’s power, past cases relied upon, and past rulemakings EPA had analyzed in 2015. It also ignored EPA’s detailed 2014, 2015, and 2017 studies of electricity sector and state regulatory trends and accomplishments, and nowhere considered or distinguished its own earlier pro-CPP reasoning.\textsuperscript{68} EPA also did not compare or quantify environmental and health costs flowing from the repeal proposal. While an accompanying Regulatory Impact Statement contained some relevant numbers and comparisons, the agency there also shifted its analytical framework.\textsuperscript{69} EPA also did not discuss predicted

\textsuperscript{60} CPP, supra note 53 at 64696 (discussing 2005 regulation of mercury from power plants and EPA’s view at the time that it should set emissions levels based on a “combination of of the cap-and-trade mechanism and the technology needed” to meet a mercury “statewide budget”). Federal briefs in challenges to the CPP further referenced industry support for trading-based regulation under Section 111(d). State of W. Va. V. U.S. EPA, Respondent EPA’s Final Brief at 12, 30-31, 33-34, 69 (D.C. Cir.) (filed April 22, 2016) (explaining how CPP is based on “what power plants are already doing,” past EPA regulatory approaches, industries and regulation already relying on “generation shifting,” and past industry support for mercury regulation utilizing regulation much like CPP). DUKE EDS—I CAN SEND YOU BRIEF OR PAGES IF YOU DON’T FIND QUICKLY VIA WESTLAW

\textsuperscript{61} U.S. ENVTL. PROT. AGENCY, BASIS FOR DENIAL OF PETITIONS TO RECONSIDER AND PETITIONS TO STAY THE CAA SECTION 111(d) EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS AND COMPLIANCE TIMES FOR ELECTRIC UTILITY GENERATING UNITS 22-30 (2017).

\textsuperscript{62} Id.

\textsuperscript{63} Id.


\textsuperscript{65} Id. at 48036, 48038. In other analysis, EPA discusses its new authority as based on the “best construction” of the statute, indicating that it perhaps had not fully surrendered its past authority. Id. at 48039, 48043. But it repeatedly claims the CPP “exceed[ed]” EPA’s authority, and also through clear statement doctrine discussion focused on massive claimed economic impacts, review of legislative history, and authority of other agencies under other laws and the states, returns to the claim of no agency power to regulate as finalized in the CPP. Id at 48039-43.

\textsuperscript{66} Id. at 48036.

\textsuperscript{67} Id. at 48036, 48038, 48039 (limiting comments sought); 48039 (citing change power cases).


increases in particulate matter pollution accompanying GHG emissions and thousands of additional predicted deaths if the CPP were abandoned, yet under a provision requiring agency consideration of “health” impacts as part of its analysis.\(^7\)

In 2018, EPA made another regulatory proposal, this time issued a proposed replacement for the CPP, calling it the Affordable Clean Energy (ACE) rule.\(^7\) This proposal also included claims of past illegal agency excess in issuing the CPP and claimed that its new “inside the fenceline” approach was, in contrast, within its powers.\(^7\) In this action, it further reduced its claim of power, stating it would no longer set permissible levels of pollution, but instead would provide information and leave to the states the setting of emission levels on a plant-by-plant basis.\(^7\) It is not clear if EPA viewed this change as legally required or another option under the statute.\(^7\)

In an unusual form of statutory abnegation, EPA proposed in several different actions to abandon the Clean Water Rule, a 2015 EPA and Army Corps of Engineer’s rule that sought to reduce regulatory uncertainty about what sorts of waters are subject to federal jurisdiction as “waters of the United States.”\(^7\) The 2015 Rule followed a lengthy rulemaking, preparation of a meta-study of all peer-reviewed science concerning types of waters and their functions and “connectivity,” and then publication of this “Connectivity Report” after opportunities for comment.\(^7\) The Clean Water Rule and Connectivity Report both followed three Supreme Court decisions that collectively created many questions about the reach of federal power.\(^7\)

\(^7\) The CPP discussed such avoided deaths. The repeal proposal does not despite CAA Section 111(a)’s mandate of agency consideration of “health . . . impacts”.


\(^7\) This new proposal, issued under new agency leadership after the first administrator resigned following a wave of allegations of irregularities, provided more engagement with underlying facts. .

\(^7\) Id. at 44748, 44750, 44772-73.

\(^7\) Id. The proposal discussion only elliptically acknowledges the policy change and does not engage with EPA’s CPP discussion of EPA’s legal authority to set pollution caps that, in turn, states, regions and polluters would need to achieve.


\(^7\) The preceding case amplifying confusion was Rapanos v. United States, 547 U.S. 715, 732 (2006) (causing legal uncertainties due to a plurality opinion of Justice Scalia protecting a small category of waters, a swing concurring opinion by Justice Kennedy that more expansively would protect waters based on their functions, and dissenters who joined most of the Kennedy concurrence and Scalia plurality regarding categories of waters subject to federal protection, thereby creating two Court majorities); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 171-72 (2001) (rejecting claim of federal jurisdiction under Clean Water Act (“CWA”) over wholly intrastate, isolated waters such as ponds, gravel pits, and seasonal waters due to their use as migratory bird habitats); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134-35 (1985) (upholding broad definition of navigable waters with focus on unavoidable judgment calls in resolving border of land and water in complex hydrological system and due to Act’s integrity goals). For analysis of the Clean Water Rule and its durability, see Patrick Parenteau, The Clean Water Rule: Not Dead Yet, 43 Envtl. L. 377 (2018).
The 2017 and 2018 abnegation claims in the linked deregulatory actions regarding the Clean Water Rule and what is a federally protected “water of the United States” were unusual and a bit indirect. EPA, following instructions from President Trump in an executive memorandum, proposed several actions to adopt a legal interpretation of the reach of federal power based on a plurality opinion by Justice Antonin Scalia in the *Rapanos* case. That opinion, however, not only did not garner a Court majority, but also ran counter to views of a five justice Court majority about the sorts of waters that are protected and legal rationales for their protection. The Scalia opinion’s narrow view of federal power as limited to permanently flowing and continuously connected waters also would have substantially cut back on the amount of the United States protected by the Clean Water Act. Scalia’s test for jurisdiction, which if the sole criteria for protecting waters was joined by only a Court minority, was rooted in dictionary-based parsing of the statutory words, and would have eliminated from federal jurisdiction most of the waters in America’s West and Southwest.

In those regions, arid conditions prevail and pollutants can concentrate or be disposed of in dry riverbeds that become crucial waterbodies (or vehicles to carry toxins) during rare but heavy rains.

Authoritative final EPA adoption of this view regarding protected waters, as proposed, would involve abnegation at several levels: it would be rejecting what a Court majority – albeit in several opinions--embraced in *Rapanos* about the nature and extent of federal power; it would reject decades of contrary regulatory interpretations by EPA and Army Corps; it would run contrary to Connectivity Report conclusions; and it would be disavowing authority to protect waters in much of the nation, even where quality water is most important. The first three 2017 and 2018 rollbacks of protected waters, however, did not mention the Connectivity Report and also nowhere analyzed the impacts of such a redefinition of protected waters. A supplemental notice issued in 2018

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79 Justice Kennedy and the four dissenters largely agreed with each others’ rationales for protecting waters and the types of waters that would be protected, but the dissenters would have gone further and also deferred more to regulators’ approaches. See 767-778 (Kennedy, J., concurring in the judgment of the Court) (discussing areas of agreement and disagreement with dissenters’ approach); at 778-83 (Kennedy, J., concurring in the judgment of the Court) (explaining his rejection of the Justice Scalia plurality opinion’s approach); and at 807-10 (Stevens, J. dissenting, joined by three fellow dissenters) (stating dissenters’ agreement with the waters that would be protected by the Kennedy concurrence, agreement with the protective rationales (but calling for more deference to regulators), and also that they would protect the limited waters protected under the Justice Scalia approach, and stating that waters hence should be protected if “either the plurality’s or Justice KENNEDY’S test is satisfied”).

80 *Rapanos*, 547 U.S. at 730-37 (Scalia, J., plurality opinion) (limiting federal jurisdiction with rationale joined by three other justices and rejected by five).

81 Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,903 (proposed July 27, 2017) (stating that agencies were not seeking comment on pre-2015 rules or “scope of the definition of ‘waters of the United States’” until second step of two-step process); Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542, 55,544-45 (proposed Nov. 22, 2017) (proposing applicability date and reiterating that agencies were not soliciting comment on scope of definition of “waters of the United States” “because the agencies propose to simply add the applicability date and ensure continuance of the legal status quo and because it is a temporary, interim measure
offered more by way of justification and legal analysis, but still vaguely claimed past illegal claims of authority and still skirted engagement with much of the Clean Water Rule’s reasoning and science-based justification. A later 2018 proposal started a new notice-and-comment process to create a new definition of federally protected “waters.” It mentioned the Connectivity Report and discussed underlying cases. However, although it proposed major policy changes and adopted a legal view contrary to the legal views that EPA, the Army Corps, and the Department of Justice embraced for a decade after Rapanos, the proposal did not admit this major change or provide comparative analysis of the change’s effects. Its language appears to embrace the view that it was required to utilize the Scalia approach, declined the Kennedy approach and (erroneously) labeled it the views of a “single justice,” and declined to base the new definition on science as set forth in the Connectivity Report due to the new view that “science cannot be used to draw the line between Federal and State waters, as those are legal distinctions.” This latest water-related action hence appears to view its abnegating, shrunken view of federal power as legally required due to its hewing to the Justice Scalia approach and new rejection of most of the “significant nexus” approach set forth by Justice Kennedy and substantially embraced by four dissenters from the limitations in that opinion.

In another policy reversal, this time related to the reach of the Clean Air Act’s regulation of hazardous air pollutant emitters, EPA disclaimed power it had asserted for twenty-two years. In 1995, EPA interpreted the law to require that sources regulated as “major” hazardous air pollutant emitters under Section 112 of the Act remained “major” once so classified. In 2018, however, a new EPA memorandum did not just reverse that view, but claimed EPA had had no such power under the Act. Despite decades of experience under the old policy, the agency did

82 Definition of “Waters of the United States—Recodification of Preexisting Rule, Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227, 32,231-50 (July 12, 2018) (reviewing underlying law and in numerous places alluding to lack of statutory authority or questions about a “sufficient statutory basis” for the 2015 rule). In places it softens the abnegation claim, stating the earlier rule “may” have exceeded the agencies’ authority. Id at 32240; id. at 32247 (the rule “may not effectively reflect the specific policy” of Congress regarding the balance of federal and state authority under the Clean Water Act).

83 Revised Definition of “Waters of the United States,” (proposed rule, Dec. 11, 2018) ADD FEDERAL REGISTER CITE WHEN PUBLISHED.

84 Id. at 77 (calling concurring opinion of Justice Kennedy in Rapanos the views of a “single justice” and stating Clean Water Rule “relied too heavily” on “considerations that Justice Kennedy expresses”).

85 Id. at 80.


87 William L. Wehrum, ENVTL. PROT. AGENCY, MEMORANDUM, RECLASSIFICATION OF MAJOR SOURCES AS AREA SOURCES UNDER SECTION 112 OF THE CLEAN AIR ACT (Jan. 25, 2018) (calling the previous policy “contrary to the plain language” of the statute in a temporal variable that made the old policy “once in, always in”). For analysis of this shift, see Michelle West, “Once In, Always In” Now Out: How the EPA is Reducing Regulations on Hazardous Air Pollutant Emitters, GEORGETOWN ENVTL. L. J. ONLINE (March 3, 2018).
not analyze the track record of the longstanding view, its air impacts, or the air impact changes that might flow from the new statutory read.\textsuperscript{90} Both policies were stated in interpretive documents issued without notice-and-comment process.

In another deregulatory carveout that quickly garnered attention, EPA in late 2017 proposed to reverse its earlier regulation that stated that upgraded trucks installed with refurbished old diesel engines were subject to regulation as “new” motor vehicles under the Clean Air Act.\textsuperscript{91} Such trucks, known as “gliders,” emit more diesel-linked pollutants and GHGs than completely new state-of-the-art trucks with new engines and designs, but gliders are far cheaper and, due to their use of recycled components, are reported by their manufacturers to result in fewer GHG emissions in their building.\textsuperscript{92} EPA in 2016 had required gliders to meet new truck emissions levels, basing that judgment on a combination of statutory language, statutory goals evident in the law, and assessment of pollution impacts.\textsuperscript{93}

In 2017, EPA stated its new view (as proposed) that it “lack[ed] authority to regulate any aspect of the glider business—trucks, engines, or kits—as reachable under the Act’s regulation of pollution from “new” motor vehicles.\textsuperscript{94} The agency reached this conclusion through a mix of claims of no “specific intent” to regulate “such a thing as a glider,” plus a larger and somewhat convoluted parsing of the Act’s amendments, its larger context and “whole law” analysis, and the roots of the Act’s definition of “new” as drawn from an earlier automobile disclosure statute. The agency concluded it “is implausible” that a “new motor vehicle” would “include a vehicle comprised of new body parts and a previously owned powertrain.”\textsuperscript{95} In a brief fallback, it stated that “at a minimum, ambiguity exists” and cited \textit{Chevron} as an additional ground for its policy reversal.\textsuperscript{96} Although the notice includes brief discussion of claimed benefits of gliders, the agency does not discuss or reveal overall emissions impacts or compare its new view with the effects, findings, or reasoning of the earlier contrary regulatory decision. Subsequent news stories and a letter of a group of senators to EPA’s first Administrator under the Trump administration, Scott Pruitt, raised numerous questions about this regulatory reversal’s genesis, legality, and underlying factual and technical claims.\textsuperscript{97}

\textsuperscript{90} Wehrum, supra note 89.


\textsuperscript{92} Id.


\textsuperscript{94} Glider Repeal Proposal, supra note 91 at 53443-44.

\textsuperscript{95} Id. at 53445-46. Earlier, it at one point calls its prior reading “not the best reading,” language also consistent with this new reading not being a Step 1 clear answer to the “precise question” under \textit{Chevron}. Generally, however, its several pages of analysis are supporting the view that it has (and had) no power to regulate gliders as new.

\textsuperscript{96} Letter of Senators Tom Carper and Tom Udall to Administrator Scott Pruitt (March 12, 2018) (citing news stories and other studies questioning the genesis of the proposed rule change and integrity of studies and industry materials relied upon); Eric Lipton, \textit{Steering Big Rigs Around Emissions Standards}, NY TIMES A1 (Feb. 15, 2018) (recounting meetings between company building gliders and Administrator Pruitt, effects of the rollback, and concerns of low-polluting truck manufacturers about the break for gliders).
The United States Department of Labor has similarly utilized an abnegation strategy, relying on disclaimers of statutory authority under the Fair Labor Standards Act as a justification for a 2017 rollback of a finalized regulation designed to ensure that workers retain tips. Earlier regulations mandated that “tipped employees retain all of their tips” except in typical “tip pooling” settings. In late 2017, however, the Department published a proposed rule that, contrary to the Department’s earlier rules and litigation defenses that had met with mixed success, now stated it had “serious concerns that it incorrectly construed the statute” and had exceeded “the scope” of its power. The previous regulatory mandate limiting employer discretion in allocation of tips would, under the proposal, become a matter resolved by contract—“a matter of agreement between the employer and employees”—or “of state law.” It stated that it was “unable to quantify” how customers would respond or how “reallocations of tips” would affect previously tipped employees. Although the earlier regulation was still in effect and hence binding, the Department also reiterated an earlier 2017 policy of “nonenforcement” of the 2011 regulation to employers paying at least the full minimum wage and not taking a “tip credit.” Subsequent news stories reported that the Department actually had prepared a quantified analysis of the regulatory revision’s impacts that found that billions of dollars would be reallocated from tipped workers to employers. After internal disputes and White House consultation, they “removed the economic transfer data altogether.” Ultimately, Congress intervened with a statutory resolution contained in a massive omnibus spending bill.

