

## 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 as 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. This Article explains the agency statutory-abnegation strategy, illustrating its variants with review of past and recent uses. It then distinguishes statutory abnegation from 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 explores 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*

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*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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## INTRODUCTION

Late in the administration of President Barack Obama, the United States Environmental Protection Agency (“EPA”) promulgated final regulations constraining greenhouse-gas pollution from power plants, regulating refurbished trucks, and dealing with pollution from oil and gas extraction, among many other areas.<sup>1</sup> 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 administration of President Donald J. 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 now claimed, in a deregulatory mode, that the underlying statutes precluded those previous actions. The exact wording of such disclaimers of power varied slightly—for example, the form of regulation “exceeded [our] proper role and authority,”<sup>2</sup> or was “contrary to the plain language of the [statute],”<sup>3</sup> or was rooted in “implausible” claims of statutory power,<sup>4</sup> or was illegal because the agency’s prior justification “rewr[ote] unambiguous statutory terms.”<sup>5</sup> But again and again, these agencies did not merely seek to adjust policy; they 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 different agency justification burdens and judicial expectations? Given the array of strategies an agency might use to make a policy change or move the law in a

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1. These actions are discussed *infra* Part I.

2. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,042 (Oct. 16, 2017) (Proposed Rule) [hereinafter CPP Repeal Proposal] (to be codified at 40 C.F.R. pt. 60); *see also infra* notes 69, 123 and accompanying text.

3. *See infra* note 97 and accompanying text.

4. *See infra* notes 103–05 and accompanying text.

5. *See infra* note 117 and accompanying text.

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 administrative-law doctrine requires, then 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.<sup>6</sup> 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.<sup>7</sup> In addition, agencies are seldom ordered to regulate in a particular way; most statutes leave agencies latitude to make pragmatic judgments about regulatory choices, even when they are rooted in some required, statutorily provided criteria.<sup>8</sup> 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.<sup>9</sup> And, by definition, the 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.<sup>10</sup>

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6. See *infra* notes 136–37, Part II.A.2, and Part II.B, and accompanying text (discussing deference doctrines and abnegation); see generally Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293 (2016) (discussing numerous deference regimes and latitude for policy changes with new administrations).

7. See *infra* notes 134–35 and accompanying text (discussing judicial deference to initial agency inaction and its relation to abnegation).

8. 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”).

9. See William W. Buzbee, *Federalism-Facilitated Regulatory Innovation and Regression in a Time of Environmental Legislative Gridlock*, 28 GEO. ENVTL. L. REV. 451, 474–75 (2016) (discussing cases providing such sympathetic review).

10. William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1366–68, 1392–1401 (2018) [hereinafter Buzbee, *The Tethered President*] (discussing the expectation of agency policy adjustments and the law governing such changes, with a focus on the centrality of comparative attention to facts and reasoning in pursuing a change).

These propositions about agency power and judicial review might, upon a superficial initial analysis, seem to lead next to the 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.<sup>11</sup> This is not to claim that abnegation is itself illegal; it is possible that an agency could correctly self-identify a past illegal claim of power. As analyzed below, however, the statutory-abnegation rationale for a policy rollback or change is unusual and generally disadvantageous. Further, in the context of recent regulatory rollbacks, abnegation claims have been accompanied by little agency effort to comply with longstanding precepts of administrative law and judicial expectations guiding agency actions—especially doctrine guiding agency policy change. Moreover, abnegation strategies have tended to involve settings where, if the agency’s claimed lack of power is correct and the agency does not proffer rationales rooted in its expertise, the agency receives zero deference. Agencies can pursue policy change and may, at times, 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 an agency policy change rooted in statutory abnegation that relies only on a new and power-shrinking legal interpretation to justify the shift. The “no power whatsoever” variant of statutory abnegation might possibly tempt reviewing courts to demand less of agencies, but this variant, which is discussed below, would be rare. Upon closer analysis, it also fails to persuasively justify abandonment of, or a carveout from, prevailing analytical and procedural obligations required for agency policy change.<sup>12</sup>

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.<sup>13</sup> Agency actions under the Trump administration have revealed an especially prevalent use of such statutory-abnegation strategies.<sup>14</sup> They are often explained, at least in part, as undertaken to comply with overtly

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11. *See id.* (illustrating the standards developed for statutory abnegation); *see also infra* Part II.A.4 (applying these cases to abnegation strategies); *see also infra* Part III.D (reviewing cases rejecting the adequacy of agency actions relying on abnegation-based deregulation).

12. *See infra* Part III.E (discussing this issue).

13. *See infra* notes 32–41, 204 and accompanying text.

14. *See infra* Part I.A.

deregulatory executive orders or to conform to the policy preferences of the president. Courts reviewing past and recent statutory-abnegation claims, however, have generally rejected such policy shifts, finding the actions legally inadequate and inconsistent with doctrinal hurdles.<sup>15</sup> They have refused to review statutory abnegation 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 agency actions and explanations that might appear to manifest or permit such a strategy, but that 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*,<sup>16</sup> undoubtedly give agencies room to pursue policy changes. But these cases repeatedly affirm and explain doctrinal steps that agencies must follow when and if they seek to change policy, and agencies have neglected or only glancingly addressed many of these hurdles in advancing their statutory-abnegation claims.<sup>17</sup> This disjuncture between doctrinal hurdles and minimal agency justifications for policy changes explains why such 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.

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15. See *infra* Part II.

16. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

17. 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 a particular regulatory action was legally precluded. Abnegation is not asserted if an agency is merely 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* Part I.

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, paid little attention to statutory criteria, avoided past rationales, and shown little or no engagement with on-the-ground impacts of the old and new policy choices. Current doctrine gives agencies no space to dodge comparative analysis of such "contingencies"—namely, the science, data, empirical assessments, and old and new legal reasoning relevant to evaluating the policy shift.<sup>18</sup> Politicized justifications and actions that are likely motivated by electoral advantage or hierarchical obedience to political leadership, but which disregard statutory requirements and these doctrinally created hurdles, come at a considerable cost 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. In particular, abnegation-based strategies may be a knowing attempt to downplay expert or technocratic roles shaped by statutory process and criteria, on the one hand, and politically sensitive or motivated policymaking and interest-group entreaties on the other. Situating this move and its apparent rationales within this political-economic literature, especially positive political theory, illuminates the appeal for statutory-abnegation proponents, at least in some political-economic environments, of this losing legal strategy.<sup>19</sup> 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.<sup>20</sup> Agency actions lacking legal merit may reflect not legal error, but rather the knowing pursuit of electoral benefits. Agencies,

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18. 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 10.

19. For two articles distilling and setting forth early core attributes of positive political theory ("PPT"), see generally Daniel A. Farber & Philip A. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462–63 (1991) and Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 43–51 (1994).

20. Rodriguez, *supra* note 19, at 6 (identifying these variables as the core enrichment of the rational-actor theory provided by PPT).

and presidents under whom they serve, can generate substantial electoral and perhaps political-party benefits through statutory-abnegation claims and repeatedly touted deregulatory and 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 justified, “reasoned decisionmaking” by agencies, have emphasized the procedural and legal inadequacies of agency statutory-abnegation claims. Some degree of policy change 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.<sup>21</sup> This body of consistency doctrine integrates and reflects respect for the multiple forms of political accountability that remain central to the legality and 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 disregard the substantive and procedural choices of Congress, as reflected in statutes. It would also run afoul of enduring judicial doctrines governing 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 may even be a rational choice when viewed through the lens of political benefits. However, abnegation will often be destined for legal defeat because the agency either incorrectly interpreted the relevant statute or failed to comply with the Administrative Procedure Act (“APA”) and consistency doctrine. But long before then, presidents, responsive agencies, and regulatory targets favoring deregulation may see

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21. As observed by Professor Seidenfeld, agencies will always be influenced by politics, but review of their actions does, and must, focus on legality in light of underlying science, facts, data, and reasoning. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 144–45 (2012); see also Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 6–8 (2009) (expressing sympathy for a “place for politics” in regulatory policymaking, but stating that evidence and statutory criteria limit room for presidential influence).



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 through notice-and-comment rulemaking; issuance of guidance and other policy documents without the notice-and-comment process; and enforcement actions, linked adjudications, and resulting orders.<sup>22</sup> In all of these settings, agencies both apply procedural and substantive policy choices set by Congress in enabling legislation, and implement and often adjust agency-set policies.<sup>23</sup> Some agency actions truly just involve applying policy previously set by Congress or the agency, but some degree of policy creation, choice, and change is a common and unexceptional occurrence.<sup>24</sup> In any of these procedural modes, an agency can reveal a

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22. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–90 (2004) (reviewing the law granting agencies latitude to choose procedurally how to make policy).

23. For analyses of agency latitude for policy change and consistency doctrine, see Buzbee, *The Tethered President*, *supra* note 10 (analyzing the need for agencies to address contingencies underlying old and new actions and discussing arrays of influences shaping consistency doctrine); Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1029–30 (2005) (examining procedural modes generating old and new policies); 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 the change mode); see also Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 783–88 (2017) (analyzing agencies’ errors about their authority, possible motivations, and judicial responses under the Prill doctrine, *Prill v. NLRB*, 755 F.2d 941, 956–57 (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 and values served by current doctrine rejecting actions founded on errors regarding agency power. They disagree with scholars questioning the value of such remands to agencies requiring them to act based on a correct understanding of their power. See *id.* at 760–62 (responding to a discussion of *Prill* claims from Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 296–301 (2017)).

24. See Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1359–70 (2012) [hereinafter Metzger, *Embracing Administrative Common Law*] (comparing agencies’ and courts’ institutional competence and administrative law’s development in a common law-like manner); see also O’Connell, *supra* note 8, at 479–86 (analyzing political transitions and resulting agency regulatory changes).

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 by EPA during the George W. Bush administration leading to the Supreme Court decision in *Massachusetts v. EPA*.<sup>25</sup> But agency statutory-abnegation claims became increasingly prevalent during 2017 and 2018 in an array of rapidly rolled out deregulatory actions and policy shifts by numerous agencies.<sup>26</sup> Many of these shifts 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 that regulatory actions result in no new net costs.<sup>27</sup> Some such actions followed more specific presidential orders or memoranda, while others emerged from agencies with no advance public involvement of the White House.<sup>28</sup>

In its strongest form, agency statutory abnegation has 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.<sup>29</sup> This is an act of agency “abnegation”—self-denial of authority—because, without any statutory or judicially mandated change, the agency is denying itself statutory power previously claimed.

Agencies have utilized these statutory-abnegation strategies in several different forms. In abnegation’s most unadorned, bare form, an agency reverses an action or policy and explains the reversal as compelled by its new view that it lacks (and earlier lacked) the authority previously claimed. Other forms of abnegation can be less boldly asserted; many make a limited claim of a particular past overreach or of a constrained set of regulatory options. Others are accompanied by a fallback claim of a mere preference for a different statutory interpretation.

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25. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

26. *See infra* Part I.A (reviewing such uses).

27. Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Feb. 3, 2017).

28. *See infra* Part I.A (reviewing an array of abnegation actions and discussing responses to regulation-specific presidential memoranda or orders).

29. As reviewed in Parts I.A and I.B, abnegation claims can be utilized in all modes through which agencies make policy, namely through rulemakings, through litigation and other adjudicatory actions, and in guidance or policy documents.

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.<sup>30</sup> In that more typical setting, the agency asserts that statutory 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.<sup>31</sup> 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 act as it did in the past and is disavowing future assertion of such power. This Part now analyzes a cross section of examples of agency policy changes rooted in statutory abnegation 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's declination to regulate greenhouse-gas emissions ("GHGs").<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> Some rationales related to presidential authority and discretion regarding policy priorities, but its primary claim was that it could not regulate GHGs as an "air pollutant" despite the Clean Air Act's broad statutory language.<sup>35</sup> Breaking from

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30. The general assumption is that agencies will prefer statutory interpretations that preserve their discretionary powers. Hemel & Nielson, *supra* note 23, at 762 (reviewing scholarship making this assumption); see also Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 5–6, 24–28, 31–38, 71–72 (2017) [hereinafter Metzger, *1930s Redux*] (reviewing and challenging claims about inappropriate uses of discretion or excess agency power).

31. This was the setting of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 853–66 (1984) (reviewing the history of EPA's approaches and reasons for its judicially upheld policy change). Neither the agency nor the Supreme Court viewed the agency's new policy as mandatory or its old views as illegal. *Id.* at 842.

32. See *Massachusetts v. EPA*, 549 U.S. 497, 510–16 (2007) (reviewing this history).

33. *Id.* at 510–11.

34. *Id.* at 511–15 (reviewing the Bush administration's denial rationales).

35. *Id.*

its earlier general counsel's memoranda, EPA—under its new statutory-abnegation view—said the statute had a different, more local focus and that Congress could not have intended regulation of a gas generally not perceived as a pollutant and that caused effects on a global scale.<sup>36</sup> Much of its analysis and legal argument relied on *FDA v. Brown & Williamson Tobacco Corp.*,<sup>37</sup> asserting that EPA could not claim such economically significant authority without a clearer delegation from Congress.<sup>38</sup> 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.<sup>39</sup>

As further analyzed below, the Supreme Court in *Massachusetts v. EPA* rejected the agency's new statutory-abnegation claim and the agency's reliance on presidential and administrative prerogatives to make politically related choices about resource priorities. The Court stated that the agency had to decide whether to act based on statutory criteria, as construed by the Court.<sup>40</sup> And the Court called for agency analysis of underlying science and climate-change effects in light of those statutory criteria.<sup>41</sup>

Statutory abnegation became common in a wave of 2017 and 2018 deregulatory actions by agencies under the Trump administration. Many of these abnegation claims were accompanied by little or no engagement with facts, science, studies, or findings previously viewed as relevant to regulatory decisions. Further, they often provided only summary engagement with the agencies' own earlier, contrary legal views and included little analysis of on-the-ground effects likely to result from the claimed lack of 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 agencies' reliance on

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36. *Id.*

37. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

38. *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,924–25 (Sept. 8, 2003) (Notice of denial of petition for rulemaking); *see also Massachusetts*, 549 U.S. at 511–13 (discussing EPA's position).

39. As discussed below, under the *State Farm* case, an agency that changes its policy needs to fully address rationales, compare past and current facts, and justify its change. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983). In *Massachusetts*, there were contrary interpretations of the Clean Air Act but no past regulation of GHGs or effects to assess.

40. *Massachusetts*, 549 U.S. at 528–33.

41. *Id.* at 528–36.

abnegation claims.<sup>42</sup> Although recent agency statutory-abnegation actions are many, a substantial but partial sample is described here, including analysis of some of the most visible, politically salient actions.<sup>43</sup> A few others resulting in court decisions are discussed at the close of the Article, including the many judicial rejections of Trump-administration policy shifts utilizing variants of abnegation claims.

For example, in the immigration arena, the Department of Homeland Security (“DHS”) in 2018 ended the Temporary Protected Status (“TPS”) of immigrants from El Salvador and Haiti living in the United States.<sup>44</sup> In doing so, however, DHS not only changed its longstanding interpretation of the underlying statute to justify the revocations, it also—in another breach of agency policy-change obligations—failed to acknowledge that shift or to address additional risks to immigrant safety that it had earlier viewed as legally relevant to TPS status.<sup>45</sup> It is hence unclear if DHS was aware of the policy

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42. As discussed *infra* Part III.B, agencies interested in quick and potentially enduring deregulatory change may see several political benefits if their use of abnegation proves successful. But an agency could claim it lacks statutory power and still provide analysis comporting with the requirements of consistency doctrine. *See infra* Part II (exploring the doctrinal answer to abnegation strategies both if used alone and if used with the agency analysis required by consistency doctrine). Part III explores why courts have rejected abnegation claims and soundly still require agencies making abnegation claims to provide the comparative analysis required by consistency doctrine. The key elements of consistency doctrine as set forth in Supreme Court cases are discussed *infra* in Part II.A.4.

43. *See, e.g.*, Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), [https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9\\_story.html?utm\\_term=.c9d7ba8b8e5f](https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html?utm_term=.c9d7ba8b8e5f) [https://perma.cc/9ZD8-9D78] (describing court reticence to permit “virtually unexplained” deregulatory policy changes across government agencies).

44. *Compare* DHS Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,645–47 (July 8, 2016) (Notice) (extending TPS due to safety risks from an initial TPS-triggering earthquake event but noting other statutorily specified sources of safety risks to explain extending this status), *with* Press Release, U.S. Dep’t of Homeland Sec., Secretary of Homeland Security Kirstjen M. Nielson Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018) (announcing termination of TPS designation because the “original conditions . . . no longer exist” and stating, therefore, that “under the applicable statute, the current TPS designation must be terminated”); *compare* DHS Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648, 2650 (Jan. 18, 2018) (Notice) (terminating TPS because “the conditions for Haiti’s designation . . . relating to the 2010 earthquake . . . are no longer met” and limiting analysis to the effects of that one event), *with* DHS Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. 23,830, 23,831–32 (May 24, 2017) (Notice) (extending TPS and discussing lingering earthquake effects as well as other risks to safety, including other storm events, agricultural harvest problems, a weak public health system, a cholera epidemic, lack of safe water, extreme poverty, corruption, and government instability).

45. *See supra* note 44 and accompanying text. Agencies making a policy change are required

change it was making. In 2018, it stated that it “must” return TPS 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 eligibility in deciding whether to continue TPS, not just the initial triggering event.<sup>46</sup> In asserting that it “must” return émigrés due to the termination of safety risks caused by the initial triggering event, and in accompanying statements that the “law does not allow” consideration of other conditions, DHS did not discuss what would happen to these former TPS designees upon return to their countries.<sup>47</sup> Statutorily specified categories of risk that had earlier justified TPS extensions were, in 2018, apparently no longer viewed as relevant.<sup>48</sup>

In a more visible action that also linked to President Trump’s campaign promises to take a harder line on immigration, in 2017 the administration, through a legal opinion of the Attorney General and action by DHS, declared it would abandon the Obama administration’s Deferred Action for Childhood Arrivals (“DACA”) program.<sup>49</sup> DACA 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

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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 10, at 1401–03 (discussing these agency policy-change obligations and metarules).

46. DHS Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. at 23, 831–32 (considering chronic public-health and governmental issues beyond the scope of the natural-disaster damage). For further review of this regulatory history in a challenge to the revocation of TPS for Haitians, see Complaint, *NAACP v. U.S. Department of Homeland Security*, Civil Action No. 1:18-cv-100239-MJG, 2018 (D. Md. Jan. 24, 2018).

47. *See Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1090–91 (N.D. Cal. 2018) [*Ramos II*] (opining that DHS had not acknowledged its “substantive and highly consequential” policy shift in “eliminating consideration of intervening conditions not directly related to the originating condition”).

48. 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. *See Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1108 (N.D. Cal. 2018) [*Ramos I*] (“[A]gencies ‘may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books,’ and ‘must show that there are good reasons for the new policy.’” (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))); *Ramos II* at 1089–90 (quoting *Ramos I*’s discussion of APA constraints on agencies’ ability to change policy).

49. *See Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1025–26 (N.D. Cal. 2018) (reviewing the history of the enactment and subsequent abandonment of the DACA program).

administrative law.<sup>50</sup> 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 DACA beneficiaries.<sup>51</sup> The Obama administration justified this program with reference to precedents supporting such agency forbearance and prioritization of activities, as well as statutory language providing this latitude.<sup>52</sup> And in explaining the policy, the administration discussed the children’s plight and argued that DACA would be sound policy and comply with the law.<sup>53</sup>

In its 2017 reversal, DHS relied only on a brief Attorney General statement rooted substantially in constitutional notions that DACA was illegal.<sup>54</sup> The agency did not engage with the policy or factual underpinnings of the earlier policy, nor did it address doctrines previously relied upon to justify prioritizing enforcement against dangerous immigrants. By not justifying its shift with expertise-rooted rationales, DHS eliminated its strongest possible grounds for seeking judicial deference. This policy change, like several other 2017 and 2018 agency actions that sidestepped the usual policy-change analytical hurdles, was judicially rejected in several substantially similar decisions for being rooted in legal error, lacking adequate explanation, and for flunking consistency doctrine in failing to fully engage with earlier factual considerations.<sup>55</sup> This and other judicial analyses of abnegation-based policy shifts are analyzed in greater depth below.

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50. See U.S. DEP’T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN 1 (2012) (“By this memorandum, I[, Secretary of Homeland Security Janet Napolitano,] am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation’s immigration laws against certain young people . . .”).

51. *Id.* at 1–3 (describing the DACA program).

52. See *Regents*, 279 F. Supp. 3d at 1019–22 (describing exercises of deferred action by immigration officials prior to the DACA program, noting that such prosecutorial deference “began ‘without express statutory authorization’ but has since been recognized by the Supreme Court as a ‘regular practice,’” and has been explicitly referenced by Congress in legislation (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999))).

53. *Id.*

54. See *id.* at 1025–26 (noting that the Acting Secretary of Homeland Security’s decision to rescind DACA was based on a short letter from Attorney General Jeff Sessions to the Secretary, opining that the program was an unconstitutional exercise of executive authority).

55. See, e.g., *Vidal v. Nielsen*, 279 F. Supp. 3d 401, 420 (E.D.N.Y. 2018) (finding that the decision to rescind DACA “appear[ed] to be arbitrary, capricious, and an abuse of discretion” because it: (1) “rest[ed] on the erroneous legal conclusion that the DACA program is unlawful and unconstitutional”; (2) “rest[ed] on the erroneous factual premise that courts have determined that the DACA program violates the Constitution”; and (3) was “internally contradictory”);

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”).<sup>56</sup> The CPP regulation was finalized in 2015 under the Obama administration and was designed to limit GHGs from power plants due to their climate impacts.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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).<sup>60</sup> It justified its consideration of power plants’ use of fuel shifts and trading strategies—sometimes referred to as “generation shifting” or regulating “beyond or outside the fenceline”—in setting its CPP

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*Regents*, 279 F. Supp. 3d at 1037 (“[P]laintiffs are likely to succeed on their claims that: (1) [DHS’s] decision to rescind DACA was based on a flawed legal premise; and (2) government counsel’s supposed ‘litigation risk’ rationale is a post hoc rationalization and would be, in any event, arbitrary and capricious.”).

56. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (Final Rule) (to be codified at 40 C.F.R. pt. 60) [hereinafter “Clean Power Plan”].

57. *Id.* at 64,663.

58. *See* *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423–25 (2011) (referring to EPA’s section 111(d) power to regulate power-plant greenhouse-gas emissions); William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WISC. L. REV. 1037, 1071–81 [hereinafter Buzbee, *Federalism Hedging*] (reviewing the cases and regulatory actions leading to the creation of the CPP).

59. Buzbee, *Federalism Hedging*, *supra* note 58, at 1075 (reviewing the Endangerment Finding).

60. *See* Clean Power Plan, *supra* note 56, at 64,707–25 (summarizing the 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. *See id.* at 64,703 (noting that previous section 111(d) actions were “necessarily geared toward the pollutants and industries regulated,” and stating that the present regulation similarly “tak[es] into account the particular characteristics of carbon pollution, the interconnected nature of the power sector and the manner in which EGUs [electric generating units] are currently operated”). It emphasized that power plants were already adjusting pollution levels through utilization of the integrated energy grid. *See id.* at 64,725 (noting that “fossil fuel-fired EGUs are taking actions to reduce emissions of both non-GHG air pollutants and GHGs” and that “[t]hese measures in aggregate result in the replacement of higher-emitting generation with lower- or zero-emitting generation, reflecting the integrated nature of the electricity system”).



pollution targets, due to EPA's policy of considering the particular attributes of the industry being regulated.<sup>61</sup> Since power plants operate in the setting of an interconnected and integrated grid and, under state-law regimes, were already reducing GHG emissions and meeting energy demands cost-effectively through off-site strategies, EPA thought it should take them into account in devising the CPP.<sup>62</sup> EPA also referenced 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 flexibility it provided.<sup>63</sup> In early 2017, at the tail end of the Obama administration, EPA denied a series of petitions to reconsider the CPP.<sup>64</sup> EPA looked at underlying conditions, trends, and costs, and it found that its CPP conclusions remained sound.<sup>65</sup> EPA found that clean-energy trends had in fact accelerated more than expected and at lower cost than initially predicted in the CPP.<sup>66</sup>

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61. *See id.* at 64,677 (discussing the interconnected grid system utilized by the power-utility sector); *id.* at 64,760–79 (justifying EPA's ability to utilize the “beyond the source” approach using canons of statutory interpretation, and arguing that the power-utility sector's reliance on the interconnected grid system warrants such an approach).

62. *See id.* at 64,761 (“[T]he EPA's interpretation is . . . reasonable [in part because] . . . [f]ossil fuel-fired EGUs are already implementing the measures in [building blocks 2 and 3] for various reasons, including for purposes of reducing CO<sub>2</sub> emissions.”); *see also* Gabriel Pacyniak, *Making the Most of Cooperative Federalism: What the Clean Power Plan Has Already Achieved*, 29 GEO. INT'L ENVTL. L. REV. 301, 320–25, 334–40 (2017) (reviewing EPA's statutory authority to enact the CPP, citing state commenters' requests that the CPP build upon already existing state-level regulation, and discussing the importance of providing states and power plants with flexibility in implementing such regulation).

63. *See* Clean Power Plan, *supra* note 56, at 64,696–97 (discussing a 2005 regulation of mercury emissions from power plants, Standards of Performance for New and Existing Stationary Sources: Electric Utility Generating Units, 70 Fed. Reg. 28,606, 28,620 (May 18, 2005) (Final Rule) (the “Mercury Rule”), and EPA's view at the time that it should set emissions levels based on a “combination of the cap-and-trade mechanism and the technology needed”). In response to a challenge to the CPP filed in the D.C. Circuit, briefs further referenced industry support for trading-based regulation under section 111(d). *See* Respondent EPA's Final Brief at 12, 30–34, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 22, 2016) (noting that the CPP is “based on an analysis of what power plants are already doing,” explaining that state regulatory programs, industry actors, and other CAA programs already rely on “generation-shifting,” and citing past industry support for the “Mercury Rule,” which promoted a “cap-and-trade” scheme similar to that utilized by the CPP).

64. EPA, 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 1 (2017) [hereinafter “EPA, BASIS FOR DENIAL”].

65. *See id.* at 22 (“[T]rends toward low- and zero-emitting energy, upon which the CPP builds, continue unabated . . .”).