In late 2017, the Agricultural Marketing Service of the United States Department of Agriculture proposed to withdraw a rule that had regulated livestock handling, conditions, and care. This agency statutory abnegation is broad in disclaiming power to regulate animal welfare, stating that such regulation was “not authorized,” the agency’s power “authoritatively prescribed” by the statute, and that it “lack[ed] the power to tailor legislation to policy goals, however worthy, by

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99 Id.
100 Id.
101 Id. at 57396.
102 Id.
103 Id. at 57399.

rewriting unambiguous statutory terms.” However, the agency waffles a bit on the claim of no power, in one place calling a different form of regulation—“market-based regulation”—“more appropriate.” The agency concludes its legal analysis with a fallback claim that its new substantially narrow power read should, if the lack of power reasoning were rejected, be viewed as “a permissible statutory construction.” As with several other statutory abnegation deregulatory actions, the agency does not discuss how or whether animal welfare or conditions will change as a result, how consumers might respond, or how producers might be affected, focusing instead on consumer growth in organic markets and risks of “overly prescriptive regulation.”

The Federal Communications Commission (FCC), an independent agency, in 2017 took substantial steps toward abandoning the Net Neutrality regulation promulgated in 2015. This proposal and the later tentative final Order relied on a weaker form of statutory abnegation. The agency did not wholly disclaim power, but stated the earlier action was founded on unsound “statutory construction” and claimed the new action is based on a “better reading” of the statute. This new interpretation resulted in a substantially reduced regulatory role for the FCC and left major internet actors subject to reduced regulatory oversight.

Under a slightly different form of statutory abnegation, an agency does not decisively disavow power, but identifies questions about agency authority and then rationalizes a power retreat as wise in light of such doubts. The Bureau of Land Management in 2017 and 2018 sought to abandon a 2016 rule governing methane pollution emissions linked to oil and gas extraction and related royalties. The BLM explained the reversal as partly due to the argument—made by challenging industry but largely embraced by the BLM in 2017 and 2018— that the 2016 rule “exceeded the BLM’s statutory authority.” The agency in 2017 and 2018 stated that it had earlier illegally focused on “conservation without regard to economic feasibility,” utilized an allegedly illegal focus on “environmental and societal benefits rather than on its resource conservation benefits alone,” and a claim that BLM had illegally engaged in pollution regulation delegated to

107 Id. at 59989.
108 Id. at 59990.
109 Id.
111 Id.
EPA and the states under other laws. After offering these statutory abnegation justifications for deregulating, the BLM also pointed to procedural infirmities and risk of rejection under the APA. But the agency also devoted substantial argument to its new deregulatory move as a better choice, especially where no governing statute mandated the 2016 regulation. In September of 2018, BLM issued a final rule that more firmly relied on statutory abnegation rationales, again identifying several ways it claimed BLM in 2016 had exceeded its authority, but also including among them claims that it had previously been excessively stringent. This last, far more limited form of abnegation—a claim of illegality due to a claim excessive stringency— involves something more akin to authority doubts about the rigor of a particular choice as a rationale for a regulatory reversal and, as a result, leads to less aggressive agency assertion of power over those regulated.

b. Statutory abnegation variants and differences

In these statutory abnegation actions, several common elements are apparent. This Part briefly identifies these elements.

i. Deregulatory benefits claims

All are deregulatory actions or, in one instance, an initial declination to act but following an earlier contrary statement about the agency’s power. Through statutory abnegation, the agency reduces burdens imposed on the targets of regulation by some earlier action. All such actions, other than the series of choices leading to Massachusetts v. EPA, prominently tout their anti-regulatory rationales, sometimes including extensive language about the harms of regulation and agency power. Such actions can involve a claim of no power to regulate in an area at all, but sometimes constitute a more action-specific disavowal that the agency lacked power to regulate as it did. Sometimes the claim is written as though it is about a statutory line or mandate, but in larger context seems to be nothing more than a claim the agency went too far under the facts or science.

ii. Omitted comparative analysis of legal reasoning and effects

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115 Id. at 7927-28.
116 Final Rule, Bureau of Land Management, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49184 (Sept. 28, 2018) (“BLM Waste Rule Rescission Final”) at 49185-86, 49189-90 (claiming past BLM illegality in its statutory interpretation and adopting a more limited read of its powers that it characterizes as consistent with “longstanding” approaches and to avoid conflict with the Clean Air Act). BLM’s hybrid claim of illegal power that is linked to excess stringency states that “by failing to give due regard to operator economics, the BLM exceeded its statutory authority.” Id. at 48189.
117 The latter setting describes the agency history leading to Massachusetts v. EPA. See supra at notes 30-38 and accompanying text.
Recent uses of agency statutory abnegation strategies are also notable in what they decline to do or include. All involve the new statutory read disclaiming power, but make only passing reference to the previous contrary statutory views and the rationales that had explained them. Most omit to provide an old-new comparison of effects of the interpretive change, and most also do not address or only glancingly refer to studies, science, and facts previously discussed as part of regulation under the earlier, but now rejected, statutory interpretation. The new view’s benefits are discussed, at least in broad terms, but the old approach’s benefits that would now be foregone, and hence logically tallied as costs of the new regulatory choice, receive little attention. They also have not discussed the track record of experience under the earlier actions.

These abnegation actions hence seem to reflect at least an implicit view that the more the agency justifies lack of power through a statutory abnegation rationale, the less it needs to engage with other factors, reasoning provided at the time of the earlier (but now abandoned) view of the agency’s power, or underlying facts, data or science contingencies relevant to the old and new action.

iii. A textualist narrative and word-driven choice

To the extent lengthy, small-type Federal Register documents can reveal a narrative, the story told by agencies utilizing a statutory abnegation strategy tends to be that the agency had overreached, that it now respects the law’s limits, and that regulation is often bad and economic activity will be enhanced by the deregulatory action. Several seem to parrot language, rationales, and methods that micro-textualist judges, such as the late Justice Antonin Scalia, would utilize in interpreting statutes. Also consistent with such judicial textualist methodology, these agencies devote little attention to the impacts of their new interpretive choice, perhaps because it is presented as obligatory and hence not a choice at all. All mention compliance with presidential executive orders calling for deregulatory actions and reduced regulatory costs. Even these narratives, however, often contain little documentation to back up their views, sometimes citing no authority and in other actions citing only to a comment or two or mentioning burdens that would have fallen on a particular category of regulatory target. The agencies in most of these actions do not actually assess such claims or reach conclusions about the accuracy or adequacy of this information about regulatory effects or claimed hardships, but nonetheless propose a

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118 Textualism comes in numerous forms, with Justice Scalia favoring a form that tended to focus upon a snippet of language, often with little attention to immediately surrounding language, larger structure, or statutory indications policy goals, even when stated in the text. For an in-depth critique, see VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 103-34 (2016) (reviewing Scalia’s form of textualism as “petty textualism”). As a short-hand, I refer to such a narrow focus as “micro-textualism.” Justice Scalia, in a less developed strain of cases, would expand his focus, generally en route to rejecting an agency’s claim of authority. See infra at notes 126-30 (discussing these cases); Buzbee, The Tethered President, supra note 11 at 1373-75 (discussing the “major questions” canon and implications for deregulatory policy changes). In a growing line of Supreme Court opinions displaying a more integrative and functional mode of statutory analysis, Chief Justice Roberts and Justice Kagan, in opinions speaking for the Court, analyze statutory texts with attention to all statutory signals, but generally maintain a focus on the text itself; they just do not focus as narrowly at Justice Scalia did in some of his most famous “new textualism” decisions. Id. at 1365-67.
broad regulatory rollback. A few late 2018 actions, however, included a bit more attention to before-and-after comparisons of regulatory effects.119

iv. Initial declinations to act as excluded

Another category of abnegation likely exists, but is hard to identify and raises a different set of issues; it hence is excluded here apart from this limited identification. Agencies frequently need to make decisions based on fact and law about whether they should, for the first time, assert jurisdiction over or impose regulatory restrictions on a source of risk. They may decline to do so out of concern about a lack of statutory authority, or perhaps concerns about challenges to their authority, or any number of other reasons usually linked to agency choices in a world of many options, demands, and limited resources. But without the wrinkle of policy change, the agency generally has no reason or need to explain a choice not to act. The Supreme Court in State Farm saw this distinction as important, rejecting the government’s attempt to justify a policy reversal as so much like an agency choice not to act as to deserve similar minimal or nonexistent judicial scrutiny.120

But as the State Farm Court noted, the two are different. With an initial choice not to act, there is unlikely to be a body of fact-finding related to, or scientific study tailored to, the regulatory action ultimately declined. As a result, there may be no written documents declaring or explaining a statutory abnegation rationale or whether a different view is tenable. Such action is actually often no action at all. In addition, there is no regulatory track record or ripple effects or subsequent reliance interests with initial choices not to act. It will deliver no new deregulatory relief, and hence provides little opportunity for agency credit claiming. Furthermore, such an initial choice not to claim power or act triggers a substantially different body of doctrine, much linked to the “committed to agency discretion” exclusion from judicial review under the APA.121 This body of law grants agencies broad, and possibly unreviewable, discretion in how they choose to deploy limited resources and choose among an array of possible actions. The article therefore generally puts to the side possible initial abnegation rationales for agencies continuing to take no action.

v. Chevron policy change distinguished from abnegation

Although the setting of the law and actions leading to the Chevron might seem to support statutory abnegation justifications, that case did not involve abnegation at all.122 Where an agency decides to adjust the stringency of its regulation or identify new permissible means for compliance with a legal edict (be it statutory or regulatory), but does not disclaim its power, there is no abnegation. Instead, the agency is basically embracing what it will claim is a better regulatory means as a matter of policy choice. In fact, an agency identifying a new means for

119 See e.g. the ACE Rule Proposal, supra note XX and accompanying text; the Supplemental Notice, supra note 82 and accompanying text.
compliance will often be claiming an expanded range of power in the sense that the agency is claiming statutory authority to regulate in several different ways. That the action may result in some sort of regulatory relief, perhaps in the form of reduced compliance costs, does not make it a form of abnegation. The agency is not denying that it has legal authority even though it may be revising policy and reducing regulatory burdens.

vi. Changed regulatory stringency distinguished

Another common sort of action often characterized as deregulatory is neither an example of statutory abnegation nor even an example of policy change. Nonetheless, by way of contrast brief analysis will help explain why statutory abnegation is different. Agencies frequently are obligated by statutes to assess some underlying science or social conditions and, depending on their factual findings, adjust regulatory obligations. So, for example, agencies will assess air quality and, as a result, change a jurisdiction’s legal category. Or regulation will hinge in part on assessments of cutting edge technological capabilities. Or agencies will examine a product’s risk and adjust labels or perhaps licensed or permitted product marketing. Although such actions can make a massive difference in resulting regulatory obligations—potentially adding burdens or easing requirements—they do not necessarily involve any changed view of the agency’s statutory authority or any policy change. Static legal criteria simply can lead to changing regulatory obligations in light of changing science, data, and conditions. This is a common underpinning of changed regulatory obligations. Hence, so-called regulatory rollbacks can involve no abnegation and sometimes no policy change at all.

vii. Past abnegation, effects on future regulatory action, and the “major questions” canon

Actions that involve past abnegation and then a new assertion of authority are also worth noting. Agencies will at times quite explicitly reach out to regulate a source of risk that had earlier been unregulated, sometimes in an area involving earlier agency disavowals of authority to regulate. A paradigmatic and often cited example is discussed in the *Brown & Williamson* decision. The FDA had previously declined to regulate tobacco products, plus Congress had in a number of laws quite specifically authorized particular types of regulation of tobacco products. When the FDA reexamined its authority in light of new revelations of industry practices regarding tobacco products’ design and effects and, as a result, newly claimed power to regulate tobacco marketing, that earlier abnegation—called “disavowal” in the case—was significant to the subsequent Supreme Court majority’s rejection of FDA’s power. (In addition, a difference

123 See 42 U.S.C. Sections 108-110 (setting forth interrelated provisions creating ambient air quality standards scheme, state obligations, and linked classifications of their status).
124 See 42 U.S.C. Section 112 (setting forth program regulating emitters of hazardous air polluters and requiring achievement of various benchmarked forms of “best” achievable performance).
127 Id. at 144-59.
among the justices concerned whether the FDA’s earlier declinations to act had been factually contingent—a “contingent disavowal” -- or a claim of no power whatsoever.128)

Such circumstances involve a new claim of power either never asserted or even the subject of earlier abnegation statements. Such actions have at times triggered the growing body of doctrine known as the “power canon” or “major questions” doctrine, under which the Supreme Court has declined to show usual deference to agencies and has reviewed the new claim of power skeptically.129 In this other converse setting involving past abnegation preceding the new power claim, the Court’s more rigorous form of judicial review is quite overtly antiregulatory in its rationale and effects. The fact of past abnegation and, it appears, sometimes simple past declinations to act, can together be part of the rationale for later skeptical and undeererential judicial scrutiny. As a result, current agency statutory abnegation claims might, in effect, set up or even by design be meant to set up later judicial resistance to a new reassertion of agency power.130 This may in part explain why agencies might utilize abnegation claims despite the disadvantages of such claims as a rationale for deregulation. The article turns now to analysis of this doctrinal disadvantage before exploring why we nonetheless see such frequent reliance on agency abnegation claims.