66. *Id.*

Under new leadership following the election of President Trump, EPA proffered a different read of the statute, focusing on claims of hardships imposed on the regulated industry.<sup>67</sup> EPA claimed consistency with an earlier EPA “inside the fenceline” approach to sources regulated under Section 111(d).<sup>68</sup> Based on EPA’s new view of the Clean Air Act’s “text, context, structure, purpose, and legislative history, as well as with the Agency’s historical understanding and exercise of its statutory authority,” 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.”<sup>69</sup> EPA initially proposed a complete repeal of the CPP, but without committing to any

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67. EPA actually just alluded to claims of such hardships and costs, neither providing citation to record evidence or particular comments from the rulemaking process nor stating its own conclusion about such claims. *See* Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,038 (Oct. 16, 2017) (Proposed Rule) (to be codified at 40 C.F.R. pt. 60) (stating that “numerous states, regulated entities and other stakeholders warned that the CPP threatened to impose massive costs on the power sector and consumers”). It also did not address contradictions between these alleged hardships and contrary conclusions in the agency’s 2017 reconsideration-petition denial. *See* EPA, BASIS FOR DENIAL, *supra* note 64 (noting accelerating clean-energy trends and lower-than-anticipated associated costs).

68. *See* CPP Repeal Proposal *supra* note 2, at 48,037 (“[T]he EPA . . . is proposing to interpret the phrase ‘best system of emission reduction’ in a way that is consistent with the Agency’s historical practice of determining a BESR by considering only measures that can be applied to or at the source.”). Whether this claim about EPA’s “historical practice” is accurate has been disputed due to past proposals about how to regulate power plants, past section 111(d) regulation, and other trading-based regulatory actions. *See* Comments of the Natural Resources Defense Council on EPA’s Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 8–10 (Apr. 26, 2018) (documenting past actions contradicting EPA’s “historical practice” claim).

69. *See* CPP Repeal Proposal *supra* note 2, at 48,036, 48,038. In later discussion, EPA discussed 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 48,039–43. Nonetheless, it repeatedly asserts that the CPP “exceed[ed]” EPA’s authority to regulate, justifying this view by relying on textual interpretations of section 111, review of its legislative history, analysis of prior rulemaking practice under that section, broader statutory context, and claimed “serious” economic impacts of the CPP approach. *See id.* at 48,039–43. In 2017, the agency viewed the statute as mandating an “inside-the-fenceline” approach, stating its regulation “must be something that physically or operationally changes the source itself, and that is taken at or applied to individual, particular sources.” *Id.* at 48,043. “Generation shifting,” as earlier embraced in the CPP, was described as “fail[ing] to comply with this limitation.” *Id.* at 48,042. Thus, most statements reveal an abnegation rationale that the EPA was prohibited from regulating in the form chosen in the CPP.

replacement rule.<sup>70</sup> It cited a few consistency-doctrine precedents and sought to limit public comment.<sup>71</sup>

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, or past rulemakings EPA had analyzed in 2015.<sup>72</sup> It also ignored EPA's detailed 2014, 2015, and 2017

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70. CPP Repeal Proposal, *supra* note 2 (“The EPA has not determined the scope of any potential rule under CAA section 111(d) to regulate greenhouse gas (GHG) emissions from existing EGUs, and, if it will issue such a rule, when it will do so and what form that rule will take.”).

71. *Id.* (“[T]he EPA is not soliciting comments on such information [regarding a possible replacement rule] with this proposal.”); *id.* at 48,039 (citing precedent to support the proposition that “the EPA has inherent authority to reconsider, repeal, or revise past decisions to the extent permitted by law so long as the Agency provides a reasoned explanation”).

72. For example, the Obama administration devoted considerable attention to why it viewed its CPP strategies as consistent with past actions. *See supra* notes 58–60 and accompanying text (reviewing these referenced past actions). Actions by the Trump administration make general claims of returning to a prior approach, but they either do not address the particular actions found relevant by the Obama administration or provide only a passing reference to those actions. *Compare* Clean Power Plan, *supra* note 56, at 64,707–25 (Obama EPA action, identifying past similarly rationalized regulatory actions and also state-level regulation reducing power-plant emissions), *with* CPP Repeal Proposal, *supra* note 2, at 48,037, 48,039–41 (Trump EPA action, claiming to return to past “historical practice” but not addressing the actions analyzed in the Obama-administration analysis, apart from alluding to an action rejected “on other grounds” without analyzing the similarities of the action to the CPP); Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746, 44,752 (Aug. 31, 2018) (Proposed Rule) [hereinafter ACE Rule Proposal] (to be codified 40 C.F.R. pts. 51, 52, and 60) (same). Regarding that action, the “Mercury Rule,” *supra* note 63, Trump’s EPA erroneously claims that the “rule was still ultimately predicated on measures taken at the level of individual sources.” Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,041 n.14 (Oct. 16, 2017) (Proposed Rule) (to be codified at 40 C.F.R. pt. 60). The 2005 “Mercury Rule” in fact set a pollution cap based on emissions “across the field of units” and proposed to use a cap-and-trade strategy. 70 Fed. Reg. at 28,617 (explaining EPA’s use of a “cap-and-trade” program); *id.* at 28,619 (explaining setting the cap based on emissions “across the field of units”). Similarly, the Obama administration relied substantially on the statutory term “system” as justifying regulation that looked beyond technology or on-site pollution-reduction methods. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,763–78 (Oct. 23, 2015) (Final Rule) (to be codified at 40 C.F.R. pt. 60) (discussing the statutory term “system” and linked language and law to justify setting emissions levels based on more than facility-specific measures). The Trump administration leapfrogged past that analysis without actually analyzing most of the Obama EPA discussion to focus on earlier actions, even under earlier versions of the Clean Air Act and different provisions, and then proffered a new view that read “system” and section 111(d) to justify a source- and technology-focused mode of regulation, even considering prohibitions on state use of trading and averaging between sources. ACE Rule Proposal at 44,751–54, 44,765–68. The agency’s new strategy and statutory view omitted engagement with the CPP interpretation being rejected. *See also* EPA, BASIS FOR DENIAL, *supra* note 64 and accompanying text (discussing the Trump EPA’s 2017 findings about unexpectedly

studies of the electricity sector and state regulatory trends and accomplishments, and nowhere considered or distinguished its own earlier pro-CPP reasoning.<sup>73</sup> Further, EPA under Trump leadership 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 too shifted its analytical framework.<sup>74</sup> Finally, EPA's 2017 proposed repeal did not discuss predicted increases in particulate-matter pollution accompanying GHG emissions or the thousands of additional predicted deaths if the CPP were abandoned, yet it was under an obligation to consider "costs" and "health" impacts as part of its analysis.<sup>75</sup>

In 2018, EPA made another regulatory proposal, this time issuing a proposed replacement for the CPP, calling it the Affordable Clean Energy ("ACE") rule.<sup>76</sup> The ACE 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.<sup>77</sup> In this

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rapid shifts to cleaner energy and at lower costs than anticipated in the CPP).

73. The Proposed CPP Repeal ignored the 2017 EPA action, where it denied requests to withdraw the CPP. In that action, EPA found that between 2015 and 2017, clean-energy trends accelerated more than anticipated and with lower costs than predicted in 2015 in the CPP. *See* EPA, BASIS FOR DENIAL, *supra* note 64, at 22 (noting that data published since the issuance of the CPP "demonstrate[s] that the trends toward low- and zero-emitting energy . . . continue unabated, and, in fact, have accelerated" and that "this information demonstrates that the state emission targets required by the CPP can be achieved with significantly less impact on the generation mix in the industry, and at much lower cost, than the EPA projected").

74. *See* EPA, REGULATORY IMPACT ANALYSIS FOR THE REVIEW OF THE CLEAN POWER PLAN: PROPOSAL (2017).

75. *See* 42 U.S.C. § 7411(a)(1) (2012) (including within the definition of "standard of performance" a requirement that the EPA Administrator "tak[e] into account the cost of achieving [emission] reduction and any nonair quality health and environmental impact"). The CPP discussed such avoided deaths. *See* Clean Power Plan, *supra* note 56, at 64,914. The repeal proposal does not do so, despite section 111(a)'s mandate.

76. ACE Rule Proposal, *supra* note 72, at 44,748.

77. *See id.* (relying on legal analysis presented in EPA's October 2017 proposed repeal of the CPP, which asserted that the CPP's "Best System of Emission Reduction" exceeded EPA's authority because it "us[ed] measures that applied to the power sector as a whole, rather than measures that apply at and to, and can be carried out at the level of, individual facilities," and stating that the current rule "aligns with EPA's statutory authority and obligation" because it "evaluat[es] technologies or systems of emission reduction that are applicable to, at, and on the premises of the facility for an affected source"). 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. *See* Barbash & Paul, *supra* note 43 (discussing the unprecedented string of Trump-administration regulatory losses in the courts; flawed work by Trump's first EPA Administrator, Scott Pruitt; the lack of knowledgeable officials surrounding political appointees; and views that EPA actions had improved under the leadership of Andrew

action, it further reduced its claim of power, stating that 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.<sup>78</sup> It is not clear if EPA viewed this second policy change as legally required or as another option under the statute.<sup>79</sup>

In an unusual form of statutory abnegation, EPA also proposed in several different actions to abandon the Clean Water Rule, a 2015 EPA and Army Corps of Engineers rule that sought to reduce regulatory uncertainty about what sorts of waters are subject to federal jurisdiction as “waters of the United States.”<sup>80</sup> The 2015 rule followed a lengthy rulemaking, preparation of a metastudy of all peer-reviewed scientific literature concerning types of waters and their functions and “connectivity,” and then publication of this “Connectivity Report” after opportunities for comment.<sup>81</sup> The Clean Water Rule and Connectivity Report both followed three Supreme Court decisions that collectively raised many questions about the reach of federal power.<sup>82</sup>

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Wheeler); Lisa Friedman, *Trump Says He'll Nominate Andrew Wheeler to Head the EPA*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/climate/trump-andrew-wheeler-epa.html> [<https://perma.cc/KA84-BPKA>] (discussing Wheeler and allegations of improprieties by Pruitt).

78. See ACE Rule Proposal, *supra* note 72, at 44,748 (“EPA’s primary role in implementing CAA section 111(d) is to provide emission guidelines that inform the development, submittal, and implementation of state plans, and to subsequently determine whether submitted state plans are approvable.”); *id.* at 44,750 (“[U]nder EPA’s new proposed regulations implementing CAA section 111(d), which tracks with the existing implementing regulations in this regard, the guideline document serves to ‘provide information for the development of state plans.’”); *id.* at 44,772–73 (discussing changed agency construction of “emission standard” and “standard of performance”).

79. The ACE Rule Proposal discussion only elliptically acknowledges the policy change and does not engage with EPA’s CPP discussion of its legal authority to set pollution caps that, in turn, states, regions, and polluters would need to achieve.

80. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (Final Rule) (to be codified at 33 C.F.R. pt. 328).

81. EPA, EPA/600/R-14/675F, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE ES-1 (2015).

82. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,054. The cases causing confusion about the scope of the Clean Water Act (“CWA”) were: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), which observed a broad definition of navigable waters, based upon the broad integrity goals of the CWA; *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), which rejected a claim of federal jurisdiction under the CWA over wholly intrastate, isolated waters such as ponds, gravel pits, and seasonal waters due to their use as migratory-bird habitats; and *Rapanos v. United States*, 547 U.S. 715 (2006), which caused legal uncertainties due to a plurality opinion by Justice Scalia, which held the CWA to protect only a small category of waters; a swing concurrence by Justice Kennedy, which more expansively protected waters based on their functions; and dissenters who concluded that “waters of the United States” encompassed all wetlands and

The 2017 and 2018 abnegation claims—and their associated deregulatory actions regarding the Clean Water Rule and federally protected “water[s] of the United States”—were unusual and a bit indirect. EPA, following instructions from President Trump in an executive memorandum,<sup>83</sup> proposed in 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*<sup>84</sup> case.<sup>85</sup> That opinion, however, not only failed to garner a Court majority, it also ran counter to views of five Justices—based on the dissent and Justice Kennedy’s concurrence—about the sorts of waters that are protected and legal rationales for their protection.<sup>86</sup> 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 coverage of the Clean Water Act. And the opinion’s test for jurisdiction was rooted in dictionary-based parsing of the statute and would have eliminated from federal jurisdiction most of the waters in America’s West and Southwest—arguably, the very areas most in need of protection.<sup>87</sup> In those regions, arid conditions prevail and pollutants

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tributaries that satisfied either Scalia’s or Kennedy’s standard due to five Justices supporting protection of these waters. *Id.* at 792–99 (Stevens, J., dissenting); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,060–61 (discussing Court splits and resulting law). For analysis of the Clean Water Rule and its durability, see generally Patrick Parenteau, *The Clean Water Rule: Not Dead Yet*, 48 ENVTL. L. 377 (2018).

83. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The Order is titled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” *Id.* at 12,497.

84. *Rapanos v. United States*, 547 U.S. 715 (2006).

85. Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532, 12, 532 (Mar. 6, 2017) (Notice of Intent).

86. Justice Kennedy and the four dissenters largely agreed with one another’s 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 *Rapanos*, 547 U.S. at 767–78 (Kennedy, J., concurring in the judgment) (agreeing with the dissenters’ view that impermanent streams are covered by the CWA); *id.* at 778–83 (Kennedy, J., concurring in the judgment) (disagreeing with the breadth of the dissent’s interpretation of navigable waters and opining that a “significant nexus” must exist between the bodies of water in question and “traditional” navigable waters in order to bring those bodies under the jurisdiction of the CWA); *id.* at 807–10 (Stevens, J., dissenting) (noting that, despite disagreement with Justice Kennedy’s “significant nexus” formulation, this test will “probably not do much to diminish the number of wetlands covered by the Act in the long run,” and stating that waters hence should be protected if “either the plurality’s or Justice Kennedy’s test is satisfied”).

87. *Id.* at 730–37 (Scalia, J., plurality opinion) (arguing that commonsense dictionary definitions, in addition to judicial precedent and the CWA’s own structure, call for limiting the CWA’s jurisdiction over “navigable waters,” statutorily defined as “waters of the United States,” only to “relatively permanent, standing or flowing bodies of water”).

can concentrate or be disposed of in dry riverbeds that become crucial waterbodies (or vehicles to carry toxins) during rare but heavy rains.

EPA's proposed adoption of this view would involve abnegation at several levels: it would reject how a majority of Justices in *Rapanos* construed the nature and extent of federal power; it would reject decades of contrary regulatory interpretations by EPA and the Army Corps; it would run contrary to the Connectivity Report's conclusions; and it would disavow authority to protect waters in much of the nation, even where quality water is most important. The first three 2017 and 2018 actions seeking to roll back the scope of protected waters, however, did not mention the Connectivity Report, nor did the agency analyze the impact of such a redefinition of protected waters.<sup>88</sup>

A supplemental notice issued in 2018 offered more by way of justification and legal analysis, but it still vaguely claimed the illegality of prior authority and skirted engagement with much of the Clean Water Rule's reasoning and science-based justification.<sup>89</sup> A late 2018 proposal started a new notice-and-comment process to create a new definition of federally protected "waters."<sup>90</sup> 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

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88. See Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200, 5,202–03 (Feb. 6, 2018) (Final Rule) (emphasizing a lack of associated costs and benefits due to claimed maintenance of the legal status quo of the Clean Water Rule, which was finalized but not yet in effect due to judicial stays); 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 (Nov. 22, 2017) (Proposed Rule) (proposing an applicability date and reiterating that agencies were not soliciting comment on the scope of the definition of "waters of the United States" "[b]ecause the agencies propose to simply add the applicability date and ensure continuance of the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking"); Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,903 (July 27, 2017) (Proposed Rule) (stating that agencies were not seeking comment on pre-2015 rules or the "scope of the definition of 'waters of the United States'" until the second step of the two-step process).

89. See Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227, 32,238 (July 12, 2018) (Supplemental Notice of Proposed Rulemaking) (in a substantially expanded justification for the policy shift, stating that, as "a result of the agencies' review and reconsideration of their statutory authority and in light of the court rulings against the 2015 Rule[.] . . . the agencies are . . . concerned that the 2015 Rule lacks sufficient statutory basis"). In places, this notice softens the abnegation claim, stating that the earlier rule "may" have exceeded the agencies' authority. *Id.* at 32,240; *id.* at 32,247 (noting that some commenters have opined that the rule "may not effectively reflect the specific policy" of Congress regarding the balance of federal and state authority under the Clean Water Act).

90. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (Feb. 14, 2019) (Proposed Rule) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

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.<sup>91</sup> Its language again appears to embrace the view that it was required to utilize the Scalia approach,<sup>92</sup> declined the Kennedy approach and (erroneously) labeled it as the view of a "single [J]ustice,"<sup>93</sup> and declined to base the new definition on science as set forth in the Connectivity Report. In fact, it asserted a new view that "science cannot be used to draw the line between Federal and State waters, as those are legal distinctions . . . ."<sup>94</sup> This latest action hence appears to view its abnegating, shrunken view of federal power as legally mandated by the Scalia approach. At the same time, the agency rejected most of the "significant nexus" approach set forth by Justice Kennedy, despite that approach being substantially embraced by a Court majority—Justice Kennedy and the four dissenters from the Scalia plurality opinion.<sup>95</sup>

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.<sup>96</sup> In 2018, however, a new EPA memorandum did not just reverse that view but also claimed that EPA had no such power under the Act.<sup>97</sup> Despite decades of experience

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91. *See id.* at 4,155–56.

92. *Id.* at 4,174 (quoting language from the plurality in *Rapanos v. United States*, 547 U.S. 723 (2006), which used words of limitation such as "only" and "necessary condition" to define "waters of the United States").

93. *Id.* at 4,196 (calling the concurring opinion of Justice Kennedy in *Rapanos* the views of a "single justice" and stating concerns that the Clean Water Rule "relies too heavily on considerations that Justice Kennedy expresses").

94. *Id.* at 4,176.

95. The dissenters and Justice Kennedy favorably commented on each other's approaches, but the dissenters did not fully join the Kennedy opinion because he called for an expanded judicial role in assessing "significant nexus" waters; the dissenters called for more judicial deference to regulatory judgments of EPA and the Army Corps. *See supra* note 86 and accompanying text. In their discussion of types of protected waters and rationales, however, the opinions had much in common. *See supra* notes 85–87 and accompanying text (discussing the split opinions in *Rapanos* and the creation of two majority positions regarding protected waters).

96. Memorandum from John S. Seitz, Dir., EPA Office of Air Quality Planning and Standards, to Reg'l Offices 9 (May 16, 1995) (withdrawn Jan. 25, 2018) (on file with the *Duke Law Journal*).

97. Memorandum from William L. Wehrum, Assistant Adm'r, EPA to Reg'l Air Div. Dirs. 3 (Jan. 25, 2018) (calling the previous policy "contrary to the plain language" of the statute because the old "once in, always in" policy imposed a "temporal limitation" that Congress never



under the old policy, the agency did not analyze the track record of the longstanding view, its impact on air quality, or the changes that might flow from the new statutory read.<sup>98</sup> 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 stating that upgraded trucks installed with refurbished old diesel engines were subject to regulation as “new” motor vehicles under the Clean Air Act.<sup>99</sup> 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 associated with their construction.<sup>100</sup> 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.<sup>101</sup>

In 2017, EPA stated its new view that it “lack[ed] authority to regulate” any aspect of the glider business—trucks, engines, or kits—under the Act’s regulation of pollution from “new” motor vehicles.<sup>102</sup> The agency argued that there was no congressional “specific intent” to regulate “such a thing as a glider” and offered a somewhat convoluted “whole law” analysis of the Act, parsing its amendments, its larger context, and the roots of the Act’s definition of “new” as drawn from an earlier statute.<sup>103</sup> 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.”<sup>104</sup> In a brief fallback, it stated that “[a]t a minimum, ambiguity exists” and cited *Chevron* as an

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placed in the CAA). 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*, GEO. ENVTL. L. REV. ONLINE (Mar. 3, 2018), <https://gelr.org/2018/03/03/once-in-always-in-now-out-how-the-epa-is-reducing-regulations-on-hazardous-air-pollutant-emitters/> [https://perma.cc/C926-DLSP].

98. Memorandum from William L. Wehrum, *supra* note 97.

99. Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53,442 (Nov. 16, 2017) (Proposed Rule) [hereinafter Glider Repeal Proposal] (to be codified at 40 C.F.R. pts. 1037, 1068).

100. *Id.*

101. Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 81 Fed. Reg. 73,478 (Oct. 25, 2016) (Final Rule) (to be codified at 40 C.F.R. pt. 9).

102. Glider Repeal Proposal, *supra* note 99, at 53,443–44.

103. *Id.* at 53,443–46.

104. *Id.* at 53,445–46.

additional ground for its policy reversal.<sup>105</sup> Although the notice includes a brief discussion of the 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 position. Subsequent news stories and a letter sent by 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 basis.<sup>106</sup>

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 pool[ing]" settings.<sup>107</sup> In late 2017, however, the department published a proposed rule that, contrary to the department's earlier rules and litigation defenses that had mixed success, now stated it had "serious concerns that it incorrectly construed the statute" and had exceeded "the scope" of its power.<sup>108</sup> It also stated concerns with the regulations "as a policy matter."<sup>109</sup> The previous regulatory mandate limiting employer discretion in the 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."<sup>110</sup> It stated that it was "unable to quantify" how customers would respond or how "reallocations of tips" would affect previously tipped employees.<sup>111</sup> Although the earlier

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105. *Id.* at 53,446. The Glider Repeal Proposal at one point calls its prior reading "not the best reading," language also consistent with this new reading not being a clear answer to the "precise question" under *Chevron* Step One. *Id.* at 53,445. Generally, however, its several pages of analysis support the view that EPA was claiming it had no power to regulate gliders as new.

106. Letter from Senators Tom Carper and Tom Udall to Scott Pruitt, Adm'r, EPA (Mar. 12, 2018) (citing news stories and other studies questioning the genesis of the proposed rule change and the integrity of the studies and industry materials relied upon); Eric Lipton, *Steering Big Rigs Around Emissions Standards*, N.Y. TIMES, Feb. 15, 2018, at A1 (recounting meetings between a company that builds gliders and Administrator Pruitt, effects of the rollback, and concerns of low-polluting-truck manufacturers about the break for gliders).

107. Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395, 57,395 (Dec. 5, 2017) (Notice of Proposed Rulemaking; Request for Comments) (to be codified at 29 C.F.R. pt. 531) (reviewing legislative, regulatory, and litigation history preceding the 2017 actions, and stating the Department of Labor's new contrary legal view).

108. *Id.* at 57,399.

109. *Id.*

110. *Id.* at 57,396.

111. *Id.*

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.”<sup>112</sup> 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.<sup>113</sup> After internal disputes and White House consultation, they “removed the economic transfer data altogether.”<sup>114</sup> Ultimately, Congress intervened with a statutory resolution contained in a massive omnibus spending bill.<sup>115</sup>

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.<sup>116</sup> This instance of abnegation broadly disclaimed power to regulate animal welfare, stating that such regulation was “not authorize[d],” the agency’s power was “authoritatively prescribed” by the statute, and that it “lack[ed] the power to tailor legislation to policy goals, however worthy, by rewriting unambiguous statutory terms.”<sup>117</sup> However, the agency waffled a bit on the abnegation claim, in one instance calling “market-based solutions . . . more appropriate.”<sup>118</sup> The agency concluded its

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112. *Id.* at 57,399.

113. Ben Penn, *Labor Dept. Ditches Data Showing Bosses Could Skim Waiters’ Tips*, BLOOMBERG L. (Feb. 1, 2018, 6:01 AM), <https://news.bloomberglaw.com/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips> [<https://perma.cc/U99L-WFNM>]; see also text accompanying *infra* note 115 (citing other news stories discussing this history).

114. Penn, *supra* note 113.

115. Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong. § 1201 (2018) (in an appropriations rider, resolving the controversy by prohibiting employers from keeping employees’ tips); see Noam Scheiber, *Trump Administration Retreats on Tip-Sharing Plan in Compromise*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/business/economy/tipping-workers.html> [<https://perma.cc/ML86-CCQN>] (reporting on the legislative resolution); Lydia Wheeler, *Spending Bill Prevents Employers from Pocketing Tips Under Tip-Pooling Rule*, HILL (Mar. 21, 2018, 8:57 PM EDT), <https://thehill.com/regulation/379662-spending-bill-prevents-employers-from-pocketing-tips-under-tip-pooling-rule> [<https://perma.cc/X4GX-JZNB>] (reporting that Democratic Senator Patty Murray reached a deal with Trump Labor Secretary Alexander Acosta to add a spending-bill rider amending the Fair Labor Standards Act to prevent employers, managers, or supervisors from pocketing workers’ tips regardless of whether they earn gratuities on top of a full minimum wage).

116. National Organic Program (NOP); Organic Livestock and Poultry Practices—Withdrawal, 82 Fed. Reg. 59,988 (Dec. 18, 2017) (Proposed Rule) (to be codified at 7 C.F.R. pt. 205).

117. *Id.* at 59,989.

118. *Id.* at 59,959 n.5.

legal analysis with a fallback claim that its new interpretation should, if the lack-of-power reasoning were rejected, be viewed as “a permissible statutory construction.”<sup>119</sup> As with several other abnegation-based deregulatory actions, the agency did not discuss how or whether animal welfare would 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.”<sup>120</sup>

In 2017, the Federal Communications Commission (“FCC”), an independent agency, took substantial steps toward abandoning the “net neutrality” regulation promulgated in 2015.<sup>121</sup> This proposal and the later tentative final order relied on a weaker form of statutory abnegation. The agency did not wholly disclaim power but instead stated the earlier action was founded on unsound “statutory construction” and claimed the new action was based on a “better reading” of the statute.<sup>122</sup> 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 rather identifies ambiguity about agency authority and then rationalizes a power retreat as wise in light of such doubt. The Bureau of Land Management (“BLM”) in 2017 and 2018 sought to abandon a 2016 rule governing methane pollution linked to oil and gas extraction and related royalties.<sup>123</sup> BLM explained the reversal as partly due to the argument—originally made

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119. *Id.* at 59,990.

120. *Id.*

121. Restoring Internet Freedom, 82 Fed. Reg. 25,568 (June 2, 2017) (Proposed Rule) (to be codified at 47 C.F.R. pts. 8, 20). The FCC revealed its likely policy-change choice and rationale with a Declaratory Ruling, Report and Order, but that document does not preclude further comment and FCC adjustment. Restoring Internet Freedom, 33 FCC Rcd. 311 (1) (2017) [hereinafter Restoring Internet Freedom Ruling].