II. The Doctrinal Answer to Statutory Abnegation

Given the prevalence of statutory abnegation claims to justify deregulatory actions, especially during 2017 and 2018, one might expect a strong doctrinal foundation for such a move. However, as found by reviewing courts and is apparent when assessed in light of governing law, the bare statutory abnegation claims rolled out during the Trump Administration lack doctrinal support.131 This is not to claim that an agency could not, at times, correctly identify a power limitation it previously disregarded. The point here is that, as utilized and explained in most of the agency actions reviewed above, the skimpy associated reasoning and factual engagement accompanying abnegation claims appears to be in outright violation of several strains of law governing judicial review of agency action, especially in settings of policy change. Unless several longstanding foundational judicial review frameworks are substantially revised, agency abnegation strategies that lack full required accompanying comparative analysis is unlikely to meet with success in the courts.

a. Assessing proffered justifications for statutory abnegation

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128 Id. at 186-92 (Breyer, J., dissenting) (reviewing reasons agency’s past views were fact-based and could change).
129 See Lisa Heinzerling, The Power Canons, 58 WM. & MARY L. REV. 1933, 1933 (2017) (analyzing and criticizing the “major questions” cases, labeled the “power canons,” for how they reorder the relationships of the three branches and have an anti-regulatory bias).
130 For other explanations for the legally dubious abnegation strategy, including the related long-shot goal of securing judicial agreement with a “no power” agency claim, see infra at Part III..
131 They are “bare” due to how they lack analysis of other required antecedents for legal policy change. Those requirement follow in this section.
Statutory abnegation actions have been justified by agencies or Department of Justice litigators with several rationales. This part reviews and also explores possible additional justifications to explore if such a strategy might be a winning or comprehensible strategy when assessed with a focus on success upon eventual judicial review. Later parts broaden the perspective to consider incentives and victories that might be more political or applauded by regulatory targets, even if eventually rejected in the courts.

i. Presidential edicts and direction

Most agencies utilizing statutory abnegation explain their regulatory reconsideration as, at least in part, an act of compliance with a president’s deregulatory agenda. This was true with agencies responding to President Reagan’s deregulatory goals and executive orders, the Bush administration’s declinations to act regarding climate change, and more recently evident in agency responses to President Trump’s priorities, especially as set forth in his Executive Order 13,771. That order requires all agencies and departments to eliminate two regulations for each new regulation and also ensure regulatory actions do not result in any new net regulatory costs. Compliance with an executive order is expected of all agencies by presidents. Hence, agency reference to governing executive orders is nothing out of the ordinary.

Nonetheless, executive orders, both by their terms and due to constitutional structure, cannot be used as an adequate rationale to justify violations of what is required by the Constitution or by enabling legislation governing an agency’s actions. Statutes and the Constitution are hierarchically above such orders, creating binding law. In addition, an order falls before still extant promulgated regulations; until revised through another rulemaking process, they remain binding law, as long established by United States ex rel. Accardi v. Shaughnessy. Order 13771, like other past orders, explicitly states it is subject to other governing statutory and legal requirements. Such presidential direction hence can explain an agency’s consideration or proposal of deregulatory moves, and perhaps has been viewed as something that will provide additional support upon judicial review due to a president’s political accountability. An Executive Order would not, however, excuse violations of law, lack of factual support, or actions that in some other respect are arbitrary and capricious. No case or law gives a president’s imprimatur via an executive order some special authority or power to save an agency action that otherwise lacks adequate justification or preceding process. If anything, recent cases perhaps are stronger in their rejection of agency actions that appear to be little more than agency capitulation to a president’s edict; courts instead look for agencies to observe all process required

134 Id. at Sec. 5.
by the APA, enabling acts, and “reasoned decisionmaking” precedents, including basic tenets of “hard look review” and the consistency doctrine cases reviewed below.\textsuperscript{136}

ii. Change and \textit{Chevron}

As mentioned above, some agencies engaged in statutory abnegation cite \textit{Chevron} as giving agencies latitude to revamp their regulatory approaches, sometimes linking that discussion to President Trump’s avowed goal to reduce regulatory burdens.\textsuperscript{137} The case is also sometimes cited as a fallback argument that, if the new abnegation statutory interpretation fails, the agency’s new interpretation and choice should be upheld as at least a reasonable or a permissible choice. \textit{Chevron} certainly is a critical endorsement of agency policy reassessment, and also provides agencies with some additional space to interpret a statute and make policy judgment calls if there is a gap, silence or ambiguity, with judicial deference required under the Supreme Court’s \textit{Chevron} Two-Step. At Step One of Chevron, an agency and court must agree on a statutory interpretation issue if Congress has addressed the “precise question at issue.” At Step Two, however, the presence of such a gap, silence, or ambiguity translatates into policymaking discretion to be wielded by the agency due to its delegated role and expertise. Courts are to defer to a “reasonable” or “permissible” interpretation.

But most statutory abnegation rationales for deregulation involve agencies claiming that they could not in conformity with law act as they previously did. Agency language explaining agency statutory abnegation often seems to be describing the agency as acting within, and hence constrained by, a \textit{Chevron} Step One context.\textsuperscript{138} Since Step One requires the agency and court to agree, and with the agency receiving no deference, \textit{Chevron} at Step One provides no additional room or judicial deference for the agency’s reinterpretation of the governing statutory language.\textsuperscript{139} So \textit{Chevron} is one of many cases embracing the possibility of policy change, but it actually provides no additional doctrinal mileage for an agency’s statutory abnegation claim that it lacks power to act as previously claimed. If the action genuinely involves a question that can only be viewed as implicating a Step One setting, then the agency and later reviewing court must agree on what language requires.\textsuperscript{140} If there is Step Two “space,” then an abnegation claim would be in error because the deregulatory agency disclaiming power would mistakenly be

\begin{footnotesize}
\textsuperscript{136} See infra at Part III.b.vi (discussing cases reviewing abnegation-based deregulatory actions).
\textsuperscript{137} EPA frequently cites it, but other agencies making policy changes also cite it for support. See supra at notes 53-87 and accompanying text (discussing EPA policy changes citing \textit{Chevron}), and supra note 106 and accompanying text at 59899 (discussing Department of Agriculture policy reversal referencing \textit{Chevron}). It appears that agencies making policy changes during the Trump administration at some point will also cite one or more executive orders by way of explanation or justification. A Westlaw search of Federal Register notices after 2016 (when President Trump became president) indicates over 2500 agency references to such orders.
\textsuperscript{138} \textit{Chevron}, 467 U.S. at 842-45.
\textsuperscript{139} In fact, as further developed infra at notes 198-99 and accompanying text, the general assumption is that agencies view it as advantageous to argue that their policy choice, and underlying statutory interpretation rationales, fall within \textit{Chevron} step two because it provides an agency room for multiple permissible choices and calls for judicial deference.
\textsuperscript{140} \textit{Chevron}, 467 U.S. at 842-45.
\end{footnotesize}
asserting lack of interpretive and policy choice options. An illegal erroneous agency claim of legal constraint, like any other erroneous agency statutory interpretation, requires later judicial rejection.

iii. Litigation risk

Most agencies pursuing a statutory abnegation strategy focus on their new interpretation, explain it, and in broad terms criticize the old view as untenable. Some agencies reject the old view due to the argument that it is likely either not to receive deference from the courts, would be vulnerable to loss when reviewed, or simply would likely to lead to litigation that the agency would like to avoid. This litigation risk rationale is, in fact, quite different in issues it raises and hence has led to different judicial responses.

iv. Consistency doctrine’s constraints

Some agencies pursue an abnegation strategy with supplementary justification. They offer a bit more robust legal explanation that acknowledges that, in addition to the issues of enabling act interpretation, agencies proposing a policy shift also need to provide analysis required by law governing policy change and consistency doctrine. This is most evident in several 2017 and 2018 actions by EPA. In such actions, in addition to offering the statutory abnegation interpretation of the statute, the agencies cite and sometimes quote from two of the four major modern Supreme Court consistency doctrine cases. This essay now turns to explication and analysis of these doctrinal claimed justifications, others that have been neglected, and the constraints these precedents impose.

These agencies cite to a few lines from the partial dissenting opinion of Chief Justice Rehnquist in the State Farm case. This is, indeed, one of the key cases governing agency policy changes and deregulatory shifts. Nonetheless, agencies citing it and quoting Rehnquist do not include discussion of the case’s majority ruling, which rejected a Reagan era deregulatory action as

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141 Hemel and Nielson, supra note 22 (discussing Prill doctrine); Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 *COLUM. L. REV.* 1867, 1880, 1885-86 (2015) (agreeing with Professor Peter Strauss regarding *Chevron* “space” and *Skidmore* “weight,” but suggesting a unity of deference frames in the focus on ascertaining statutory meaning as part of analysis of agency power). QUESTION FOR DUKE EDITORS—DO WE NEED CASE CITES WITHIN THE NOTE?

142 In the DACA cases, DHS erroneous views about its powers led to a string of judicial losses. See supra notes 46-52 and 290-95 and accompanying text (discussing the actions and judicial rejections).


144 The cases parsed in this subpart are analyzed for their emphasis on contingent facts and past reasoning in Buzbee, The Tethered President, supra note 11. Here they set the stage for assessment of the legal adequacy of statutory abnegation rationales for regulatory reversals.

145 Supra notes 53-87 and accompanying text (discussing such proposals and citations to consistency doctrine cases).

inadequately justified and stated what was required of agencies proposal a policy change. Before turning to other consistency precedents, *State Farm’s* two contrary facets are worth exploration.

*State Farm* is undoubtedly the foundational modern case governing judicial review of agency policy change, in that case in a deregulatory direction. In addition to embracing “hard look review” and articulating the key elements of “reasoned decisionmaking,” the Court set forth the key elements of consistency doctrine. The Court was confronted with the National Highway Traffic & Safety Administration’s rejection of Standard 208, a regulation requiring cars to be equipped with either air bags or automatic seatbelts. The agency, however, only offered an explanation for one of the regulatory reversals and argued for minimal judicial scrutiny of its actions because they were deregulatory.

The Court rejected this argument for minimal scrutiny, emphasizing the need for an agency to confront its old policy and offer explanation for the change. An agency, the Court stated, when “changing its course” is required to “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” Abandonment of the airbags option was easily found arbitrary and capricious because the agency “apparently gave no consideration whatever” to keeping one of safety strategies. As the Court stated, “[n]ot one sentence of its rulemaking statement discusses the airbags only option.”

The *State Farm* Court declined to submit deregulatory action to some less rigorous standard of review, offering several reasons for this rejection. First, the APA made no such distinction. Second, the enabling act language also provided no basis for treating differently initial regulatory actions and rescissions of past actions. Moreover, the Court offered a rationale rooted in logic. The usually minimal review of agency declinations to act was “substantially different” from an agency’s “revocation of an extant regulation.” Such revocation “constitutes a reversal of an agency’s former views as to the proper course.” The Court stated that a “settled course of behavior embodies the agency’s informed judgment” that the earlier action “will carry out the policies

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150 Id. at 42. The tail clause, stating more is required than “when an agency does not act in the first instance,” is rejecting arguments that a deregulatory act is akin to an agency’s choice not to act or regulate, a setting subject either to no judicial review or deferential review. See *supra* notes and accompanying text (discussing law on unreviewability).
151 Id. at 46.
152 Id. at 48. See also id. at 50-51 (stating the “agency submitted no reasons at all”)
153 Id. at 41-42.
154 Id.
155 Id. at 41.
committed to it by Congress.”

This creates “at least a presumption” that “those policies will be carried out best if the settled rule is adhered to.”

The Court acknowledged, as had already been long established, that agencies can seek to change policy. But the Court linked the possibility of change not to politics, a president’s priorities, or just examination of statutory language, but to the need for “ample latitude to ‘adopt their rules and policies to the demands of changing circumstances.’” It reiterated the “changing circumstances” language and stated that “the presumption is against changes in current policy that are not justified by the rulemaking record.” Hence, the State Farm Court left room for agency policy change, but emphasized how past agency reasoning, the record, and underlying “circumstances” would need to be engaged and overcome to justify a change.

Chief Justice Rehnquist’s opinion, which was labeled as part concurrence and part dissent, suggested that a change of administration and policy priorities could be among the grounds for an agency policy shift. He stated that they could be a “reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”

Although Chief Justice Rehnquist’s view did not gain majority support in State Farm, it was quoted in the more recent FCC v. Fox case, in a majority opinion that further fleshed out the general framework for the permissible role of politics in agency policy change. The Court in Fox found permissible the FCC’s changed approach to “fleeting obscenity” on television. The splintered opinions in Fox render difficult determination of exactly what views garnered majority support. Change itself was stated not to trigger any heightened standard of judicial scrutiny, but all justices agreed the agency would have to confront the old policy and explain the changed new policy.

The justices in FCC v. Fox differed on what had to be weighed. In an opinion that at times appeared to garner majority support, Justice Scalia stated agencies would have to “show that there are good reasons for the new policy.” All justices appeared to agree on this need for “good reasons.” The Scalia opinion ostensibly garnered majority support for most of its discussion, but

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156 Id. at 41-42.
157 Id. For analysis of statutory interpretation and judicial review standards for “longstanding” agency law interpretations, see Anita Krishnakumar, Longstanding Agency Interpretations, 83 Fordham L. Rev. 1823 (2015). Krishnakumar calls for more rigorous review of agency change if based on political factors, but deference if rooted in analysis of changing facts, expertise and “experience-based reasons,” and workability. Id. at 1877-79.
158 State Farm, 463 U.S. at 42.
159 Id.
160 Id.
161 Id, at 59 (Rehnquist, C.J., concurring in part and dissenting in part) (“As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration”).
162 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). See also Kozel & Pojanowski, supra note 22 at 129-33 (analyzing additional cases developing law between State Farm and Fox).
163 See id. at 129 (highlighting doctrinal uncertainty left by Fox).
164 Fox, 556 U.S. at 1810.
165 Id. at 1811.
166 The dissenters would have required more, but indicated no disagreement with the need for “good reasons.”
left the law a bit uncertain due to pointed differences in the Justice Kennedy concurrence; Kennedy’s vote was needed to make a majority. The Scalia opinion stated the following, in language that has become a common part of 2017 and 2018 statutory abnegation justifications: an agency “need not demonstrate to the court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.” Justice Scalia and concurring Justice Kennedy both also acknowledged that because past policies will tend to change the status quo by engendering reliance interests and because prior agency actions often involve “factual findings,” reviewing courts will tend to have to look at more with a policy change than with a policy generated anew. Dissenters argued that agencies must always explain why the change was made, and agreed with the majority opinion that agencies must engage with prior facts and justifications.

Surprisingly, almost all of the 2017 and 2018 deregulatory actions and the statutory abnegation actions focused upon here fail to grapple with the Encino Motorcars decision. This 2016 case included a clearer majority opinion by Justice Kennedy, post-dating the death of Justice Scalia. Encino Motorcars also lacked the uncertainty in Fox created by multiple opinions and concurring opinions quibbling over ostensible majority language. The Court rejected as inadequately justified the agency’s revised policy about employment status in the car dealership setting. Agencies making a policy change must, as always, “give adequate reasons” for their decisions. And the Encino Court stated that, as under typical “hard look review” articulated in State Farm, this means an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.” The Court again emphasized the need for assessment of any “reliance interests” and, quoting from Fox, stated that a “reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” And “unexplained inconsistency” is justification for holding a new agency action “arbitrary and capricious.” The Encino Court notably did not quote or refine the Fox language about the agency change not needing to be “better” or that an agency “belie[f]” it was better would be enough, leaving its majority stature still uncertain.

None of the 2017 and 2018 abnegation actions discuss the implications of Massachusetts v. EPA, but it too involved a statutory abnegation claim plus arguments about presidential power to justify

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167 Id. at 1811. Justice Kennedy’s ostensibly joined this opinion, but his concurrence—which was needed to make a Court majority—emphasized more agency factual justification, concerns with agencies exercising “unbridled discretion” or ignoring contrary or “inconvenient” facts, especially since many agency actions are built on “factual findings.” Id. at 1822. Encino focused even more on facts. See infra at notes and accompanying text.

168 Id. at 1811.

169 Id. at 1832.


172 Id. at 2125.

173 Id. at 2126 (quoting Fox at 515-16).

174 Id at 2125 (quoting Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).
the agency’s action. The Court’s opinion, however, strongly rejects the agency’s legal claim of no power and declines to accept presidential political priorities as adequate to justify the petition denial and ongoing inaction on climate change. The Massachusetts Court ordered the agency, EPA, to reassess its action in light of the statute’s criteria for action and science relevant to that choice. Neither the abnegation claim nor the presidential priorities arguments triggered any lessened burden of agency explanation. If anything, the decision is an unusually strong affirmation of the need for agency use of expertise, rational decisionmaking, engagement with science and facts, and a rejection of politicized agencies.

The subsequent Michigan v. EPA decision did not involve a policy change, but it also involved an agency claiming it lacked statutory authority, in that case authority to consider costs associated with its regulation of air toxics from power plants. It, much like Massachusetts, elicited a judicial skewering for the agency’s “interpretive gerrymander” and selective attention to “context” to justify the regulatory choice. It too compelled the agency to go back and fully attend to the statute’s variables and related analysis of regulatory effects.

In fact, none of these cases in explicit language or even implicit logic indicate that deregulation or a statutory abnegation theory alone—that is, a claim that the agency has no power or choice but to reject its previous claim of authority---somehow eliminates other agency hurdles to justifying a policy choice or shift. No opinion provides that an agency policy revision aligned with a presidential edict more easily surmounts the policy change hurdles. At most, the one sentence in Fox about agencies’ not needing to show that a revised policy is “better” provides agencies with a judgment call cushion; if all of the law and facts are in rough balance, then an agency will likely succeed in its policy revision.

But these cases share the requirement that agencies must engage with the “facts and circumstances that underlie” an earlier action. Such “underlying facts and circumstances” will usually be repeatedly stated and linked to relevant law by agencies in explaining their action initially and later in defending it in court. Such “facts and circumstances” will hence require substantial engagement

175 The Court in Massachusetts did not emphasize the change in statutory interpretations and additional justifications they might trigger under consistency doctrine; this may explain the failure of agencies to cite and grapple with its lessons in the many deregulatory statutory abnegation actions discussed here. Its key language rejecting the adequacy of EPA’s “no power” rationales and requiring analysis shaped by statutory criteria is at 549 U.S. at 528-35
176 Id.
177 Id., especially at 532-35.
178 For analysis of Massachusetts and its emphasis on expertise and deemphasis of politics as a rationale for regulatory action, see David J. Barron, From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization, 76 GEO. WASH. L. REV. 1095 (2008); Jody Freeman & Adrian Vermeule, Massachusetts v EPA: From Politics to Expertise, 2007 SUP. CT. REV. 51
179 See Michigan v. EPA, 138 S. Ct. 2699, 2707-11 (2015) (rejecting EPA claim of no power also to consider costs associated with its regulation to reduce risks of mercury pollution from power plants). The dissent, by Justice Kagan and joined by 3 other justices, agreed with a general default rule that reasonable agency action requires considering of costs unless precluded by the statute. Id. at 2716 (Kagan, J., dissenting).
by the later agency proposing the policy change. Yet none of the 2017 and 2018 wave of abnegation actions provides a thorough grappling with past relevant facts, past reasoning, or analysis of the effects of the past or revised policy choice, as required by Supreme Court doctrine. “Unexplained inconsistency” is not permissible, as stated in 2016 in Encino’s modest embellishment and clarification of the law as left by the earlier State Farm and Fox cases.

Recent deregulatory proposals relying on abnegation rationales emphasize the possibility of policy change and a place for politics, but disregard or barely acknowledge these cases’ persistent doctrinal emphasis on the agency obligation to address “contingencies” that justified the past action and need to engage in rigorous comparative reasoning of the old and new action. Most of these 2017 and 2018 agency actions seem fated for eventual judicial rejection unless they succeed in provoking a major shift in administrative law doctrine.

If intended or expected to succeed in the courts—–an assertion I question below—–these abnegation based actions almost seem rooted in a logic error, mistaking the possibility of policy change for a sufficient rationale, while ignoring the conditions that an agency must surmount to succeed in such a policy change. As a result, the early judicial reception of the wave of Trump deregulation has indeed been harsh. Courts have repeatedly faulted the agencies for failing to provide required process before making a policy change and for failing to engage with and provide comparative analysis of underlying facts, circumstances, and reasoning previously viewed as relevant and the new “good reasons” for the policy change.

b. The doctrinal disadvantages of statutory abnegation

Because agencies relying on statutory abnegation claims have focused on statutory language while neglecting to engage with past explanations, underlying facts, changing conditions, and reliance interests, they appear to be repeatedly running afoul of consistency doctrine hurdles for agency justification of change. But they are also strategically puzzling even if one looks past the mandates of consistency doctrine. As shown in this part, they are usually unnecessary and legally disadvantageous for the agency under prevailing deferential standard of review regimes.

Since the Supreme Court issued its Chevron decision, and before it as well, agencies have long been advantaged when justifying their actions by weaving together interpretations of enabling legislation with expert assessment of their areas of regulation. Since statutes rarely mandate any single specific type of action, agencies issuing regulations are usually making context-rich

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180 In fact, as explained below, during litigation those justifications will be reiterated and likely sharpened. See infra at notes 219-20 and accompanying text.

181 Encino at 2125.

182 See Buzbee, The Tethered President, supra note 11.

183 For analysis of these first reviewed deregulatory actions and judicial rejections, see id. at 1408-17; Lisa Heinzerling, Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge, 12 Harv. L. & Pol’y Rev. 13, 16-47 (2018) (analyzing first wave of Trump administration stay and delay actions and judicial rejections); and this article, infra at Part III.b.vi (reviewing opinions rejecting the adequacy of statutory abnegation rationales for policy reversals).

184 See Herz, supra note 141 at 1897 (discussing deference to agencies as long-rooted in delegated authority and expertise, well before Chevron, and discussing NLRB v. Heart Pubs., Inc., 322 U.S. 111, 114-15, 130-31 (1944)).
judgments that draw on the agency’s experience and expertise in a setting where neither statutory language nor empirical study of the world point to only one solution or action. The early Skidmore decision creates what is now the general fallback deference regime if an agency has acted outside of a notice-and-comment setting. It also emphasizes deference as grounded in an agency’s expertise and the thoroughness of its reasoning, among a number of factors now often characterized as “Mead-Skidmore” sliding scale deference.

Agency statutory abnegation, with its near exclusive agency focus on language to claim obligatory policy change, in contrast, is a recipe for reduced or no deference under this regime. Such a narrow agency focus has, as revealed in recent actions, not relied on agency expertise and seldom provided expertise-based analysis of statutory factors and on-the-ground effects of regulatory policies under the regulatory regime. If the agency is claiming mere obedience to an all-knowing and constraining Congress, then the traditional experience-based justifications for any deference fall away.

Statutory abnegation is also a disadvantageous strategy when assessed under Chevron’s famed two-step framework. As introduced earlier (and much applied in the courts and analyzed in scholarship), under Chevron, judicial scrutiny toggles between Step One zero deference if Congress has addressed the “precise question at issue,” and substantial deference at Step Two if the statute leaves silence, gap, or an ambiguity regarding how the agency should regulate. In the zero deference Step One setting, the agency and court must agree on that single answer. In Step Two settings, however, the Court in Chevron recognized that agencies frequently have to make policy choices rooted in interpretations reconciling conflicting statutory policies, using power and turf delegated to the agency by Congress, and in light of often political and pragmatic calculations about how best to regulate. And where the action involves technical and scientific expertise, as risk-regulating agencies’ actions often do, the Court indicated that judicial deference to an agency is especially appropriate. Although less favorable to agencies than

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185 Agencies interpretive roles are intertwined with their congressionally delegated policymaking roles, both of which draw on their expertise. See Sidney A. Shapiro, The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences, 50 Wake Forest L. Rev. 1097 (2015) (discussing agencies’ delegated roles and development of “craft” expertise); Jonathan R. Siegel, The Constitutional Case for Chevron Deference, 71 Vand. L. Rev. 937, 956-65 (discussing delegated roles and conceptions of “interpretation” and “policymaking” in the Chevron case and as allocated by regulatory statutes); Wendy E. Wagner, A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power, 115 Colum. L. Rev. 2019 (2015) (explaining congressionally delegated agency roles and expertise, benefits of deliberative procedures, and tensions between presidential control through OIRA and agencies’ delegated roles).

186 See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating factors now called sliding scale review, including “consistency” as a favorable factor when judicially reviewed); See generally Peter L. Strauss, “Deference is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 Colum. L. Rev. 1143, 1153-72 (2012) (discussing applicability and conceptual differences of judicial review under Chevron and Skidmore).


188 Chevron, 467 U.S. at 842-45.

189 Id. at 842.

190 Id. at 843-45; Siegel, supra note 185 at 962-65.

191 Id. at 843-45, 861-66.
Once thought, agencies explaining and defending regulatory choices governed by the *Chevron* Step Two framework are still benefitted by this most favorable deference regime.\(^{192}\)

The subsequent *Mead* case built on *Chevron*, but also clarified when and why *Chevron* deference would apply.\(^{193}\) It too creates an unfavorable frame for agencies seeking to roll back regulations through abnegation claims. When agencies offer a reasoned choice from among a range of possible choices, the actions occur in a setting characterized by two types of political accountability. Although some courts and scholars have read *Chevron* as all about one type of political accountability (via the president’s electoral accountability), the opinion actually is built on several accountability rationales. The Court emphasized legislative supremacy-based accountability, in the form of Congress choosing the agency delegate (EPA, not the courts) and Congress setting the criteria for action to be weighed by that expert delegate.\(^{194}\) It also, in more cited closing language, emphasized electoral and hierarchical accountability, contrasting agency leadership fealty to the elected president as well as Congress delegating a turf and task to an agency, versus reposing interpretive power in judges lacking expertise or political accountability.\(^{195}\) *Chevron* involved notice-and-comment rulemaking with its usual quasi-legislative forms of participation and transparency in reasoning, but the decision itself left unclear if that procedural form was also an underpinning of the case’s call for judicial deference.\(^{196}\) That question was resolved in *Mead*, where the Court emphasized that deference is also justified by procedural accountability engendered through the quasi-legislative formulation of regulations through transparent, participatory, and deliberative notice-and-comment proceedings where Congress intended agencies to act with the “force of law.”\(^{197}\)

So when agencies argue, as they usually can, that they are acting in a *Chevron* Step Two setting, they benefit from substantial judicial deference of several types. Agencies, not courts, have been delegated the expert task by Congress. They hence can claim legislative supremacy-based legitimacy. Agencies also can claim special expertise-based knowledge about the implications of their choices. They know best—or at least know more than courts--how competing tasks or policies should be best reconciled due to their familiarity with statutory and regulatory law and ongoing work with all affected. They know the law, plus they are deeply familiar with on-the-

\(^{192}\) See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron to Hamdan, 96 Geo. L.J. 1083, 1150 (2008) (finding consistency remains an important factor for judicial deference and agency victory, even in cases where *Chevron* is applied).


\(^{194}\) Chevron, 467 at 843-45, 861-66.

\(^{195}\) Id. at 865-66 (mentioning agencies and “within limits of that delegation, property rely[ing] upon the incumbent administration’s view of wise policy”).


\(^{197}\) The Court in Mead also discussed formal adjudications as a setting justifying Chevron deference. See United States v. Mead Corp., 533 U.S. 218, 227-31 (2001); see also M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383 (2004) (discussing agency options of policymaking modes post-*Mead* and their repercussions).
ground effects of policy choices. This is a quintessential attribute of expertise-based accountability. They are also accountable, both indirectly via electoral accountability of the President, and, due to their use of transparent and participatory process and obligation to engage in reasoned decisionmaking, when taking actions that have the force of law. This is a process-based form of accountability; courts look for agency fealty to such participatory process and full and adequate explanation.

Due to these differences in expertise and linked forms of accountability, courts reviewing an action in a Chevron Step Two setting will look for a reasonable agency choice, not complete agreement with a single sole correct answer. The law interpretation and resulting policy choices need only be “permissible” or “reasonable.” This all means that an agency setting itself up for review under the favorable Chevron Step Two posture--which requires a successful claim that statutory language leaves room for policymaking choice--can point to several forms of political accountability justifying judicial deference to agency views. If agencies succeed in this claim, then if underlying facts, science or data provide such a basis, they can claim under Chevron and Mead that they have room for a range of permissible policy outcomes.

Furthermore, agencies acting with claims to a Chevron Step Two setting also protect their power in a second way. They preserve power in the future to adjust their statutory read and resulting policy. Step Two interpretive choices, by definition and as just explained, are permissible choices in a setting that usually provides multiple permissible choices (provided other choices can be justified in light of relevant facts and likely regulatory effects). Because agencies always need to react to a changing world, examine regulatory compliance, evasions, and violations, and assess regulatory effectiveness or reallocate regulatory burdens, agencies often will develop better means to achieve a statutory end. Chevron itself involved just such a policy shift. EPA changed its approach to factory pollution in a setting of an undefined term and growing regulatory sophistication about, and interest in, use of market-based regulatory strategies. Thus, a Chevron Step Two posture is usually available to an agency and is a favorable posture to claim before a later reviewing court. It preserves agency flexibility to later adjust its action, without necessarily triggering arguments that the agency had shifted policy or changed its statutory interpretation. In other words, an agency that consistently identifies a range of permissible options to address a social challenge is, when later embracing one of those choices, making a modest policy shift that may involve no changing view of its statutory powers.

Chevron does, however, come with a downside that agencies may prefer to avoid. Because a Chevron Step Two posture involves an agency choice and requires justification, it shares a key

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198 See Shapiro, supra note 185 (discussing forms of expertise wielded and developed by agencies).
199 See Farber & O’Connell, supra note 196 at 1171-72 (discussing usual procedural prerequisites for agency claims of deference after Mead).
200 Chevron itself emphasized EPA as an agency learning from experience and consistently and permissibly interpreting governing language “flexibly” in able to “engage in informed rulemaking.” 467 U.S. at 863-64.
201 Id.
202 See Merrick B. Garland, Deregulation and Judicial Review, 98 HARV. L. REV. 505, 549-53 (1985) (discussing how Chevron and State Farm can be reconciled and noting that the Court in Chevron did not analyze the agency’s action under the framework for review of agency policy change and “hard look review” set forth in State Farm).
attribute with the consistency doctrine cases. *Chevron* necessarily requires the agency to explain based on policy grounds why the choice is well founded, or at least not arbitrary and capricious, when examined in light of statutory factors and underlying data or science. Prominent scholars soundly argue that Step Two reasonableness analysis is in fact a variant of, or at least overlaps with, “arbitrary and capricious” analysis governed by the *Overton Park* and *State Farm* cases. This other linked body of law emphatically requires agencies to engage with evidence, criticism, and offer “reasoned decisionmaking” to justify choices. Such full engagement under “arbitrary and capricious” and “hard look review” involves several burdens that agencies changing policy may yearn to avoid. First, agencies will need to engage with all arguably salient science or data, substantive comments and criticisms of those participating in the process, and offer rationales for choices or changes engaging all such science, material comments, and past agency views and conclusions. Such work is labor intensive and will slow down any change. Second, the science or facts may, when reviewed in court, present a genuine barrier to a regulatory reversal that must be shown to be a reasonable choice in light of such empirical materials. Similarly, problematic facts may be politically disastrous. For example, if a regulatory reversal will lead to a wave of illness or deaths, the agency understandably (but not legally) may hope to avoid a firestorm of criticism by ignoring such facts and by dodging the requirement to highlight inconsistency with protective statutory criteria.