122. Restoring Internet Freedom, 82 Fed. Reg. at 25,575.

123. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (Feb. 22, 2018) (Proposed Rule) (to be codified at 43 C.F.R. pts. 3,160, 3,170) [hereinafter “BLM Waste Rule Rescission Proposal”]; Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050 (Dec. 8, 2017) (Final Rule) [hereinafter “BLM Waste Suspension Rule”]. A district court declared that the BLM Waste Suspension Rule illegally circumvented numerous requirements of consistency doctrine, was “untethered to evidence,” failed to allow meaningful opportunity for comments, and contained internal logical inconsistencies. *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1065–66, 1071–72 (N.D. Cal. 2018).

by industry challenging the rule but largely embraced by BLM in 2017 and 2018—that the 2016 rule “exceeded the BLM’s statutory authority.”<sup>124</sup> The agency stated that its earlier focus on “conservation without regard to economic feasibility” was illegal, as was its consideration of “environmental and societal benefits rather than . . . resource conservation benefits alone.” Further, BLM claimed that it had illegally engaged in pollution regulation delegated to EPA and the states under other laws.<sup>125</sup> After offering these statutory-abnegation justifications for deregulating, BLM also pointed to alleged procedural infirmities with the prior regulations and the risk of their rejection under the APA.<sup>126</sup> But the agency also explained its new deregulatory move as a better choice, especially where no governing statute mandated the 2016 regulation.<sup>127</sup> In September of 2018, BLM issued a final rule that more firmly relied on statutory-abnegation rationales, again identifying several ways it claimed BLM had exceeded its authority in 2016, including among them claims that it had previously been excessively stringent.<sup>128</sup> This last, far more limited form of abnegation—a claim of illegality due to excessively ambitious regulation and resulting hardship—involves something more akin to doubts about the rigor of a particular choice as a rationale for a regulatory change or reversal and, as a result, leads to less aggressive agency assertion of power over those regulated.

### *B. Statutory-Abnegation Variants and Differences*

In these instances of statutory abnegation, several common elements are apparent. This section briefly identifies these elements.

1. *Deregulatory Benefits.* All are deregulatory actions or, in one instance, an initial declination to act that followed an earlier contrary

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124. BLM Waste Rule Rescission Proposal, *supra* note 123, at 7927–28.

125. *Id.*

126. *Id.* at 7927.

127. *Id.* at 7927–28.

128. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 at 49,185–86, 49,189–90 (Sept. 28, 2018) (Final Rule) [hereinafter “BLM Waste Rule Rescission Final”] (alleging that BLM’s prior statutory interpretation was illegal, and adopting a more limited read of its powers that it characterized as consistent with “longstanding” approaches and as avoiding 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 48,189.

statement about the agency's power.<sup>129</sup> Through statutory abnegation, the agency reduces burdens imposed on regulated entities. All such actions, other than the series of choices leading to *Massachusetts v. EPA*, prominently tout their antiregulatory 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 they sometimes constitute a more action-specific disavowal that the agency lacked power to regulate *as it did*. Sometimes the assertion is written as though it is about a statutory line or mandate prohibiting action but, in a broader context, seems to be nothing more than a claim that the agency went too far under the facts or science.

2. *Omitted Comparative Analysis of Legal Reasoning and Effects.*

Recent uses of statutory abnegation are also notable in what they decline to do or include. All involve the new statutory interpretation disclaiming power but make only passing reference to the previous contrary statutory views and the rationales that had explained them. Most fail to provide an old–new comparison of effects of the interpretive change, and most also place little or no weight on studies, science, and facts previously discussed in regulating under the earlier 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. Agencies' also have not discussed the track record under the earlier approach, actions in reliance on the earlier policy, or other intervening changes.

These abnegation actions hence seem to reflect at least an implicit view that the more the agency argues that it lacks power through statutory abnegation, the less it needs to engage with other factors, such as the basis for the earlier (but now abandoned) view of the agency's power or the underlying facts, data, or scientific contingencies relevant to the old and new action.

3. *A Textualist Narrative and Word-Driven Choice.* To the extent lengthy, small-type Federal Register documents can reveal a narrative, the story told by abnegating agencies 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

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129. The latter setting describes the agency history leading to *Massachusetts v. EPA*, 549 U.S. 497 (2007). See *supra* notes 32–41 and accompanying text.

action. Several seem to parrot language, rationales, and methods that microtextualist judges, such as the late Justice Antonin Scalia, would utilize in interpreting statutes.<sup>130</sup> Also consistent with some forms of 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 executive orders calling for deregulation and reduced regulatory costs. Even these narratives, however, often contain little supporting documentation, sometimes citing no authority and at other times only alluding generally to burdens that would have allegedly resulted under the earlier policy, but without indicating the sources for such claims.<sup>131</sup> The agencies in most of these actions do not actually scrutinize this information about regulatory effects or claimed hardships, or offer the agency's own conclusions, but they nonetheless propose a broad regulatory rollback. A few late 2018 actions, however, included a bit more attention to before-and-after comparisons of regulatory effects.<sup>132</sup>

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130. 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 of 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 shorthand, I refer to such a narrow focus as "microtextualism." In a less developed strain of cases, Justices mostly utilizing a textualist methodology have expanded their focus, generally en route to rejecting an agency's new claim of authority. See *infra* notes 141–46 (discussing these cases); see also Buzbee, *The Tethered President*, *supra* note 10, at 1373–75 (discussing the "major questions" canon and its implications for deregulatory policy changes). In a growing line of Supreme Court opinions exhibiting 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 simply do not focus as narrowly as Justice Scalia did in some of his most famous "new textualism" decisions. *Id.* at 1365–67. Justice Kagan employed this form of textualism in a recent case addressing the National Park Service's jurisdiction over hovercraft use on an Alaskan river. See *generally* *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) (reviewing operative text, surrounding language, definitions, other regulatory powers in parks outside Alaska, other legislation regulating the same area, the history of the legislation and compromises, legislative history, and the consequences of alternative interpretations, concluding that the agency lacked power to regulate).

131. See, e.g., CPP Repeal Proposal, *supra* note 2, at 48,038, 48,042 (referring to costs, harms, and energy-system risks under the CPP, but without attribution or stating the agency's conclusions about such claims and not discussing the change from a virtually opposite agency position in CPP documentation or the 2017 EPA, *BASIS FOR DENIAL*, *supra* note 64).

132. See, e.g., ACE Rule Proposal, *supra* note 72 and accompanying text; *supra* note 92 and accompanying text.

4. *Initial Declinations to Act, Distinguished.* 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 facts and law about whether they should, *for the first time*, assert jurisdiction over or impose regulations on a source of risk. They may decline to do so out of concern about a lack of statutory authority, or perhaps concern 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*<sup>133</sup> 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 similarly minimal or nonexistent judicial scrutiny.<sup>134</sup>

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 an abnegation rationale or whether a different view is tenable. In fact, such action is often no action at all. In addition, there are no regulatory track records, ripple effects, or subsequent reliance interests associated with initial choices not to act. Abnegation would deliver no new regulatory relief, and hence there is 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.<sup>135</sup> 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. This Article therefore generally puts to the side possible abnegation rationales for agencies continuing to take no action.

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133. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, (1983).

134. *Id.* at 41–43.

135. See generally Ronald Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 702–34 (1990) (discussing unreviewability doctrines).



5. *Chevron Policy Change, Distinguished.* Although the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>136</sup> might seem to support statutory abnegation, that case did not involve abnegation at all.<sup>137</sup> 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 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.

6. *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.<sup>138</sup> Regulation might also hinge in part on assessments of cutting-edge technological capabilities.<sup>139</sup> Or, agencies may examine a product's risk and adjust its labeling, licensing, or marketing scheme.<sup>140</sup> Although such actions can make a massive difference in resulting regulatory obligations—

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136. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

137. *See id.*

138. *See* 42 U.S.C. §§ 7408–7410 (2012) (setting forth interrelated provisions creating an “ambient air quality standard” scheme, state obligations, and linked classifications of their status).

139. *See* 42 U.S.C. § 7412 (2012) (setting forth a program regulating emitters of hazardous air pollutants and requiring achievement of various benchmarked forms of “best” achievable performance).

140. *See generally* *Wyeth v. Levine*, 555 U.S. 555 (2009) (describing such regulation in a challenge to claimed preemptive impacts of regulatory action); David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461 (2008) (reviewing FDA roles and food and drug laws' interplay with common-law regimes).

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 new science, data, and conditions. This is a common source of changed regulatory obligations. Hence, so-called regulatory rollbacks can sometimes involve neither abnegation nor policy change at all.

7. *Past Abnegation, Effects on Future Regulatory Action, and the “Major Questions” Canon.* Actions that involve past abnegation, in the sense of previously disclaimed power and then a new assertion of authority, are also worth noting. Agencies will, at times, quite explicitly seek to regulate a source of risk that had earlier been unregulated, sometimes due to earlier agency disavowals of authority to regulate. A paradigmatic and often cited example is discussed in the *Brown & Williamson* decision.<sup>141</sup> FDA had previously declined to regulate tobacco products, and Congress had enacted a number of laws specifically authorizing particular types of regulation of tobacco products.<sup>142</sup> When 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 Supreme Court’s subsequent rejection of FDA’s power.<sup>143</sup> In addition, a difference among the Justices concerned whether FDA’s earlier declinations to act had been factually contingent—a “contingent disavowal”—or a complete abnegation.<sup>144</sup>

Such circumstances involve a new claim of power that was either never asserted or was the subject of earlier abnegation. These changing claims about agency power have at times triggered the growing body of doctrine known as the “power canon” or “major questions” canon, under which the Supreme Court has declined to show the usual deference to agencies, reviewing the new claim of power skeptically.<sup>145</sup>

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141. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

142. *Id.* at 126–30, 143–59 (reviewing FDA’s 1995 and 1996 tobacco actions, as well as other congressional actions regarding tobacco and the sequence of FDA actions and officials’ statements about FDA’s power to regulate tobacco).

143. *Id.* at 144–59.

144. *Id.* at 186–92 (Breyer, J., dissenting) (reviewing reasons the agency’s past views were fact-based and could change).

145. 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 antiregulatory bias).

In this 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 undeferential judicial scrutiny. As a result, current abnegation might, in effect, set up—perhaps by design—later judicial resistance to a new assertion of agency power.<sup>146</sup> This may partly explain why agencies utilize abnegation as a rationale for deregulation despite the disadvantages of doing so. This Article turns now to analyzing this doctrinal disadvantage, exploring why we nonetheless see such frequent reliance on abnegation, and assessing statutory abnegation as a normative matter.

## II. THE DOCTRINAL ANSWER TO STATUTORY ABNEGATION

Given the prevalence of statutory abnegation to justify deregulatory actions, especially during 2017 and 2018, one might expect a strong doctrinal foundation for such a move. However, as is apparent when assessed by reviewing courts in light of governing law, the bare statutory-abnegation claims rolled out during the Trump administration lack doctrinal support.<sup>147</sup> 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 reasoning and minimal factual engagement accompanying abnegation claims appears to be in outright violation of several strains of law governing judicial review of agency action, especially regarding policy change. Unless several longstanding, foundational judicial-review frameworks are substantially revised, abnegation strategies that lack accompanying, necessary comparative analysis are unlikely to meet success in the courts.

### A. *Assessing Proffered Justifications for Statutory Abnegation*

Statutory abnegation has been justified by agencies or Department of Justice litigators with several rationales. This Part explores these and additional possible justifications for such a strategy,

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146. For other explanations for the legally dubious abnegation strategy, including the related long-shot goal of securing judicial ratification of abnegation, see *infra* Part III.

147. They are “bare” due to the lack of analysis of other required antecedents for legal policy change. Those requirements follow in this section.

with a focus on the likelihood of success upon eventual judicial review. It then broadens the perspective, considering incentives and victories that might be more political and motivated by a desire to deliver quick relief for regulatory targets, even if eventually rejected in the courts.

1. *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 the Bush administration's declinations to act regarding climate change,<sup>148</sup> and more recently in agency responses to President Trump's priorities, especially as set forth in his Executive Order 13,771.<sup>149</sup> 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.<sup>150</sup> Presidents expect all agencies to comply with executive orders. 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 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 extant promulgated regulations; until revised through another rulemaking process, they remain binding law, as long established by *United States ex rel. Accardi v. Shaughnessy*.<sup>151</sup> Order 13,771, like past orders, explicitly states it is subject to other governing statutory and legal requirements.<sup>152</sup> 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, a 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

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148. See *supra* notes 32–41 and accompanying text.

149. Exec. Order No. 13,771, 82 Fed. Reg. 9,339, 9,339 (Feb. 3, 2017).

150. *Id.*

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

152. Exec. Order No. 13,771, 82 Fed., Reg. at 9,340.

process.<sup>153</sup> 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 by the APA, enabling acts, and "reasoned decisionmaking" precedents, including basic tenets of "hard look review" and the consistency-doctrine cases reviewed below.<sup>154</sup>

2. *Change and Chevron*. As mentioned above, some abnegating agencies cite *Chevron* as giving agencies latitude to revamp their regulatory approaches, sometimes linking that discussion to President Trump's avowed goal to reduce regulatory burdens.<sup>155</sup> The case is also sometimes cited as a fallback argument that, if the new statutory interpretation fails, the agency's new interpretation should be upheld as at least a reasonable or a permissible choice.<sup>156</sup> *Chevron* certainly is a critical endorsement of agency policy reassessment. It provides agencies with some additional space to make statutory and policy judgments if there is a gap, silence, or ambiguity, with judicial deference in such settings required under the Supreme Court's *Chevron* Two-Step. At Step One of *Chevron*, an agency and court must agree on a statutory interpretation if Congress has addressed the "precise question at issue."<sup>157</sup> At Step Two, however, the presence of a gap, silence, or ambiguity translates into policymaking discretion to be wielded by the agency due to its delegated role and expertise. Courts must defer to a "reasonable" or permissible interpretation.<sup>158</sup>

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153. See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1108–14 (2008) (discussing the role of the Office of Information and Regulatory Affairs ("OIRA") and questions of legitimacy and politicization); Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 327–30, 365–67 (2014) (discussing and questioning such regulatory-oversight orders' legality as written and applied).

154. See *infra* Part III.D (discussing cases reviewing abnegation-based deregulatory actions).

155. EPA frequently cites it in actions, see *supra* notes 56–106 and accompanying text, but other agencies making policy changes also cite it for support. See, e.g., National Organic Program (NOP); Organic Livestock and Poultry Practices—Withdrawal, 82 Fed. Reg. 59,988, 59,989 (Dec. 18, 2017) (Proposed Rule) (to be codified at 7 C.F.R. pt. 205) (discussing a Department of Agriculture policy reversal referencing *Chevron*). It appears that agencies making policy changes during the Trump administration tend to cite one or more executive orders by way of explanation or justification. A Westlaw search of Federal Register notices after 2016 (shortly before President Trump was inaugurated) shows over 2500 agency references to such orders.

156. See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (upholding reasonable interpretation of FCC under *Chevron*).

157. See *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

158. See *id.* at 843.

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 statutory abnegation often seems to describe the agency as acting within, and hence constrained by, a *Chevron* Step One context.<sup>159</sup> Because Step One requires the agency and court to agree, and with the agency receiving no deference, *Chevron* at Step One provides no additional room or judicial deference for the agency's reinterpretation of the governing statutory language.<sup>160</sup> So *Chevron* is one of many cases embracing the possibility of policy change, but it actually provides no doctrinal mileage for an agency's claim that it lacks power to act as it did previously. If the action genuinely involves a question that can only be viewed as implicating Step One, then the agency and reviewing court must agree on what the statute requires.<sup>161</sup> If there is Step Two "space," then an abnegation claim would be in error because the agency disclaiming power would mistakenly be asserting a lack of interpretive and policy options.<sup>162</sup> An erroneous—and thus illegal—agency claim of legal constraint, like any other erroneous statutory interpretation by an agency, requires judicial rejection.<sup>163</sup>

3. *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 in part due to the argument that it is unlikely to receive deference from the courts, would be vulnerable upon review, or simply would likely lead to litigation that the agency would prefer to avoid.<sup>164</sup> This

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159. *See id.* at 842–45.

160. *See id.* In fact, the general assumption is that agencies view it as advantageous to argue that their policy choice, and underlying statutory interpretations, fall within *Chevron* Step Two because it provides an agency room for multiple permissible choices and calls for judicial deference. *See infra* notes 226–30 and accompanying text.

161. *Chevron*, 467 U.S. at 842–45.

162. *See* Hemel and Nielson, *supra* note 23 (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 an analysis of agency power).

163. In the DACA cases, DHS's erroneous views about its powers led to a string of judicial losses. *See supra* notes 49–55, and *infra* notes 335–41 and accompanying text (discussing the actions and judicial rejections).

164. For a final-rule withdrawal substantially predicated on litigation risks of the earlier action, see Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48,594, 48,596–99 (Oct. 18, 2017) (codified at 9 C.F.R. pt. 201) (Final Rule) (withdrawing an

litigation-risk rationale raises quite different issues and has led to different judicial responses.<sup>165</sup>

4. *Consistency Doctrine's Constraints.* Some agencies pursue an abnegation strategy with supplementary justification.<sup>166</sup> They offer a more robust legal explanation that acknowledges that, in addition to the issues of interpreting the relevant enabling act, agencies proposing a policy shift also must provide the analysis required by law governing policy change and by consistency doctrine. This is most evident in several late 2017 and 2018 actions by EPA.<sup>167</sup> In addition to offering an abnegating interpretation of the statute, agencies cite and sometimes quote from two of the four major modern consistency-doctrine cases. Most Trump-administration agencies, however, appear to view citation to cases acknowledging the possibility of agency policy change as legally sufficient, failing to address the procedural and analytical hurdles that consistency doctrine requires agencies to surmount to make a successful policy change. This Part now explores these requirements of consistency doctrine.

Agencies referring to this body of law often cite to a few lines from the partial dissenting opinion of then-Associate Justice Rehnquist in *State Farm*.<sup>168</sup> This is, indeed, one of the key cases governing agency

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interim final rule that had “enumerated unlawful practices” and discussing reasons the agency viewed it as legally vulnerable). For cases discussing and rejecting the adequacy of the litigation-risk rationale for a deregulatory policy shift, see *Vidal v. Nielsen*, 279 F. Supp. 3d 401, 420–33 (E.D.N.Y. 2018) (rejecting the DACA reversal as rooted in legal error, illogical reasoning, and inadequately analyzed litigation-risk arguments since either maintaining DACA or rescinding it could lead to litigation, as well as failures to analyze factors required by consistency doctrine), and *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1037–46 (N.D. Cal. 2018) (discussing the inadequacy of a litigation-risk rationale among other infirmities in the DACA rescission), *aff’d*, 908 F.3d 476, 500–03 (9th Cir. 2018) (reviewing a litigation-risk claim and finding it pretextual and a post hoc rationale). See also *infra* note 165.

165. See, e.g., *NAACP v. Trump*, 315 F. Supp. 3d 457, 463 (D.D.C. 2018) (holding that litigation risks and “serious doubts” rationales for a regulatory reversal are inadequate without a more full justification, due to the risk that these rationales would insulate policy changes from meaningful judicial review); *NAACP v. Trump*, 298 F. Supp. 3d 209, 215 (D.D.C. 2018) (same).

166. The cases parsed in this subpart are analyzed for their emphasis on contingent facts and past reasoning in Buzbee, *The Tethered President*, *supra* note 10. Here, they set the stage for assessing the legal adequacy of statutory abnegation for regulatory reversals.

167. See *supra* Part I.A (discussing such abnegation-based actions and noting citations in some actions to consistency doctrine).

168. The key language is in *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part). For agencies citing this language, see, e.g., *Intention to Review and Rescind or Revise the Clean Water Rule*, *supra* note 85, at 12,532; see also *Glider Repeal Proposal*, *supra* note 99, at 53,443 and accompanying text.

policy changes and deregulatory shifts. Oddly, however, agencies citing it and quoting Rehnquist do not include discussion of the case's majority ruling, which rejected a Reagan-era deregulatory action as inadequately justified and stated what was required of agencies proposing a policy change.<sup>169</sup> 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.<sup>170</sup> In addition to embracing “hard look review” and articulating the requisites of “reasoned decisionmaking,” the Court set forth the key elements of consistency doctrine.<sup>171</sup> 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 airbags 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.<sup>172</sup>

The Court rejected this argument for minimal scrutiny, emphasizing the need for an agency to confront its old policy and offer an explanation for the change. The Court stated that when an agency is “changing its course,” it 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.”<sup>173</sup> The Court easily determined that abandoning the airbags option was arbitrary and capricious because the agency “apparently gave no consideration whatever” to keeping one of the safety strategies.<sup>174</sup> As the Court stated, “[n]ot one sentence of its rulemaking statement discusses the airbags-only option.”<sup>175</sup>

The *State Farm* Court declined to submit deregulatory action to some less rigorous standard of review for several reasons. First, the

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169. See *supra* note 168 and accompanying text.

170. See generally *State Farm*, 463 U.S. 29.

171. See Jerry L. Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.: Law, Science and Politics in the Administrative State*, in ADMINISTRATIVE LAW STORIES 334 (Peter L. Strauss ed., 2006) (discussing the case's history and its importance).

172. See *State Farm*, 463 U.S. at 30.

173. *Id.* at 42. The tail clause, stating more is required than “when an agency does not act in the first instance,” rejects 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* note 135 and accompanying text (discussing law on unreviewability).

174. See *id.* at 46.

175. *Id.* at 48; see also *id.* at 50–51 (stating that the “agency submitted no reasons at all”).



APA made no such distinction.<sup>176</sup> Second, the enabling act’s language also provided no basis for treating differently initial regulatory actions and rescissions of past actions.<sup>177</sup> Moreover, the Court reasoned that agency declinations to act—usually subject to minimal review—are “substantially different” from an agency’s “revocation of an extant regulation.”<sup>178</sup> Such revocation “constitutes a reversal of the agency’s former views as to the proper course.”<sup>179</sup> The Court stated that a “settled course of behavior embodies the agency’s informed judgment” that the earlier action “will carry out the policies committed to it by Congress.”<sup>180</sup> This creates “at least a presumption that those policies will be carried out best if the settled rule is adhered to.”<sup>181</sup>

The Court acknowledged that agencies can seek to change policy, as had already been long established.<sup>182</sup> But the Court linked the possibility of change not to politics, presidential priorities, or statutory language, but to the need for “ample latitude to ‘adapt their rules and policies to the demands of changing circumstances.’”<sup>183</sup> It reiterated the importance of “changing circumstances” and stated that the presumption is “*against* changes in current policy that are not justified by the rulemaking record.”<sup>184</sup> 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 justify a change.

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. These factors could provide a “reasonable basis for an executive agency’s reappraisal of the costs and benefits of its

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176. *Id.* at 41–42.

177. *Id.*

178. *Id.* at 41.

179. *Id.*

180. *Id.* at 41–42.

181. *Id.* (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–08 (1973)). For analysis of statutory interpretation and judicial review of “longstanding” agency interpretations, see generally Anita Krishnakumar, *Longstanding Agency Interpretations*, 83 *FORDHAM L. REV.* 1823 (2015). Krishnakumar calls for more rigorous review of agency change if it is based on political factors but supports deference if it is rooted in changed circumstances, expertise, and workability. *Id.* at 1877–79.

182. *See State Farm*, 463 U.S. at 42.

183. *See id.*

184. *Id.* (emphasis in original)

programs and regulations.”<sup>185</sup>

Although Justice Rehnquist’s view did not gain majority support in *State Farm*, it was quoted in the more recent *FCC v. Fox*<sup>186</sup> case, in a majority opinion that further fleshed out the general framework for the permissible role of politics in agency policy change.<sup>187</sup> The Court in *Fox* found permissible the FCC’s changed approach to “fleeting obscenity” on television. The splintered opinions in *Fox* render it difficult to determine exactly what views garnered majority support.<sup>188</sup> Change does not, by itself, trigger any heightened scrutiny, but all Justices agreed the agency would have to confront the old policy and explain the changed new policy.<sup>189</sup>

The Justices in *Fox* differed on what had to be weighed. Writing for the majority, Justice Scalia stated that agencies would have to “show that there are good reasons for the new policy.”<sup>190</sup> All Justices appeared to agree on this need for “good reasons.”<sup>191</sup> The Scalia opinion ostensibly garnered majority support for most of its discussion, but it 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 a 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.”<sup>192</sup> The Court also acknowledged that because past policies will

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185. *Id.* at 59 (Rehnquist, 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.”).

186. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

187. *Id.* at 515; *see also* Kozel & Pojanowski, *supra* note 23, at 129–33 (analyzing additional cases developing the law between *State Farm* and *Fox*).

188. *See also* Kozel & Pojanowski, *supra* note 23, at 129 (highlighting doctrinal uncertainty left by *Fox*).

189. *Fox*, 556 U.S. at 514.

190. *Id.* at 515.

191. The dissenters would have required more, but they indicated no disagreement with the need for “good reasons.” *Id.* at 550–51 (Breyer, J., dissenting).

192. *Id.* at 515. Justice Kennedy ostensibly joined this opinion, but his concurrence—which was needed to make a Court majority—emphasized the need for factual justification and expressed concern with agencies exercising “unbridled discretion” or ignoring contrary or “inconvenient” facts, especially since many agency actions are built on “factual findings.” *Id.* at 536–37 (Kennedy, J., concurring in part and concurring in the judgment). *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) focused even more on facts. *See infra* notes 195–99 and

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.<sup>193</sup> The dissent argued that agencies must always explain why the change was made and agreed with the majority that agencies must engage with prior facts and justifications.<sup>194</sup>

Surprisingly, almost all of the 2017 and 2018 deregulatory actions and the statutory-abnegation actions discussed here failed to grapple with the *Encino Motorcars* decision.<sup>195</sup> This 2016 case, decided after Justice Scalia’s death, included a clearer majority opinion written by Justice Kennedy. *Encino Motorcars* lacked the uncertainty in *Fox* created by multiple opinions quibbling over ostensible majority language. The Court rejected as inadequately justified the agency’s revised policy about employment status in the context of car dealerships. Agencies making a policy change must, as always, “give adequate reasons” for their decisions.<sup>196</sup> And the *Encino* Court stated that, as under the typical “hard look review” articulated in *State Farm*, this means that 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.”<sup>197</sup> The Court again emphasized the need for assessment of any “reliance interests” and, quoting *Fox*, stated that a “reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>198</sup> And “unexplained inconsistency” is a basis for holding a new agency action “arbitrary and capricious.”<sup>199</sup> The *Encino* Court notably did not quote or refine *Fox*’s language about the agency change not needing to be “better” or that an agency’s “belie[f]” that it was better would be enough, leaving its continued force uncertain.

None of the 2017 and 2018 abnegation actions discuss the implications of *Massachusetts v. EPA*,<sup>200</sup> which involved arguments

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accompanying text.

193. *Fox*, 556 U.S. at 515.

194. *Id.* at 551 (Breyer, J., dissenting).

195. *Encino Motorcars*, 136 S. Ct. at 2125–26.