Furthermore, between the initial regulatory action and the later move to deregulate, a track record of compliance and investment in the new regulatory status quo will require new empirical investigation. (As discussed above, the Court’s mandate that agencies assess reliance interests when making a policy change is directed at this sort of on-the-ground change.) Entities regulated or companies eager to meet a new market demand often quickly figure out means to

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203 *Chevron*, 467 U.S. at 853-65 (tracing EPA’s policy shifts, underlying support for the new “bubble strategy,” and permissible nature of such expertise-based changes through “informed rulemaking”). *Mead* further emphasized the importance of deliberative procedures generating actions worthy of *Chevron* Step Two deference. See supra notes 193-99 and accompanying text (discussing questions resolved through *Mead*).


205 Id.

206 See Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 565-66 (2011) (discussing different agency and court tasks when governing legislation requires the agency to provide “factually grounded explanation” as opposed to one grounded in “value judgment[s]”).


208 The Clean Power Plan’s replacement is predicted to cause a substantial increase in deaths. This revelation spurred substantial adverse press and comment. See Lisa Friedman, *Costs of New Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. Times (Aug. 21, 2018) (reviewing new proposed rule and new additional expected deaths, statements of President Trump about helping coal country, and other coal-linked rollbacks). See also supra at notes 198-205 and accompanying text (discussing action, including agency efforts to avoid disclosure of how tip regulation policy change would shift wealth away from servers and to management).

209 See supra Part II.a.iv (discussing such requirements in cases setting forth key elements of consistency doctrine).
comply with a regulatory mandate, often at far more reasonable cost than initially predicted or claimed.\textsuperscript{210} And societal conditions also change, requiring agencies to consider overall updating of assumptions. In fact, any legal choice will lead citizens and economic players to adjust, often to capitalize on new opportunities or minimize compliance costs. Such adjustments and market benefits of past regulation can give rise to new formidable legal and political palatability barriers to change.

So, at \textit{Chevron} Step Two, agencies are advantaged by deferential judicial review and benefit from retained policy flexibility, but this does not mean the work will be easy or fast. Agencies still need to engage and make arguments in favor of the deregulatory move or other policy shift where science, linked harms, and logic might present serious logic or justification challenges. In addition, a choice that is acknowledged to be a choice to change policy, not a single required outcome, may create a political tempest. Blame will fall on the agency or the President, not on Congress for some earlier (allegedly) imprudent statute or perhaps a court for an allegedly unsound decision. Despite recurrent claims of agencies as eager to grab power and turf, scholars of regulation often observe tendencies to avoid risk, dodge work, and shun publicity.\textsuperscript{211} Hence, deregulation through statutory abnegation presents agencies confounding the turf expansion expectation in two ways. Agencies are denying themselves turf, plus they appear to be avoiding work.

As defined and explained earlier, when agencies offer a statutory abnegation rationale for rejecting an earlier read of the statute, they tend to focus on statutory language. They claim that they had no statutory authority to act as they did, usually including some new narrower read of their power or even a claim of no power whatsoever. Thus, viewed from a doctrinal perspective under these cases just reviewed, statutory abnegation necessarily puts the agency into a disadvantageous posture that leads to several easy pathways to defeat in the courts. (The infirmities of not addressing other consistency doctrine hurdles is, for now, put to the side.) First, if an agency claims only one possible interpretive choice, a court has to agree with that

\textsuperscript{210} When EPA denied petitions to reconsider the CPP, it found such compliance at lower cost and more rapidly than originally anticipated. See supra notes 61-63 and accompanying text. See also Lesley K. McAllister, \textit{The Overalllocation Problem in Cap-and-Trade: Moving Toward Stringency}, 34 COLUM. J. ENVT'L. L. 395 (2009) (describing and analyzing overalllocation of pollution rights under cap-and-trade regimes and reasons compliance tends to be easier than predicted).

choice for the agency later to win on that interpretive issue.\textsuperscript{212} Any different reading by the court means the agency loses. Second, even if a court agrees that the agency choice is legally permissible, the agency loses if a court concludes the agency erred in viewing itself as constrained to only that single permissible interpretation.\textsuperscript{213} Even without affording deference to the agency, the court might see the enabling act as providing an array of regulatory choices. If so, the agency loses and will eventually have to try again. If the agency had a range of choices, it needs to explain under the law and relevant facts why it chose one versus another, attending to statutory criteria guiding such choices.\textsuperscript{214} Third--in a variant on the second permutation--if the reviewing court identifies some statutory silence, gap, or ambiguity that, under \textit{Chevron}, translates into the agency having some factually and contextually informed range of policymaking choices, then the erroneous agency claim of no choice could also lead to judicial rejection.\textsuperscript{215} Thus, the self-constraining agency engaged in abnegation creates several sorts of judicial reversal risks, plus will thereby have limited its future flexibility.

\section*{III. Rationalizing the Statutory Abnegation Strategy}

Agency statutory abnegation is thus, upon initial examination focused on long-term legal success, a puzzler. Agencies are both disadvantaging themselves and embracing a lessened view of their own powers. But if one takes seriously the reality that regulation involves human institutions guided by law but operating in a political matrix, then agency statutory abnegation becomes both more understandable and problematic. As long posited by Positive Political Theory, all regulatory actors will strategically act in light of incentives they face and in light of each others’ actions; the political calculus may not mesh with an obedient focus on what the law seems to require.\textsuperscript{216} This Part operates at two levels. First, it illuminates why agencies and their leaders might opt for a statutory abnegation strategy when other approaches would promise more long-term legal success.

\textsuperscript{212} See NextEra Desert Ctr. Blythe v. Fed. Energy Regulatory Comm’n, 852 F.3d 1118, 1122-23 (D.C. Cir. 2017) (finding agency erred regarding its own authority and hence remand was required); Prill v. National Labor Relations Bd., 755 F.2d 941 (D.C. Cir. 1985) (rejecting agency action due to agency error about its own statutory authority); Hemel & Nielson, supra note 22 at 818-21 (analyzing cases holding that agency errors about nature of their own authority must be rejected).


\textsuperscript{214} For example, language might leave room for a few choices, but the effects of those choices might make clear that some choices, in actual application given underlying facts about effects or business dynamics (for example), would violate a statute’s protective goals. This is part of the logic of judicial review under Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). An agency can be acting within a correct understanding of its governing statutory criteria, but it will still need to show its actual choice is not “arbitrary and capricious” under the APA, and this involves “inquiry into the facts” that should be “searching and careful” to ensure the agency did not make a “clear error” of judgment. Id. at 416.

\textsuperscript{215} Hemel & Nielson, supra note 22 at 802-03.

\textsuperscript{216} See supra notes 18-20 and accompanying text (introducing Positive Political Theory and citing literature).
But this Part’s second major section argues that the very political incentives driving abnegation strategies reveal the shaky foundations of arguments that politicized regulation should be embraced or even trigger some lesser level of judicial scrutiny. Much of administrative law doctrine is designed to nudge or compel agencies to exercise their delegated expertise in conformity with legislative instructions. As exercised, agency disavowals of authority have been accompanied by virtually none of the procedural attributes that—whether in enabling legislation, the APA, or judicial doctrine—are designed to foster sound and accountable regulatory actions. Presidential mandates and agency obedience constitute one form of politically accountable action, but in the abnegation setting all other political accountability norms and practices have been neglected. As argued above, longstanding doctrine rewards actions reflecting respect for multiple intertwined modes of political accountability. As reviewing courts have found, presidential edicts are inadequate justification for inexpert agency rollbacks that dodge full engagement with congressional requirements, do not analyze underlying science and data, and fail to grapple with past reasoning and regulatory contestation.

a. Abnegation as a surrender or expansion of agency power

A longstanding anti-administrative argument is that agencies will predictably seek to expand turf and aggrandize authority. The claim is of hegemonic agencies that take on more and more turf and burden society with growing bodies of regulation. This claim persists but has, at this point, been subject to cogent theoretical and empirical historical critiques. Little reason exists to anticipate agencies will skew to overreach or turf aggrandizement. Agency abnegation claims, however, also illuminate a fundamental lack of nuance at the heart of the agency “empire building” turf expansion hypothesis. As shown by the wave of agency abnegation claims, agencies can simultaneously deny themselves power to address a risk and, at the same time, be claiming newly expansive powers to redefine their authority. This part briefly explains this seeming paradox of power denial and simultaneous agency power claiming.

Agencies are, as indicated by their very label, agents of Congress and the President. They are handed tasks and turf defined by statutes. They wield that authority either via an additional delegation of authority from the president, through personnel appointments, and through political

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oversight and direction from the President and sometimes Congress as well. But congressionally delegated tasks and presidential priorities can and often do clash. In fact, statutes empowering and obligating agencies often reflect past bargains and priorities that may not mesh with any branch’s later policy preferences. Nonetheless, those laws’ choices and compromises live on due to the usual hurdles to enacting any legislation.

An agency can be claiming newfound powers in any deviation from what Congress, via its delegation and statutory instructions, assigned to the agency. One sort of deviation could be in the form claimed by Niskanen and others generally critical of the administrative state, namely an agency’s claiming new or expanded turf or regulating risks in a way more stringent or onerous than Congress allegedly anticipated or meant in its statutory delegation.

But agencies abnegating previously claimed authority reveal another sort of agency power claim. An agency that deviates from congressional expectations through a regulatory withdrawal—whether by redefining down its statutory powers (the subject of this article), or the more usual method of more lax implementation and enforcement (a common occurrence that is hard to challenge)---is also making a claim of agency power over the extent of its authority.

The wave of abnegation claims presented here, at a minimum, provide yet another substantial factual counterpoint to the oft-stated claim that agencies will overreach in the form of turf expansion and excess stringency. It hence also provides a counterpoint to the view that doctrine and regulatory infrastructure should be designed to check an allegedly pervasive agency tendency to do too much. Since political and economic incentives can lead agencies to tilt in a turf-shrinking direction, yet also assert questionable statutory interpretations and violate administrative law tenets about agency consistency, any one sided doctrinal “cures” or checks may actually exacerbate already pervasive problems of agency disregard for statutorily defined domains, as well as risks of agency lassitude and “torpor.”

In addition, targets of regulation and powerful interest groups will predictably seek to reduce regulatory burdens at every stage from enacting legislation down to tailored planning, permits, requests for variances, or

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219 See Patricia M. Wald, The “New Administrative Law”—With the Same Old Judges in It?, 1991 DUKE L.J. 647, 651 (discussing agencies seeking to carry out policies of the “current administration” that “chafe at the bridle of old statutes” and resulting tensions with reviewing courts).

220 Id. (noting hurdles to statutory change in era of “divided government,” at that point houses of Congress under different parties’ control).

221 WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (positing the tendency of regulators to expand budgets through more regulation); see also ANDRE BLAIS & STEPHANE DION, THE BUDGET-MAXIMIZING BUREAUCRAT 4, 5 (1991) (same). Levinson and others, see supra note X and accompanying text, are responding to these claims.

222 Cf., City of Arlington, Texas v. FCC, 569 U.S. 290, 297-98 (2013) (rejecting call for judicial review distinction between ordinary review of agency action and review of “jurisdictional” claims due to difficulty in drawing such a line since all agency actions reflect a view of the agency’s power).

223 Much of the role of OIRA and imposition of cost-benefit analysis, as well as regulatory reform proposals and deregulatory orders, are rooted in such a claim of agency excess. See, e.g., supra Parts I.b.i and II.a.i (reviewing Trump deregulatory orders and memoranda and claims about regulatory excess).

224 Metzger, Foreword, supra note 28 at 86 (discussing such risks and quoting Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2339-40 (2001)).
enforcement negotiations.\textsuperscript{225} If “slippage” and laxity are a risk, as they are, regulatory process choices and standard of review regimes need to adjust for those risks as well.

\textit{b. Political-economic theory and the abnegation claim}

This part now turns to analyze the central mystery of statutory abnegation. Why would—really, why have—agencies in numerous actions found the statutory abnegation strategy worth pursuing despite its doctrinal disadvantages and the necessary diminution in agency turf and policy discretion that it entails? As analyzed in the sections that follow, political and economic incentives make sense of abnegation. Legal actors, especially agencies and presidents, are not invariably disinterested agents faithfully hewing to legislative instructions, but are entities responding to their own incentives in a dynamic, political, and interactive environment.\textsuperscript{226} Many incentives shaping agency actions are unrelated to what the law says or requires.\textsuperscript{227} This section’s analysis also reveals inadequacies of incomplete political accountability rationales often wielded in battles over the value of, and perils of, the administrative state. Although agency abnegation claims could involve sound claims about the limits of agency authority, and hence are not necessarily or by definition illegal, agencies utilizing such abnegation claims have almost always also dodged procedural accountability and opportunities for public input, made little use of agency expertise, provided little or no engagement with facts and regulatory track records, and offered little explanation other than summary linguistic analysis and virtually no close comparative legal reasoning about old and new views of agency authority.\textsuperscript{228} Claims of agency accountability that focus only on claimed statutory clarity or presidential edicts under a new administration are identifying two facets of regulatory political accountability. Such hierarchical obedience to a president and political appointees does not, however, logically or doctrinally excuse neglect all of the other critically important sources of agency legitimacy, accountability, responsiveness, and clarity. These other neglected sources of political accountability remain crucial to the regulatory rule of law and, relatedly, reflect a “moral” commitment explaining many pervasive and enforced norms governing the administrative state.\textsuperscript{229}

\begin{footnotesize}
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\item \textsuperscript{225} For review of such multi-layered strategic efforts to weaken or escape regulatory strictures in the setting of a massive land use highway project threatening a vulnerable fishery, see \textsc{William W. Buzbee, Fighting Westway: Environmental Law, Citizen Activism, and the Regulatory War that Transformed New York City} (2014) (tracing and analyzing the fourteen year battle); at 31-51 (analyzing the “art of regulatory war” and how partisans fight strategically in multiple venues over time to achieve their goals and seeking to address or identify regulatory vulnerabilities).
\item \textsuperscript{226} Again, this view of agencies as acting in a sequential, interactive, political and legally constrained environment with shifting and strategic incentives is a major difference between simple, more deterministic rational actor theories of agency behavior (see, e.g., Niskanen, supra note 221) and PPT assumptions. See supra notes 18-20 and accompanying text (citing to works describing key elements of PPT).
\item \textsuperscript{227} Wald, supra note 219 at 651.
\item \textsuperscript{228} See supra part I.a (reviewing sample of abnegation claims).
\item \textsuperscript{229} Cass R. Sunstein & Adrian Vermeule, \textit{The Morality of Administrative Law}, 131 Harv. L. Rev. 1924, 1947-55 (2018) (discussing “rule of law” values, consistency doctrine, and reliance interests as forms of “morality” enforced by administrative law even though some lack a grounding in any particular positive law). The essay builds off of
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i. A long shot worthwhile risk

If one thinks about agency actions as not just about a particular regulatory intervention, but as always reflecting concern with, and also influencing, the agency’s future actions and its power, agency abnegation claims may reflect an antiregulatory administration’s long shot gamble for a long term diminution in agency powers and, concomitantly, an enduring deregulatory result.

The agency actions discussed above involve many agencies saying, in a variety of forms and to different degrees, that they simply cannot regulate as previously claimed. Because a claim of no power is hard to justify under most statutes, plus consistency doctrine cases require agency policy shifts to be justified with much more engagement and explanation than actually displayed by abnegating agencies, most 2017 and 2018 actions involving abnegation claims are legally vulnerable. But deregulation rooted in abnegation claims, whether ultimately rejected or successful, can provide both political and judicial benefits. The political benefits accompanying even an ultimate judicial loss are reviewed below, but the long shot judicial victory for a power-limiting statutory interpretation is worth analyzing here.

If an agency proffers a “no power” claim, it is making a potentially enduring claim about its authority and how the underlying statute would still have to be read in the future. If a reviewing court agrees, especially if under a single venue judicial review statute, or if later embraced by the Supreme Court, then that abnegating statutory interpretation becomes permanent. The statute, and the agency’s power under it, would be permanently modified in a newly diminished form. And during an era of legislative gridlock, a legislative fix via a statutory amendment is especially unlikely. Even if the abnegation claim is of the more contingent “we can’t regulate in that way” sort, judicial agreement that an agency cannot use a particular regulatory tool or strategy would make some diminished authority permanent. Presidential or agency leadership seeking to weaken the agency or law in the long term simply may view such claims as worth a shot, especially if one considers political benefits that may flow from such rollbacks even if ultimately rejected.

The claim of no statutory power and the link to Chevron Step One may also be motivated by desire for a new doctrinally recognized Chevron-based dodge of problematic facts. Agency investigation and revelation of impacts of a deregulatory shift can trigger judicial skepticism and require expenditure of substantial agency resources. And if such science and fact-related immersion identifies genuine new risks of a deregulatory move, such a policy shift can create substantial political costs. Agencies pursuing abnegation strategies may be hoping to

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230 If an agency’s actions are reviewable in numerous circuits, then the law will need to progress circuit by circuit, with potential intracircuit respect for precedent and intercircuit disagreement until Congress intervenes, the agency changes policy, or the Supreme Court resolves the statutory issue. William W. Buzbee, Administrative Agency Intracircuit Nonacquiescence, 85 COLUM. L. REV. 582 (1985); Samuel Estreicher and Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 YALE L.J. 679 (1989).

231 For example, initial efforts to stay or delay implementation of the Clean Power Plan avoided discussion of impacts. The 2018 proposal of the ACE rule did include more comparative analysis of impacts; thousands of
convince courts to create a new doctrinal carveout. Under this view, the argument is, or would be, that if the agency never had the power earlier claimed, then the agency should be able to avoid the time and costs of undertaking such legally unauthorized factual engagement and explanation.\textsuperscript{232} If the earlier claim of power was all overreach and illegal, then such analysis (under this view) has always been legally irrelevant. As mentioned above, no current cases provide such a window for avoiding facts and discussion of harms resulting from deregulation. But most actions and cases have involved courts that ultimately disagree with the agency’s abnegation claim, so we do not know if courts accepting an abnegation claim would also accept a fast-tracked action that neglected comparative legal and factual analysis. Were reviewing courts to agree that an abnegating agency always lacked authority in an area, they might be sympathetic to agencies shortcircuiting their usual consistency doctrine analytical obligations.

ii. Changing policy change doctrine

The recent wave of statutory abnegation claims by agencies could also be a strategic prelude to arguments for doctrinal change regarding consistency doctrine and hard look review in the deregulatory setting. No cases now embrace a lesser standard of review for a deregulatory shift; in fact, the Supreme Court’s enduring, repeated demand is that agencies--whether engaged in initial regulation, deregulation, or proposing a policy shift-- must confront underlying past and current facts, reliance interests, and leave no unexplained inconsistency.\textsuperscript{233} The Court has long demanded more explanation by agencies when changing policies than applied when an agency takes an initial action or simply declines to act.\textsuperscript{234} As explained above, this body of law does not set a different or higher standard of review, but sets requirements linked to hard look review that agencies must always engage with all salient facts, address contested issues, and offer “good reasons” for a policy, be it new or a change; with a preexisting policy undergoing change, there is simply more that must be analyzed.\textsuperscript{235}

If the Supreme Court sees fit to devise a new generally applicable reviewing framework that involves less rigorous agency obligations and less searching judicial review in the setting of deregulation by statutory abnegation, then these many quite uniform abnegation claims may make some sense. Due to these actions’ numerosity, they offer many opportunities for judicial recasting of doctrine, whether through lower court rulings or an increased probability of a case going to the Supreme Court. In proverbial terms, the administration and its deregulatory allies may be seeking many bites of the apple. And because doctrinal adjustments smoothing the path

\textsuperscript{232} Cf., Ruhl and Robisch, supra note 207 at 102-03, 109-10 (identifying and criticizing agencies that use claims of lack of discretion to avoid hard and political costly work due to body of law developed at intersection of the Endangered Species Act and the National Environmental Policy Act and characterizing such avoidance as “discretion aversion”).
\textsuperscript{233} See supra notes 144-83 and accompanying text.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
for agency statutory abnegation claims would be of enduring value for all deregulatory and anti-
regulatory agencies and advocates, fighting for such a doctrinal change might be viewed as
worth the price of many losses.

iii. Political and career regulator tensions

Another explanation for statutory abnegation and linked legal inadequacies in agencies’
justifications relates to tensions or distrust between political appointees (whether early “acting”
leadership or Senate-confirmed leaders) and career officials. Due to their years of service for
politically diverse leaders, career officials will usually know how to identify agency action
weaknesses and reduce judicial reversal risks. Internal distrust, however, can lead political
appointee change agents to fail to follow the usual forms of sequential vetting by career agency
experts in pursuing legal change. News stories and some internal agency investigations have
revealed that agencies during the Trump administration pursued hasty policy changes due to
advocacy of “beachhead teams” drawn from affected industry and lobbying organizations,
sometimes without involvement of career officials. News stories also recount similar political
versus career tensions with the Department of Justice, the litigator for federal agencies.
Similar interactions were found in study of Reagan era deregulatory efforts. Relatedly,

236 News stories indicate that early Trump administration deregulatory actions were championed by temporary
“beachhead teams” that often were drawn from law firms and industrial associations. See, e.g., Annie
Waldman, Former Lobbyist With For-Profit Colleges Quits Education Department, PROPUBLICA (Mar. 21,
Such actions were reportedly not vetted by career agency professionals (whether civil servant or “senior executive
service” personnel), perhaps explaining some of their overreaching and legal infirmities. See infra note [NEXT
NOTE] (reviewing an investigated such clash). Similar strategies and resulting flaws plagued the Reagan
administration during its deregulatory efforts. See GOLDEN, supra note 211 at 45-47 (describing how major change
was “sent down” by political appointee pushing deregulation rather than “percolating up” through agency as
“was customary for agency policy”). She also found other political versus career tensions, but with wide array of
responses, although with few career officials seeking to sabotage the politically led deregulation. Id. at 44-60.

237 See, e.g., Office of the Inspector General, Department of Health and Human Services, Review of the Department
of Health and Human Services (HHS) Cancellation of Marketplace Enrollment Outreach Efforts (OEI-12-17-00290)
(linked to Press Release, Senator Patty Murray, Government Watch Dog Investigation, Requested by Senator
Murray, Confirms Trump Administration Sabotaged Open Enrollment Without Any Analysis of Impacts on Patients
& Families (Oct. 25, 2017)) (tracking cancellation of publicity to encourage healthcare enrollments and failures of
communication and coordination between “beachhead team” that cancelled plans despite career officials’
presentation and monetary commitments for such publicity). Similar failures of coordination between career and
political officials appear to explain the failure of Department of Homeland Security even to acknowledge a change
in policy and a new statutory abnegation claim regarding return of emigrees in the United States under Temporary
motion and reviewing APA claims and documenting policy change and agency’s failure to disclose and explain it);
Ramos v. Nielsen, 321 F. Supp.3d 1083 (N.D.CA. 2018) (denying motions to dismiss and, after tracking changed
views of policy and tensions between career and political appointees’ views, explaining why agency policy shifts
without explanation and justification violated APA requirements).

discussing results of political leaders ignoring dissent and advice of career attorneys).

239 Golden, supra note 211 at 44-60 (discussing tensions between political and career officials and how they
contributed to inadequately explained changes in seatbelt and airbag regulation leading to State Farm case); at
regulatory incentives will vary for political and career officials. Politically accountable agency leadership will unsurprisingly focus upon electoral pressures and presidential preferences, with shorter term advantages or obedience to the president looming large. Legislators responsible for underlying law will have an institutional interest in statutes’ ongoing effectiveness, but in reality may be long gone from the political scene when an agency seeks to shuck off some previously understood authority or task. Career agency lawyers and staff, in contrast, will often focus on longstanding agency practices, policy goals, longer term concerns about agency power and discretion, and choices constrained by legislation, evidence, and ultimate judicial reviewing expectations of more technocratic and reasoned decisionmaking. Career officials (whether civil servants or Senior Executive Service) may also, due to their career choices and long work within an agency, feel a stronger dedication to overall mission of the agency, while political appointees pushing for deregulation may overtly seek dismantling of the agency’s law and regulations. Due to this clash, unreasoned or flawed regulatory changes may emerge.

iv. Political benefits even if vulnerable to judicial rejection

Perhaps the best explanation for these many disavowals of agency power are also the most troubling from a perspective focused on the rule of law, legislative supremacy, agency legitimacy, and the web of political accountability rationales that underlie the legitimacy of the administrative state. Agency power disavowals and the regulatory rollbacks that accompany them can, and indeed are likely to, generate political benefits wholly unrelated to their legal merits. In fact, agency embrace of rollbacks and diminution of power may be of maximum political benefit where the agency and presidential administration can simultaneously reject the

109-50 (describing stark differences in career and political leadership and interactions during the Reagan administration at EPA under different leadership and how periods of tension led to clashes and even “strong resistance, even guerilla warfare” but also finding tension due to political leaders’ delay, “footdragging,” and avoidance of “checks” created under the APA to avoid accountability).

240 Judge Wald describes this reality as common. Wald, supra note 219 at 651-52, 655.

241 Golden, supra note 211 at 151-66, found differences in agencies’ cultures and interactions of career and political appointees, but observed career officials being more focused on evidence than political officials, but still at times silenced or prone to acquiescence due to respect for politically motivated policy shifts along with worry about reassignment or unfavorable treatment if resistant.

242 Id. See also Benner, supra note 238 (describing such clashes at the Department of Justice).

243 Although not identified in deregulation literature, a form of “work-to-rule” protest could also explain the legal inadequacies of the wave deregulatory abnegation actions. If political leaders insist on hastily issuing a policy change, career personnel could capitulate to their hierarchical superiors and let the action become public, but without fighting for improvement. See, cf., Jessica Bulman Pozen & David Pozen, Uncivil Obedience, 115 Colum. L. Rev. 809, 818-19 (2015) (identifying extreme forms of obedience to rules as means of protest, including labor law “work-to-rule” strategies). With a possible example of capitulation as protest, the Army Corps of Engineers reversed itself on a permit decision with no explanation other than obedience to the president’s “direction” after a presidential memorandum seeking such action. See Buzbee, The Tethered President, supra note 11 at 1389. A reviewing court similarly found federal agencies’ new Keystone Pipeline environmental impact analysis following a presidential directive to be shoddy and inadequately explained given the requirements of consistency doctrine cases. See Indigenous Envtl. Network v. U.S. Dept. of State, slip op. at 17, 19-23, 30, 31-35 (D.Ct.D.Montana Nov. 8, 2018) (identifying inconsistencies and stating (quoting Fox at 573) that agencies cannot “ignore inconvenient facts”). ADD F SUPP CITE WHEN AVAILABLE
choices of previous presidents and agency leaders. And if they can loudly and repeatedly claim that a past administration’s work was egregiously illegal, as claimed by abnegating agencies, that may be even better politics. Agencies and presidents may also see benefits in publicly rejecting the legislative work of a past Congress. Such regulatory opposition by a president and from within an agency, even if contrary to law, may appeal to a political party base or perhaps an electorally important region. Legal discontinuity and upsetting of the legal fabric may not be a mistake or reflect imprudence, but be precisely the political goal. Agency statutory abnegation hence may be a form of political speech, totally apart from its legal merits. Regulatory integrity and compliance with governing statutes may be of little or no importance. Political coalitions supporting a president, agency leadership, or a political party may hence see abrupt deregulatory relief and accompanying rhetoric as political delivery on promises, even if unjustified under governing law and underlying facts.

Targeted but arguably illegal regulatory rollbacks also can provide unusually focused and tangible political and business benefits akin to variances and exemptions from otherwise uniform and broadly imposed regulatory obligations. Even if the policy shift is eventually rejected in the courts, agencies and presidents pursuing an overt and vocal statutory abnegation strategy still get to reveal their loyalties. The very political responsiveness that abnegation manifests thus can be, and has been during 2017 and 2018, linked to agencies’ direct and overt opposition to still governing laws and regulations that a president and agencies are nonetheless constitutionally obligated to “take care” to faithfully execute.

Because federal laws, by their very nature, tend to set national goals and require uniform requirements, agencies and presidents delivering promises of regulatory abandonment or laxity for small sectors, regions, or particular political supporters will often be acting in a legally

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244 The many Trump Administration regulatory rollbacks aimed at Midwestern and Appalachian mining and oil and gas drilling businesses have been broadly viewed and even claimed as meant to benefit those regions and, in particular, coal interests. See Friedman, supra note 208 (reviewing new proposed rule’s effects, statements of President Trump about helping coal country, and other coal-linked rollbacks).

245 Cf., Heather K. Gerken, Dissenting by Deciding, 56 Stan. L. Rev. 1745 (2005) (exploring government decisions as a form of dissent and political speech, especially in the federalism arena).

246 Alfred C. Aman, Administrative Equity: An Analysis of Exceptions to Administrative Rules, 1982 Duke L.J. 277, 323-28 (analyzing capture concerns with use of regulatory exceptions but also identifying benefits of regulatory tailoring and flexibility); Aaron L. Nielson, Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices, Final Report for the Administrative Conference of the United States (Nov. 1, 2017) at 11-25 (reviewing cases on nonenforcement unreviewability and scholarship on the subject); at 24-25, 60 (identifying concerns with nonenforcement and risk agency could “nullify a valid act of Congress,” act for “insiders” or due to bias, and also do so without transparency). See also Peter H. Schuck, When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process, 1984 Duke L.J. 163, 263-300 (analyzing uses of an exceptions process and reasons for and benefits of its use, but extensively identifying risks mainly in forms of power accretion and loss of political accountability).