196. *See id.* at 2125–26.

197. *Id.* at 2125.

198. *Id.* at 2126 (quoting *Fox*, 556 U.S. at 515–16).

199. *Id.* at 2125 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

200. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

based on both abnegation and presidential power in an attempt to justify the agency's policy reversal about its own power to address climate change.<sup>201</sup> The Court's opinion, however, strongly rejected the attempted abnegation and declined to accept presidential political priorities as justification for the petition denial and ongoing inaction on climate change.<sup>202</sup> The *Massachusetts v. EPA* Court ordered EPA to reassess its action in light of the statute's procedural and substantive requirements.<sup>203</sup> Neither the abnegation claim nor the presidential-priorities argument triggered any lessened burden of agency justification. If anything, the decision is an unusually strong affirmation of the need for expertise, rational decisionmaking, engagement with science and facts, and apolitical agencies, at least in the sense of requiring that statutory choices be the paramount shaper of agency power and actions.<sup>204</sup>

The subsequent *Michigan v. EPA* decision did not involve a policy change, but it did involve abnegation of an agency's authority to consider the costs associated with its regulation of air toxins from power plants. Much like *Massachusetts*, *Michigan* prompted a judicial skewering of the agency's "interpretive gerrymanders" and selective attention to "context" to justify the regulatory choice.<sup>205</sup> The Court likewise compelled the agency to go back and fully attend to the statutorily required analysis of regulatory effects.

In fact, none of these cases even implicitly indicates that deregulation based on abnegation alone somehow eliminates other agency requirements for justifying a policy choice or shift. And no opinion provides that a policy revision aligned with a presidential edict

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201. The Court in *Massachusetts v. EPA* did not emphasize how changes of statutory interpretation would interact with 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. *Massachusetts v. EPA* has key language rejecting the adequacy of EPA's asserted lack of power and requiring analysis shaped by statutory criteria. *See id.* at 528–35.

202. *Id.* at 513–14, 532–35.

203. *Id.* at 532–35.

204. For analysis of *Massachusetts* and its emphasis on expertise and deemphasis of politics as a rationale for regulatory action, see generally 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 (2007).

205. *See Michigan v. EPA*, 138 S. Ct. 2699, 2707–11 (2015) (rejecting EPA's claim that it lacked the power to consider costs associated with its regulation to reduce risks of mercury pollution from power plants). The dissent, by Justice Kagan and joined by three other Justices, agreed with a general default rule that reasonable agency action requires considering costs unless precluded by the statute. *Id.* at 2716 (Kagan, J., dissenting).

more easily surmounts these requirements. At most, one sentence in *Fox*—suggesting that agencies need not show that a revised policy is “better”—provides agencies with a 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 all 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. Hence, an agency proposing a policy change will need to engage with these earlier stated “facts and circumstances” that had been viewed as justifying a different legal view and course of action.<sup>206</sup> Yet none of the recent agency abnegations meaningfully grappled with the factual findings, reasoning, or impact of the past or revised policy choice, as required by Supreme Court doctrine. *Encino*’s 2016 decision—a modest embellishment and clarification of the law after *State Farm* and *Fox*—stated that “unexplained inconsistency” is not permissible.<sup>207</sup>

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206. During the usual litigation over a major rule, those justifications will be reiterated and likely sharpened. See Buzbee, *The Tethered President*, *supra* note 10, at 1405–07 (discussing why the process of promulgating and defending regulation will lead to further explication and elucidation).

207. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (alterations omitted)). Such policies can be established by informal adjudicatory choices and changed in similar subsequent actions; change must still be justified by the agency. See, e.g., *American Bar Ass’n v. U.S. Dep’t of Educ.*, No. 16-2476, 2019 WL 858770, at \*19–21 (D.D.C. Feb. 22, 2019) (finding an unacknowledged and unexplained policy shift on loan forgiveness to be arbitrary and capricious). Policy change based on pretextual claims or without a record basis also can fall under this body of law. For example, two trial courts rejected the Department of Commerce’s decision to add citizenship-status questions to the census questionnaire despite previous Department views to the contrary and internal expert findings of the Census Bureau about likely effects which would undercut the claimed rationale. See generally *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (extensively documenting, based on the agency record, inconsistencies with the claimed rationale for adding a citizenship question to the census form and faulting the agency for failure to explain changed conclusions about the effect of adding such a question), cert. granted before judgment, *Dep’t of Commerce v. New York*, 139 S. Ct. 953 (2019); *California v. Ross*, No. 18-cv-01865, 2019 WL 1052434, at \*66–69 (N.D. Cal. Mar. 6, 2019) (finding the addition of a citizenship question to be based on pretextual grounds and to be an arbitrary and capricious decision, with agency conclusions lacking evidentiary support). Both trial courts separately looked at materials outside the record due to infirmities and conflicts in the agency’s claims and justifications, but the courts broke out extra-record considerations from review of the action and conclusions based on the agency’s own compiled record. The Solicitor General’s Supreme Court merits brief faults the Southern District of New York trial court for “extra-record” discovery but only glancingly address lower-court findings based on the agency’s own administrative record. Brief for Petitioners at 9–10, 16, 55, *Dep’t of Commerce v. New York*, 139 S. Ct. 953 (Mar. 6,

Recent abnegation-based deregulatory proposals emphasize the possibility of politically responsive policy change. However, they disregard or barely acknowledge the persistent doctrinal emphasis on agency obligations to address “contingencies” that justified the past action and to engage in a rigorous comparison of the old and new policy.<sup>208</sup> Most recent shifts accordingly seem fated for eventual judicial rejection unless they succeed in provoking a major shift in administrative law.

If agency abnegation is intended as a sound regulatory and litigation strategy—an assertion I question below—then it almost seems rooted in a logic error, mistaking the *possibility* of policy change for a sufficient rationale, while ignoring the conditions and hurdles that an agency must surmount to succeed in such a policy change. As a result, courts have repeatedly faulted Trump-administration agencies for failing to provide required process before making a policy change; for failing to engage with and provide comparative analysis of underlying facts, circumstances, and reasoning previously viewed as relevant; and for failing to provide the new “good reasons” for the policy change.<sup>209</sup>

### B. *The Doctrinal Disadvantages of Abnegation*

Because agencies relying on abnegation to make a policy change 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 the requirements of consistency doctrine. But abnegation is also strategically puzzling, even if one looks past the mandates of consistency doctrine. As shown in this Part, abnegation is usually unnecessary and legally disadvantageous for the agency under the prevailing, deferential standards of review.

Both before and after the Supreme Court decided *Chevron*,

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2019) (No. 18-966).

208. See Buzbee, *The Tethered President*, *supra* note 10, at 1376.

209. For analysis of these deregulatory actions and judicial rejections, see *id.* at 1408–17. For a recent tally and exploration of reasons for this high percentage of agency litigation losses, see Barbash & Paul, *supra* note 43 (documenting and discussing high percentage of losses); see also Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge*, 12 HARV. L. & POLY REV. 13, 16–47 (2018) [hereinafter Heinzerling, *Unreasonable Delays*] (analyzing the first wave of Trump-administration stay-and-delay actions and judicial rejections); *infra* Part III.D (reviewing opinions rejecting the adequacy of statutory-abnegation rationales for policy reversals).

agencies have routinely justified their actions by weaving together interpretations of enabling legislation with choices rooted in their regulatory expertise.<sup>210</sup> Because statutes rarely mandate just one course of action, and empirical study usually reveals social problems as having numerous causes and presenting tradeoffs for any regulatory response, agencies typically have latitude to make context-rich judgments that draw on the agency's experience and expertise.<sup>211</sup> The *Skidmore*<sup>212</sup> decision created what is now the default deference regime, used when an agency has acted outside of a notice-and-comment setting.<sup>213</sup> 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*”<sup>214</sup> sliding-scale deference.<sup>215</sup>

In contrast, abnegation, with its near-exclusive focus on statutory language to claim obligatory policy change, is a recipe for reduced or no deference under this regime. In adopting such a narrow focus, recent agency attempts at policy change via abnegation have seldom relied on expert analysis of statutory factors and on-the-ground effects of regulatory policy. If the agency is claiming mere obedience to an all-knowing and constraining Congress, then the traditional expertise-based justifications for any deference fall away.

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210. See Herz, *supra* note 162, at 1897 (describing deference to agencies as long rooted in delegated authority and expertise, well before *Chevron*, and discussing *NLRB v. Hearst Pubs., Inc.*, 322 U.S. 111, 114–15, 130–31 (1944)).

211. 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, 1099 (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 (2018) (discussing delegated roles and conceptions of “interpretation” and “policymaking” in the *Chevron* case and as allocated by regulatory statutes). See generally 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).

212. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

213. See *id.* at 140 (stating factors now called sliding-scale review, including “consistency” as a favorable factor); see also Peter L. Strauss, *Deference Is Too Confusing—Let's Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143, 1153–72 (2012) [hereinafter Strauss, *Deference Is Too Confusing*] (discussing the applicability and conceptual differences of judicial review under *Chevron* and *Skidmore*).

214. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

215. Strauss, *Deference Is Too Confusing*, *supra* note 213, at 1154. *Mead* made clear that *Skidmore* provides the scope-of-review framework when the underlying law or the agency's procedural choices render *Chevron* deference inapplicable. *Mead*, 533 U.S. at 234–35.

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), judicial scrutiny under *Chevron* toggles between zero deference at Step One, if Congress has addressed the “precise question at issue,” and substantial deference at Step Two, if the statute is silent, leaves a gap, or is ambiguous regarding how the agency should regulate.<sup>216</sup> In the zero-deference Step One setting, the agency and court must agree on that single answer.<sup>217</sup> At Step Two, however, the Court in *Chevron* recognized that agencies frequently have to make policy choices that balance conflicting statutory policies, require the exercise of discretion delegated to the agency by Congress, and depend on political and pragmatic calculations about how best to regulate.<sup>218</sup> 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.<sup>219</sup> Although *Chevron* deference is less favorable to agencies than once thought, agencies still benefit from the deference afforded by Step Two in defending regulatory choices.<sup>220</sup>

The subsequent *Mead* case both built on *Chevron* and also clarified when and why *Chevron* deference applies.<sup>221</sup> It, too, creates an unfavorable standard for agencies seeking to roll back regulations through abnegation. When agencies make a reasoned choice from among a range of possible options, that choice occurs in a setting characterized by two types of political accountability. Although some courts and scholars have read *Chevron* as reflecting just one type of political accountability—the president's electoral accountability—the opinion actually is built on several rationales. The Court emphasized legislative supremacy-based accountability in the form of Congress choosing to delegate to the agency (not the courts) and Congress setting the criteria for action to be weighed by that expert delegate.<sup>222</sup>

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216. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

217. *Id.* at 842.

218. *Id.* at 843–45; Siegel, *supra* note 211, at 962–65.

219. *Chevron*, 467 U.S. at 843–45, 861–66.

220. 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).

221. See *United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001).

222. *Chevron*, 467 U.S. at 843–45, 861–66.



It also, in more frequently cited language, emphasized electoral and hierarchical accountability, contrasting agency leadership's fealty to the elected president as well as Congress delegating turf to an agency with the alternative of reposing primary interpretive power in judges lacking expertise or political accountability.<sup>223</sup> *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 mode was also an underpinning of the case's call for judicial deference.<sup>224</sup> That question was resolved in *Mead*, where the Court emphasized that the procedural accountability associated with quasi-legislative rulemaking also justifies deference. This procedural context entails transparent, participatory, and deliberative notice-and-comment proceedings where Congress intended agencies to act with the "force of law."<sup>225</sup>

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 about the implications of their choices. They know best—or at least know more than courts—how competing tasks or policies should best be reconciled, due to their familiarity with statutory and regulatory law and ongoing work with all affected stakeholders. They know the law, plus they are deeply familiar with on-the-ground effects of policy choices.<sup>226</sup> This is a quintessential attribute of expertise-based accountability. They are also subject to the president's electoral accountability, and they generally must use a transparent, participatory process to act with the force of law. This is a process-based form of

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223. *Id.* at 865–66 (discussing agency authority and, “within the limits of that delegation, properly rely[ing] upon the incumbent administration’s view of wise policy”).

224. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1171–72 (2014) (discussing usual procedural prerequisites for agency claims of deference after *Mead*); Thomas W. Merrill & Kristen E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 883, 852–63 (2001) (discussing triggers for *Chevron* deference and emphasizing procedural accountability provided through notice-and-comment rulemaking like that generating the policy upheld in *Chevron*).

225. *Mead*, 533 U.S. at 227. The Court in *Mead* also discussed formal adjudications as a setting justifying *Chevron* deference. See *id.* at 227–31 (2001). See generally 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).

226. See generally Shapiro, *supra* note 211 (discussing forms of expertise wielded and developed by agencies).

accountability; courts look for agency fealty to such participatory process and full and adequate explanation.<sup>227</sup>

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 necessarily the choice that the court would have made; the agency's legal interpretation 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 agency discretion—can point to several forms of political accountability justifying judicial deference to agency views. If agencies succeed in this claim, and underlying facts, science, or data provide an adequate basis, agencies are advantaged by how *Chevron* and *Mead* provide agencies with room for a range of permissible policy choices.