247 U.S. Const. art. II, Sec. 3. For discussion of this clause and its centrality to tensions over the role of the administrative state and clashes between congressional choices and presidential priorities, see Metzger, supra note 28 at 88-91.
suspect manner. Statutes making such factors permissible criteria are rare. Thus, deregulatory rollouts and accompanying political events have sometimes made the action’s targeted beneficiaries clear; the actual regulatory documents, in contrast, have focused only on language with little or no attention to distributional or political consequences.

Furthermore, targets of regulation will often gain financially from delay between a president’s deregulatory directions, then agency abnegation claims, and then eventual final resolution in the courts. Such deregulatory efforts and linked delay of required compliance will often accomplish a temporary de facto regulatory rollback. At a minimum, when agencies signal a shift in a deregulatory direction they will often stifle any momentum for more rigorous or burdensome regulation. Business or technological shifts and new business competition that might have justified further regulatory rigor are also likely to be undercut with political signals that regulatory demands for improved products or performance are unlikely. And even if old regulations remain in force in the interim, every brief and judicial appeal provides another press and politics-worthy declaration of political and regulatory priorities and loyalties.

Paradoxically, one of the central tenets of skepticism about the regulatory state and regulatory excess, namely that agencies go too far because regulation imposes economic burdens on others that are not felt by the agency itself, can partly explain agencies’ many likely ill-fated statutory abnegation actions. Because agency and presidential budgets, or squandering of such

248 Cf., BRUCE A. ACKERMAN AND WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR, OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT (1981) (analyzing how Clean Air Act provision tilted regulatory choices to protect high sulphur coal producers). Most environmental and risk regulation laws, however, call for nationally uniform standards without criteria that reflect explicit or veiled regional favoritism, although courts have allowed regionally focused action in the enforcement remedy setting when rational and not prohibited. Center for Auto Safety v. NHTSA, 342 F.Supp.2d 1, 5-17 (D.D.C. 2004), aff’d on other grounds, 452 F.3d 798 (D.C. Cir. 2006).

249 See note 108 (discussing coal protective deregulation and overt regionally focused appeals by the president). The ACE proposed rule notice does not have a regional focus and rarely even mentions coal. See supra note 71-74 (discussing genesis and substance of this proposed rule and linked past regulation and delays). In contrast, coal-focused benefits have been an overt part of accompanying politics. Lisa Friedman, E.P.A. Will Ease Path for New Coal Plants, N.Y. Times (Dec. 5, 2018) at B3 (describing and quoting stakeholders about coal-targeted benefits); White House Press Release, WTAS: Support for Trump Administration’s Proposal to Replace the Costly and Overreaching Clean Power Plan (Aug. 22, 2018) (containing four pages of quotes from politicians and interest groups supporting rollback and emphasizing Obama administration overreach and benefits for coal and energy industry). Available at https://www.whitehouse.gov/briefings-statements/wtas-support-trump-administrations-proposal-replace-costly-overreaching-clean-power-plan/

250 See Blais & Wagner, supra note 211 at 1711-15 (discussing benefits for regulatory targets of delay and citing supportive sources)

251 See Buzbee, Federalism Hedging, supra note 55 at 1051-57, 1081-92 (discussing linkage of regulation and regulatory reversal risks, “federalism hedging,” and development of products and practices to meet regulation-assisted demand).

252 See Niskanen, supra note 221 (arguing agencies will expand since they do not pay for such expansion or costs imposed by regulation); see also notes 217-18 and accompanying text (citing literature questioning this agency turf expansion hypothesis).
resources, are not felt personally by officials, they may see repeated failed regulatory rollbacks as nonetheless a victory due to political benefits. They are unlikely to personally pay for futile failed rollbacks, litigation expenses and court losses, vast administrative and advocacy expenditures, or harms befalling those left unprotected due to regulatory stasis or policy reversals. Such deregulatory costs remain off the agency’s ledger.

v. Abnegation, politicized regulation, and political accountability’s forms

Agencies justifying deregulation with statutory abnegation claims have generally offered little in the way of explanation or scale-tipping rationales, tending instead to make conclusory claims about past excess and circumscribed agency statutory power. Some abnegating agencies cite presidential executive orders and the partial dissent of Chief Justice Rehnquist in State Farm and a sentence in Fox, both of which acknowledge that a new president can legitimately push for a change in regulatory priorities.253 Presidential involvement is presented as a “plus,” if not implicitly viewed or presented as a decisive factor to justify these regulatory rollbacks. This part analyzes forms of political involvement and accountability and the statutory abnegation strategy.

If one links the presidential involvement rationale for agency deregulatory statutory abnegations to unitary executive theorists’ views of the administrative state—and deregulatory statements by President Trump and agency heads echo such sentiments254—then the more fully fleshed out argument for abnegation strategies seems to be the following: Agencies are deregulating consistent with the current elected president’s political preferences, and such vertical hierarchical accountability and respect for presidential wishes make the president directly and overtly accountable for the action. And, so the argument goes, this direct alignment of agency and presidential views heightens its constitutional legitimacy. Justice Kagan’s scholarship, when she was a professor, offered a somewhat aligned view. She argued that presidents should have presumptive authority to be involved in agency actions if not statutorily prohibited; she did not, however, argue for presidential involvement as creating a pro-agency presumption.255 Justice Kavanaugh’s lengthy concurrence about political accountability and the place of independent agencies in In re Aiken (written when he was still an appellate judge) is somewhat similar but goes further.256 He constructs a president-centric theory of “political accountability” and argues that presidential agency leadership and power to fire agency official at will is constitutionally required for the administrative state.257 Much of that dissent builds off broad language in the far more narrow context of questions about layered dismissal protections addressed in Free Enterprise.258

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253 See notes 161-64 and accompanying text (presenting this language).
254 See supra Parts I.a and I.b (presenting deregulatory proposals and accompanying rationales and politics).
256 In re Aiken County, 645 F.3d 428, 438-48 (D.C. Cir. 2011) (Kavanaugh J., concurring).
257 Judge Kavanaugh in closing pulls back in light of past Supreme Court precedents to soften his argument, but nonetheless repeatedly argues that the president’s constitutional position logically should include the unfettered power to dismiss executive branch officials.
Before questioning the adequacy of such hierarchical president-focused political accountability rationales, one caveat is necessary. A president’s ability to nudge agencies to consider an action, to try to further a president’s priorities, and to involve the White House in regulatory deliberations plus seek reports are all generally acceptable and even run-of-the-mill types of interaction.\footnote{259} That presidents can seek agency reports is a constitutionally rooted power.\footnote{260} Similarly, both executive agency heads and, when appointments arise, independent agency appointments will unsurprisingly involve politically aligned appointments.\footnote{261} Presidents are indeed the person (or really institution) constitutionally obligated to “take care” that the laws are “faithfully executed,” so agency actions can be and are generally attributed to the presiding president.

That presidents can and often are involved in agency appointments, actions and policy initiatives and regulatory leanings, however, does not provide cover for violations of other legal edicts. Nor does such presidential involvement excuse failures to act in the web of politically accountable modes required by statutory and regulatory law and centuries of administrative law doctrine.\footnote{262} Because the president is the head of the executive branch does not logically or, under current law, doctrinally mean that only that form of accountability matters to the legality of agency actions and policy changes. Longstanding administrative and constitutional law doctrines identify and enforce several forms of political accountability and legal regularity as essential to the legitimacy of the administrative state and central to review of the legality of agency actions.\footnote{263}

These bodies of intertwined doctrine emphasize legislative supremacy and the need for agencies, presidents, and reviewing courts to respect and enforce the substantive and procedural choices of Congress.\footnote{264} Presidents and politics can often influence an agency choice, but only within the confines of what Congress provides or delegates by way of choice.\footnote{265} Political accountability as

\footnote{259} Buzbee, Tethered President, supra note 11 at 1427-29 (identifying such leadership nudges as legitimate and ordinary).

\footnote{260} Peter L. Strauss, On the Difficulties of Generalization—PCAOB in the Footsteps of Myers, Humprey’s Executor, Morrison, and Freytag, 32 CARDOZO L. REV. 2255, 2258 (2011) (discussing the president’s constitutionally rooted right to seek opinions in writing from executive branch officials).

\footnote{261} Id. (discussing tensions between presidential authority and congressional choices about agency design and regulatory goals).

\footnote{262} For arguments about the need for presidents to respect congressional choices, see Kevin M. Stack, The President’s Statutory Power to Administer the Laws, 106 COLUM. L. REV. 263, 284 (2006) (documenting variety of congressional statutory choices about agency and presidential power and arguing for respect for such varied choices); Peter L. Strauss, Presidential Rulemaking, 72 CHI.-KENT L. REV. 965, 977-79 (1997) (same, with focus on different forms of political control with agencies, congressional choices, and Constitution’s specified means of presidential control).

\footnote{263} See Lisa Schultz Bressman, Deference and Democracy, 75 GEO. WASH. L. REV. 761 (2007) (reviewing cases where courts review agency actions with a focus on whether the agency exercised its authority “in a democratic fashion”).

\footnote{264} Strauss, supra note 260 at 2275 (emphasizing obligation of president to respect placement of power in agencies subject to statutorily set criteria and process).

\footnote{265} For additional analysis of settings and degrees of presidential control, see supra note 262 and accompanying text; Buzbee, supra note 11 at 1427-41.
a cross-doctrine value does not, upon closer analysis, do much to advance the argument for agency statutory abnegation rooted in presidential political predilections.

The first and most essential element of agency political accountability is rooted in legislative supremacy. Congress sets policy under its conferred powers and, through an express constitutional grant, can fashion laws as “Necessary and Proper” to fulfill this role and make government work to achieve its policy goals. In thousands of laws, Congress has stated policy priorities, designated the responsible regulatory actors, set forth the process through which the agency acts, and provided criteria to guide each agency’s multitudinous regulatory tasks. All agency actions need to conform to these congressional choices. And, conversely, agencies cannot decline their roles, ignore required process, and modify agency choices based on factors outside the law or in violation of required process. Even if a president becomes involved in an agency action, the action’s legality is still assessed for conformity with congressional choices. And courts, too, are not to second guess the goals and means chosen by Congress. Those are choices for the political branches, although enforced by the courts.

Relatedly, the APA’s presumptively applicable procedural modes and judicial review presumptions and exceptions also reflect an enduring congressional commitment to regularity of agency process and a mandate for agencies to explain and justify their choices. The courts’ longstanding embrace of “reasoned decisionmaking” requirements and, in reviewing recent delay and abnegation actions, enforcement of APA mandates reify those commitments. This body of doctrine is now a hybrid of statutory interpretation and administrative common law, reflecting a “morality” of administrative law with deep roots in Rule of Law aspirations.

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266 John Mikhail, The Necessary and Proper Clauses, 102 GEO. L.J. 1045 (2014) (providing a historical perspective and such clauses and powers they conferred); see also Gillian E. Metzger, Appointments, Innovation, and the Judicial-Political Divide, 64 Duke L.J. 1607, 1639 (2015) (questioning Supreme Court resistance to innovation and lack of deference to how Congress allocates authority to agencies due to Necessary and Proper clause “textual assignment” of this choice and power to Congress) (citing and quoting John Manning, The Supreme Court, 2013 Term-Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1, 6-7 (2014).


268 See infra at notes 30-38 and accompanying text (discussing Massachusetts and other cases rejecting abnegation deregulatory claims lacking accompanying compliance with substantive and procedural statutory requirements).

269 See Seidenfeld, supra note 20 (acknowledging politics in regulation but arguing that judicial review must focus on the agency action for conformity with law as evidenced by agency’s stated justifications and with agency explication of tradeoffs).


271 Section 559 of the APA, by making its requirements presumptively applicable and requiring express contrary choices by Congress before agencies can ignore the APA, reflects Congress’s enduring embrace of agency reasoned decisionmaking and robust judicial review. Courts rigorously enforce such requirements. Buzbee, The Tethered President, supra note 11 at 1403-07 (reviewing “reasoned decisionmaking” law and its importance to review of deregulatory rollbacks).

272 Sunstein & Vermeule, supra note 229; Metzger, supra note 23.
Furthermore, that the President is the nation’s chief executive and holder of the executive authority conferred under the Constitution does not mean that authority is limitless or unfettered. The President must “take care” that the laws of the land (both statutory, regulatory, and judicially developed) are “faithfully executed.” As mandated in Massachusetts v. EPA and dozens of other Supreme Court and lower court decisions before and after Massachusetts, agencies and presidents cannot toss aside regulatory tasks assigned by Congress based on factors outside the relevant statute. As stated by the Supreme Court in City of Arlington, the agency’s “power to act and how they are to act is authoritatively prescribed by Congress, so when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.”

Moreover, despite the breadth of agencies’ conferred powers, judicial review of agency actions has long been viewed as essential for agency legitimacy and part of the reason courts accept broad delegations of power. Courts insist on agency actions rising or falling based on the justifying explanation provided contemporaneously with the action. Agency actions lacking sufficient explanation, even if possibly acceptable in result, will be rejected if not adequately explained or justified so courts can fulfill their reviewing function. And that judicial reviewing and checking role is contingent on agencies acting through participatory and transparent process, with all actions explained by agencies in conformity with substantive and procedural requirements. As noted in Sierra Club v. Costle, regulation is in part a political process that leaves room for some unreCORd ed and informal communications within and among the branches. Were mere presidential prodding or pressure all that was needed to explain an agency action, however, these other checks to ensure legality and rationality would be weakened.

Lastly, Congress creates agencies in a remarkable array of forms. Among the variables reflected in those agency forms are nuanced differences in criteria agencies are to weigh and procedures through which they must act. The more a president could influence an agency choice with nonstatutory mandates or just off-the-record nudges, the more that agency action could stray from congressionally reticulated mandates. When Congress imposes on agencies specific

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273 See Stack, supra note 262 (discussing roots of presidential obligations to respect congressional choices); Strauss, supra note 262 (same).
274 For discussion of Massachusetts, see supra notes 30-38 and accompanying text.
278 Id. at 93-95.
280 Allowance for unrecorded influence in politicized notice-and-comment rulemakings allows for some influence, see id. at 405-08, but the agency action still must be justified under the law and the agency record. See also Vermont Yankee Nuclear Pwr. Corp. v. NRDC, 435 U.S. 519 (1978) (prohibiting judicial imposition of process not required by statutes or agency regulations but emphasizing review for substantive justification remains); Seidenfeld, supra note 20 (emphasizing need for judicial review to focus on agency justifications while acknowledging ubiquity of political influence).
tasks, criteria and procedural edicts, the room for politically driven agency action dwindles.\textsuperscript{281} Furthermore, Congress often chooses to create and harness independent agencies, with their usual stable but rotating multi-leader commission structure and protections against dismissals without cause. When it does so, Congress has chosen to add even more agency insulation from the more frequently oscillating political preferences of particular presidential administrations.\textsuperscript{282} This could reflect a congressional preference for legal stability, or technocratic or science-based decisionmaking, or a preference for policy moderation less buffeted by partisan rancor.\textsuperscript{283}

vi. Judicial enforcement of the agency obligation to engage

\textit{Massachusetts} and an early wave of judicial rejections of Trump administration deregulatory actions reveal that courts apply no different or easier judicial review merely because an agency asserts a statutory abnegation claim. Courts take seriously the requirement that agencies conform their conduct to requirements of their enabling acts, the APA, and the body of law collectively described here as consistency doctrine. Courts require agencies to fully engage with their governing law, underlying regulatory contingencies, and leave no unexplained inconsistency. This includes a judicial requirement that agencies fully engage with and explain changes in legal views about the agency’s power and effects of such a change. The cross-cutting theme of these decisions is that full agency engagement and reasoned decisionmaking is essential for agencies to respect congressional choices, for agency legitimacy, and to allow courts to fulfill their role as monitors of agency actions. Political accountability in all of its forms remains a strong requirement enforced by the courts.

For example, when the Bush administration’s EPA tried to justify inaction on climate change with reference to presidential priorities, foreign policy repercussions, and avoidance of excessive agency power claims (were EPA to address climate change), and hence asserted a broad abnegation claim of no such power under the Clean Air Act, the Supreme Court in \textit{Massachusetts} resoundingly rejected EPA’s arguments.\textsuperscript{284} The Court focused on the statute’s broad language, the lack of statutory grounding for EPA’s rationales for inaction, and noted that the agency had not yet engaged with the science relevant to the Act’s requirements. Both in its standing discussion and its overall construction of the statute, the Court mandated that the agency undertake whatever actions Congress had required based on the criteria chosen by

\begin{itemize}
  \item \textsuperscript{281} See infra Part III.b.vi (discussing cases rejecting abnegation-based policy shifts and noting courts careful parsing of APA and enabling acts for their procedural requirements and governing substantive criteria).
  \item \textsuperscript{282} \textsc{Marshall J. Breger} \& \textsc{Gary J. Edles}, \textsc{Independent Agencies in the United States} (2015) (discussing logic behind and forms of independent agencies); at 385-96 (discussing recent resistance to role of independent agencies and addressing countervailing arguments).
  \item \textsuperscript{283} \textit{See id., passim} (extensively discussing goals of expertise and insulation historically and as battled over leading to major precedents).
  \item \textsuperscript{284} \textit{Massachusetts}, 127 S. Ct. at 1459-63.
\end{itemize}
Congress, even if only an incremental step towards a larger goal. The agency’s “reasons for action or inaction must conform to the authorizing statute,” the Court declared. It rejected agency declination to act based on a “laundry list” of non-statutory considerations.

Appellate and district courts ruling on the first wave of Trump agency deregulatory actions have used similar language and reached similar conclusions. Many of these first rulings involved initial agency efforts to abandon or at least delay late regulatory actions of the Obama administration, but often with agency language that argued for a delay or stay, promised some return to an alleged status quo, or indicated likely future proposal of a policy change. As shown in Part I’s survey of agency abnegation claims, most such Trump deregulatory actions involved agency claims that the past administration exceeded its statutory powers, although some involved summarily paraphrased industry empirical claims of excess stringency or doubts about the efficacy of the earlier regulatory strategy. And, as discussed above, most of these delay or stay actions and other statutory abnegation claims have involved little or no accompanying engagement with past reasoning and underlying facts and science previously viewed as central.

Several courts rejected the Trump administration’s abnegation-based abandonment of DACA—the Obama administration’s policy of immigration forbearance for “Dreamers”--with the opinions substantially tracking each others’ logic. The courts found legal error, inadequate explanation, and also infirmity due to the department’s failure to hew to consistency doctrine by not fully engaging with earlier factual considerations and legal views. A third decision did not itself determine the lawfulness of DACA, but declined to enjoin the rescission due to a finding that the rescission was based on a “legitimate belief” in its lawfulness and agency concerns with litigation; that opinion also did not discuss consistency doctrine precedents. A fourth decision found the agency’s legal justification too lacking in any actual explanation to be worthy of

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285 Id.; id. at 1457-58 (stating that “agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop” but “whittle away at them over time” and discussing a standing remedy as shaped by analysis of “whether EPA has a duty to take steps to slow or reduce it”) (italics in original).
286 Id. at 1462.
287 Id.
288 Buzbee, The Tethered President, supra note 11 at 1376-90 (reviewing wide array of Trump deregulatory actions); Lisa Heinzerling, supra note 183 at 16-47 (analyzing early Trump administration stay and delay actions and judicial rejections).
289 See, e.g. LULAC v. Wheeler, 899 F.3d 814, ADD PP WHEN PDF AVAILABLE (9th Cir. 2018) (rejecting EPA reversal of proposed revocation of regulation of chlorpyrifos due to claim that “science . . . remains unresolved” in light of express statutory criteria and deadlines agency was violating and agency failure to respond to submitted objections).
290 The DACA policy and its reversal is introduced supra at notes 46-52 and accompanying text.
291 The Regents of the Univ. of Cal. v. United States Department of Homeland Security, slip op. (N.D. Cal. Jan. 9, 2018). The second rejection was in Vidal v. Nielson (also labelled New York v. Trump), Amended Memorandum & Order & Preliminary Injunction, slip op., 24-26 (16-CV-4756 (NGG) (JO) (E.D.N.Y. Feb. 13, 2018) (finding agency DACA reversal was rooted in legal error); at 36-45 (finding the agency committed factual errors, failed to offer logical legal reasoning, and did not analyze “reliance” interests as required by consistency doctrine precedents).
292 Casa de Maryland v. U.S. Dept. of Homeland Security, 2018 WL 1156759 (D. Maryland March 5, 2018). That court did, however, enjoin the Department from utilizing information submitted by Dreamers in response to DACA. Id.
affirmation. The judge gave the DHS an opportunity to offer a more fulsome legal rationale before imposing a national injunction, but upon a later review still found the actions inadequately justified. This court identified the accountability peril in policy changes rooted in unexplained abnegation arguments, even when in the setting of enforcement choices where agencies generally wield broad discretion: “When an official claims that the law requires her to exercise her enforcement authority in a certain way, however, she excuses herself from accountability.” The court concluded that “an official cannot claim that the law ties her hands while at the same time denying the courts’ power to unbind her. She may escape political accountability or judicial review, but not both.”

The court hence refused to accept the validity of the DACA rescission rooted in what was either erroneous or inadequately explained legal views.

The series of regulatory proposals and actions to revise or abandon the Clean Water Rule have relied in part on statutory abnegation claims, with EPA and the Army Corps under the Trump administration claiming that in the Obama administration’s Clean Water Rule the agencies exceeded their statutory authority. The first court opinion on these several linked actions rejected the addition of a new “applicability date” that worked to suspend the Clean Water Rule’s requirements. The court in no way granted the agencies greater latitude to revise, rescind or delay the 2015 finalized rule’s requirements due to the underlying abnegation claim. The court instead noted the agencies’ prohibition of merits’ comments (which was found to be unlawful), failures to comply with the APA’s procedural requirements, and their failure to abide by the requirements of consistency doctrine. Agencies may be able to change policy, the court recognized, but they must supply a “reasoned analysis,” allow meaningful opportunity for comment, and show “at least some fidelity to law and legal process.” Agencies must show such fidelity, and courts enforce it, or “government [would] become ‘a matter of the whim and caprice of the bureaucracy.’” The court noted that its finding of legal infirmities was consisted with a raft of other rejections of “similarly hastily enacted rules.” This last comment appears to indicate an additional degree of judicial skepticism for agency policy change actions that lack the usual more slow-moving deliberative process leading to regulatory change.

294 NAACP v. Trump, slip op. at 58-60 (initial finding of inadequacy); 315 F. Supp. At ?? [pages not yet available] (finding new government explaining still failed to provide a “sufficient basis” to revise the earlier judgment that the agency policy was rooted in error about “what the law requires” and also rejecting “serious doubts” and “litigation risk” rationales due to how they could allow an agency to “evade” judicial review).
295 Id. at XX. ADD PPTS WHEN BECOME AVAILABLE#
296 These actions are introduced above at supra notes 75-87 and accompanying text.
298 Id. at XX (citing and quoting N.C. Growers’ Ass’n, supra, 702 F.3d at 772 (Wilkinson, J. concurring)).
299 Id. at xx (quoting C. Growers’ Ass’n, supra, 702 F.3d at 772 (Wilkinson, J. concurring)).
300 Id. at xx and note 2 (in text and footnote citing to eight other judicial rejections).
In *Bauer v. DeVos*, the court rejected the Trump Department of Education’s effort to delay implementation of the 2016 Obama Administration’s “Borrower Defense Regulations.” The rejected form of agency abnegation was a bit unusual and convoluted. The Department claimed that due to litigation challenges and other questions about the Borrower Defense Regulations, it would stay the regulations’ effective date under APA Section 705 and, due to that stay, another provision of underlying law, the “Master Calendar Provision,” required the agency (in its view) to delay any implementation of the Obama Regulations until July 2019. The department thus claimed it had no choice but to provide this delayed implementation. The court rejected the department’s interpretation of Section 705’s stay authority, its sidestepping of a statutory negotiated rulemaking mandate, and the agency’s claim it had no choice but to provide a multi-year delay. The court also noted that the department did not provide a balanced comparative assessment of the effects of the implementation delay for those regulated and students losing regulatory protections, explain inconsistencies in approaches under the 2016 Regulations and the delay actions, or engage rigorously with its own contrary earlier legal analysis of the need for the Borrower Defense Regulations and its own regulatory powers. More than other cases, the court repeatedly criticized the department for leaving so much “unexplained.” Agencies must, the court stated, provide explanation “that will enable the court to evaluate the agency’s rationale.” Here, again, a reviewing court emphasized the importance of its own checking role to ensure agency political accountability and agency legitimacy.

In *Pennsylvania v. Trump*, the Department of Health and Human Services (and other co-defendants) fared no better in defending an “interim final rule” that was issued without a preceding notice-and-comment process. This new rule would have allowed employers to opt out of no-cost contraceptive coverage under the Patient Protection and Affordable Care Act. Here too, the agency relied on a mix of claims of inherent authority, power under the APA, and claims that it had no choice under statutory law but to reject its earlier action and provide the requested relief. The court rejected the agency’s construction of the APA, its view of statutory requirements for religious accommodation, and the agency’s view of the Affordable Care Act. It concluded that the agency had failed to weigh congressional policy choices to protect women’s

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301 Slip op. (D.D.C. Sept. 12, 2018). ADD PPTS WHEN FSUPP CITE AND PDF BECOME AVAILABLE
302 Id. at XX, citing Higher Education Act of 1965 (as amended), 20 U.S.C. 1089(c)(1).
303 Id. at 31-32 (stating that the department claimed its “hands were tied” and stating why this error required judicial invalidation of the action and also why deference to the agency’s view (which was in error) was inappropriate).
304 Id. at 32-57 (presenting and rejecting department’s numerous arguments).
305 The court disagreed with the department’s claims about having no statutory choice and disagreed in other places with how the court construed substantive law and the APA. Slip op. at 31-32, 54-55.
306 Slip op. 54 (quoting Pension Benefit Guar. Corp. LTV Corp., 496 U.S. 633, 654 (1990)).
309 The agency claimed that due to the Religious Freedom Restoration Act, the earlier administration’s provision of an “Accommodation Process” was illegal and required immediate action without the APA’s “time-consuming notice and comment process.” Id. at 573
310 Id. at 570-76.
health in the Act. The agency had to provide a full pre-action notice-and-comment process, as evidenced by the massive interest in the original policies and in response to the interim final rule. Agency concerns with “uncertainty” and “speculation, unsupported by the record” were inadequate to justify the agency’s actions. The court called the agency’s effort to “sidestep the strictures of the notice and comment process . . . matryoshkanesque in its construction.” The agency’s efforts to link three statutes to claim it had no choice were wholly rejected.

These opinions reviewing abnegation claims, all of which involved minimal agency engagement with past related factual or scientific findings, past legal reasoning, or clear comparative analysis of the effects of the new and discarded or delayed regulation, reveal courts hewing to regulatory rule of law fundamentals. They also hew to what the Supreme Court has long required for an agency to justify a policy change. Agencies must address past reasoning, offer good reasons for their new choice, leave no unexplained inconsistency, address reliance interests or changes in conditions between the original and revised action or policy, and address all relevant factual or scientific findings relevant to the original and revised action. No court excuses required analysis due to the abnegation claim. Similarly, although courts dutifully quote key governing law, including the usual room for presidents to pursue different regulatory priorities, none view conformity with the president’s wishes as shielding the actions from usual judicial review scrutiny. None see this possibility of change and presidential agreement as legally adequate or, it appears, as even improving the agency’s odds of winning. Courts expect compliance with statutory substantive and procedural requirements and look for indicia that agencies acted through and provided justifications consistent with “reasoned decisionmaking” law. Political accountability in all of its forms remains essential. Courts hence study congressional procedural and substantive choices, assess the agency action for conformity with those choices, and home in on agencies failures of explanation.

In addition, it is notable that no agency making a strong abnegation claim that it lacked power previously claimed has yet (as of fall of 2018) elicited judicial agreement that the agency actually lacked all such power. Broad agency claims of complete lack of power seem, upon litigant and judicial examination, either to be in error (as they will usually be since few laws contain such clear mandates or preclusions), or really mere statements about past regulatory excess or preferences for a different approach. Several of the political rationales for an embrace of abnegation that might lead to a new carveout excusing minimal agency explanation and comparative reasoning—avoidance of work, expedited deregulation, and avoidance of politically

311 Id. 584 (stating this in discussion the injunction “balance of the equities” and stating “[h]ere, Congress has already struck the balance” to “bridge the significant gender gap in healthcare costs between men and women”).
312 Id. at 574-75.
313 Id. at 573-74.
314 Id. at 571. The court appears to be referring to this complicated multi-statute based arguments as akin in complexity or intertwining to nesting Russian dolls.
315 Id. at 571-73 (reviewing and rejecting the several statutes the agency wove together to claim it could bypass notice and comment and that the agency also claimed required the its provision of religious relief).
316 See supra at notes 144-83 and accompanying text (setting forth key elements of consistency doctrine).
317 Id.
costly disclosure of deregulatory lost protections—are completely untenable if the claim is really just one of such excess or preference for a different policy. Uniform Supreme Court law requires full agency engagement and explanation for policy change in a setting where several choices are possible; agencies must provide assessment of their relative impacts. If a new choice is better or equally appropriate under the law and relevant facts, the policy shift might be possible, but the agency will need to justify such a claim.

Conclusion

Although numerous agencies during 2017 and 2018 asserted statutory abnegation justifications for deregulatory and policy change actions, they did so with consistent inattention or perhaps intentional bypassing of statutory substantive and procedural requirements, both as set forth in enabling acts and in the APA. They also generally provided little or no effort satisfy the long-established requirements for reasoned agency decisionmaking and for agency policy change under consistency doctrine. Governing doctrine and the first wave of judicial rejections reveal little sympathy for this novel and previously uncommon rationale for an agency policy change. These widely trumpeted deregulatory actions may have been good politics, but so far they have come up short under the law. Political accountability in all of its forms matters. Agencies making hasty, unreasoned, and conclusory claims of no power may gain political credit and provide delay benefits for those who left less regulated due to the abnegation claim and linked—but likely temporary—regulatory rollback. Enduring policy change, however, requires the same full process, deliberation, and sound legal and factual grounding that has always preceded successful agency policymaking.