Furthermore, agencies acting in a *Chevron* Step Two setting also protect their power in a second way. They preserve the ability to adjust their statutory interpretation and resulting policy in the future.<sup>228</sup> Step Two interpretive choices, by definition and as explained above, are permissible choices in a setting that usually provides multiple such options (provided other choices can be justified in light of relevant facts and likely regulatory effects). Agencies always need to react to a changing world and 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 response to growing regulatory sophistication about, and interest in, use of market-based regulatory strategies. An undefined statutory term gave EPA latitude to do so.<sup>229</sup> Thus, *Chevron* Step Two is often available to an agency and is a favorable posture for eventual judicial review. It preserves agency flexibility to later adjust its action without necessarily triggering arguments that the agency had shifted policy or changed its statutory interpretation.<sup>230</sup> In other words, an agency that consistently identifies

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227. See Farber & O'Connell, *supra* note 224, at 1171–72 (discussing usual procedural prerequisites for agency claims of deference after *Mead*).

228. *Chevron* itself emphasized EPA as an agency learning from experience and consistently and permissibly interpreting governing language "flexibly" in order to "engage in informed rulemaking." *Chevron*, 467 U.S. at 863–64.

229. *Id.*

230. 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

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 not involve any changed view of its statutory powers.

*Chevron* does, however, come with a downside that agencies may be seeking to avoid through abnegation claims, even though that means foregoing the benefits of *Chevron* Step Two deference. Because *Chevron* Step Two involves an agency choice and requires justification, it shares a key attribute with consistency-doctrine cases. *Chevron* necessarily requires the agency to explain based on policy grounds why its choice is well founded, or at least not arbitrary and capricious, when examined in light of statutory factors and full engagement with underlying data or science.<sup>231</sup> Prominent scholars soundly argue that Step Two reasonableness analysis is in fact a variant of, or at least overlaps with, the “arbitrary and capricious” analysis governed by the *Overton Park*<sup>232</sup> and *State Farm* cases.<sup>233</sup> This other linked body of law emphatically requires agencies to engage with evidence and criticism, and to offer “reasoned decisionmaking” to justify its decisions.<sup>234</sup>

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. They will need to respond to substantive comments and criticisms offered by those participating in the process and provide rationales for choices or changes that also engage relevant science and past agency views and conclusions.<sup>235</sup> The track record of the earlier policy, changes in societal conditions, and shifts in reliance on the regulation must be assessed. Such work is labor intensive and will slow down any change. Second, the science or facts may, when

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change and “hard look review” set forth in *State Farm*).

231. *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 for generating actions worthy of *Chevron* Step Two deference. See *supra* notes 221–27 and accompanying text (discussing questions resolved through *Mead*).

232. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1972).

233. Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1268–69 (1997) (stating that despite *Chevron*’s use of the term “interpretation,” the actual opinion involved an assessment of how factual and economic rationales supported the agency’s reasoning).

234. *Id.*

235. 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 judicial tasks when governing legislation requires the agency to provide “factually grounded explanation” as opposed to one grounded in “value judgment[s]”).

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.<sup>236</sup> For example, if a regulatory reversal will lead to a wave of illness or deaths, or an increase in pollution under a provision requiring “emissions reductions,” 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.<sup>237</sup>

Furthermore, changes will arise between the initial regulatory action and the later move to deregulate. Agencies must assess the track record of compliance and other regulatory effects and changes while also considering the effects of the proposed change. 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.<sup>238</sup> Old agency predictions about the regulation sought to be changed will often prove inaccurate. Regulated entities or companies eager to meet a new market demand quickly figure out means to comply with a regulatory mandate, often at a far more reasonable cost than initially predicted.<sup>239</sup> And societal conditions also change, requiring agencies to update their assumptions. In fact, any legal choice will lead citizens and economic players to capitalize on new opportunities or minimize compliance costs. Such adjustments and

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236. Cf. J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 WM. & MARY L. REV. 97, 102–03, 109–10 (2016) (exploring agencies avoiding work and potential political costs by claiming they have no discretion due to doctrine developed at the intersection of two laws governing risks to endangered species).

237. The CPP’s replacement is predicted to increase pollution and 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), <https://www.nytimes.com/2018/08/21/climate/epa-coal-pollution-deaths.html> [https://perma.cc/EBJ6-YWE7] (reviewing the proposed rule and additional expected deaths, statements of President Trump about helping coal country, and other coal-linked rollbacks); see also *supra* notes 107–14 and accompanying text (discussing agency efforts to avoid disclosure of how the tip-regulation change would shift wealth away from servers and to management).

238. See *supra* Part II.A.4 (discussing such requirements in cases setting forth key elements of consistency doctrine).

239. When EPA denied petitions to reconsider the CPP, it found that clean-energy shifts from coal to gas were happening at lower cost and more rapidly than originally anticipated. See *supra* notes 64–66 and accompanying text. See generally Lesley K. McAllister, *The Overallocation Problem in Cap-and-Trade: Moving Toward Stringency*, 34 COLUM. J. ENVTL. L. 395 (2009) (describing and analyzing overallocation of pollution rights under cap-and-trade regimes and reasons compliance tends to be easier than predicted).

market benefits of past regulation can give rise to new, formidable analytical burdens as well as legal and political barriers to change.<sup>240</sup>

So, at *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, potential harms, and logic might present serious justificatory challenges. In addition, a choice that is acknowledged to be a discretionary policy change, not a legally mandated change, may create a political tempest. Blame for an unpopular change will fall on the agency or the president, not on Congress for some earlier allegedly imprudent statute or on a court for an allegedly unsound decision. Despite recurrent claims that agencies are eager to grab power and turf, scholars of regulation often observe tendencies to avoid risk, dodge work, and shun publicity.<sup>241</sup> Hence, deregulation through statutory abnegation confounds the turf-expansion expectation in two ways. Agencies are denying themselves turf, plus they appear to be avoiding work.

Thus, to distill this section's discussion, viewed from the perspective of doctrinal frames and legal prospects, statutory abnegation necessarily puts the agency into a disadvantageous posture, creating several 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

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240. See Buzbee, *Federalism Hedging*, *supra* note 58, at 1088–92 (discussing how regulatory regimes can lead to investment and entrench such regulation).

241. See Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1711–15 (2008) (discussing the problem of regulations stuck in rulemaking “ruts”); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 5–6 (2003) [hereinafter Buzbee, *Recognizing the Regulatory Commons*] (identifying as “regulatory commons” settings where shared or uncertain regulatory turfs create incentives for potential regulators to leave social ills unaddressed); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 297–98 (1998) (identifying problems of rigidified law and regulation, and advocating “experimentalist” strategies conducive to new information and legal improvement); Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 304 (1999) (discussing many reasons for agency “slippage”); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 923–37 (2005) (questioning the agency empire-building hypothesis); see also MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 151–72 (2000) (observing, after discussing bureaucrats' actions within multiple agencies during the deregulatory Reagan administration, that depending on context, political and career regulators at times will seek to reduce agency power or avoid work and risk, not expand agency authority).

court has to agree with that choice for the agency to win on that interpretive issue.<sup>242</sup> 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 that the agency erred in viewing itself as constrained to that single permissible interpretation.<sup>243</sup> 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 why it chose one versus another, attending to relevant facts and statutory criteria guiding such choices.<sup>244</sup> Third—in a variant on the second permutation—if the reviewing court identifies some statutory silence, gap, or ambiguity that, under *Chevron*, translates into the agency having some factually and contextually informed range of policymaking choices, then the erroneous claimed lack of discretion could also lead to judicial rejection.<sup>245</sup> Thus, the self-constraining agency that relies on a statutory-abnegation claim heightens risks of judicial reversal and also limits its future flexibility.

### III. RATIONALIZING THE STATUTORY-ABNEGATION STRATEGY, AND NORMATIVE CONCERNS

Agency policy shifts relying on statutory abnegation are thus, if measured by likely long-term legal success, a puzzler. Agencies are both disadvantaging themselves and embracing a lessened view of their

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242. See *NextEra Desert Ctr. Blythe, LLC v. Fed. Energy Regulatory Comm'n*, 852 F.3d 1118, 1122–23 (D.C. Cir. 2017) (finding the agency erred regarding its own authority and hence remand was required); *Prill v. NLRB*, 755 F.2d 941, 956 (D.C. Cir. 1985) (rejecting agency action due to agency error about its own statutory authority); Hemel & Nielson, *supra* note 23, at 818–21 (analyzing cases holding that agency errors about the nature of their own authority must be rejected).

243. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 35, 41–43, 45, 50 n.18 (D.D.C. 2003) (noting agency error about the nature of its own legal authority requires judicial rejection, and parsing views of the Solicitor for the Bureau of Land Management and the Department of the Interior to determine if error regarding authority tainted a resulting regulation).

244. 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 and in light of underlying facts about effects or business dynamics, 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.

245. Hemel & Nielson, *supra* note 23, at 802–03.

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 behave strategically in light of incentives they face and in light of one another's actions; the political calculus may not mesh with an obedient focus on what the law seems to require.<sup>246</sup> This Part operates at two levels. First, it illuminates why agencies and their leaders might opt for statutory abnegation when other approaches would promise more long-term legal success.

But this Part's second major section argues that the very political incentives driving abnegation reveal the shaky foundations of arguments that politicized regulation should be embraced or even trigger some lesser level of judicial scrutiny. And agencies utilizing abnegation rationales should not be given a pass from obligations to act in conformity with the usual legal and analytical hurdles, whether the action is new or a policy change. Much of administrative law is designed to nudge or compel agencies to exercise their delegated expertise in conformity with legislative instructions and in quasi-democratic, transparent, and accountable fashion. As attempted, agency disavowals of authority have been accompanied by skirting of procedural and substantive hurdles that have long been required in order to foster sound and accountable regulatory actions. Presidential mandates and agency obedience constitute one form of political accountability, but in the abnegation setting all other norms and practices of political accountability have been neglected. As argued below, well-established doctrine appropriately rewards actions reflecting respect for multiple sources of political accountability. As courts have found, presidential edicts are inadequate justifications 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 antiregulatory argument is that agencies must be subject to checks or they will predictably seek to expand their turf and aggrandize their authority, burdening society with growing bodies of

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246. See *supra* notes 19–21 and accompanying text (introducing Positive Political Theory and citing literature).

regulation.<sup>247</sup> This claim persists but has, at this point, been subject to cogent theoretical and empirical historical critiques.<sup>248</sup> There is little reason to anticipate that agencies will predictably skew towards overreach or self-aggrandizement. Agency abnegation, however, also illuminates a fundamental lack of nuance at the heart of the agency “empire building” hypothesis. As shown by the wave of agency attempts at abnegation, agencies can simultaneously deny themselves power to address a risk and, at the same time, claim newly expansive powers to redefine their authority. This section briefly explains this seeming paradox of power denial and 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 power subject to additional delegation of authority from the president, personnel appointments, and political oversight and direction from the president and sometimes Congress. 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.<sup>249</sup> Nonetheless, the choices and compromises embodied in statutes live on due to the usual hurdles to enacting any legislation.<sup>250</sup>

*Any deviation* from Congress’s statutory delegation—whether that deviation cuts in a regulatory or deregulatory direction—ultimately involves an agency seeking to define the extent of its own power. One sort of deviation could be in the form claimed by William

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247. See Levinson, *supra* note 241, at 923–37 (presenting and questioning the “empire-building” hypothesis).

248. See, e.g., *id.*; see also GOLDEN, *supra* note 241, at 151–72 (questioning the “rational actor” theory’s expectations of self-interested agency officials’ behavior resulting in shirking and budget maximization, and instead observing an array of responses to agency power, with agency cultures, personalities, and career and political appointees’ different incentives leading to varied actions); Blais & Wagner, *supra* note 241, at 1711–15 (discussing the problem of long-unamended regulations); Buzbee, *Recognizing the Regulatory Commons*, *supra* note 241, at 5–6 (identifying “regulatory commons” dynamics and how regulatory overlap and uncertain turf can create incentives for potential regulators to leave social ills unaddressed); Dorf & Sabel, *supra* note 241, at 297–98 (identifying problems of regulatory stasis and advocating regulatory design that would generate new information and trigger regulatory adjustments); Farber, *supra* note 241, at 304 (discussing forms of agency “slippage” and reasons for agency delay and inaction).

249. 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).

250. *Id.* (noting hurdles to statutory change in an era of “divided government”).



A. Niskanen and others generally critical of the administrative state. They focus on an agency claiming new or expanded turf, or regulating risks in a way more stringent or onerous than Congress allegedly intended in its statutory delegation.<sup>251</sup>

But agencies abnegating previously claimed authority reveal another sort of power claim. An agency that deviates from congressional expectations through a regulatory withdrawal—whether by redefining its statutory powers or by relaxing implementation and enforcement (a common occurrence that is hard to challenge)—is also making a claim about the extent of its authority.<sup>252</sup>

The wave of abnegation claims presented here, at a minimum, provides yet another substantial factual counterpoint to the oft-stated argument that agencies will overreach in the form of turf expansion and excess stringency. It also provides a counterpoint to the view that doctrine and regulatory infrastructure should be designed to check an allegedly pervasive agency tendency to overregulate.<sup>253</sup> Political and economic incentives can lead agencies to act in a turf-shrinking direction while also asserting questionable statutory interpretations and violating administrative-law tenets about agency consistency. As such, any one-sided doctrinal “cures” or checks may actually exacerbate already prevalent problems of agency disregard for statutorily defined domains, as well as risks of agency lassitude and “torpor.”<sup>254</sup> In addition, regulated parties and powerful interest groups will predictably seek to reduce regulatory burdens at every stage, from enabling legislation down to tailored planning, permits, requests for variances, or enforcement negotiations.<sup>255</sup> If “slippage” and laxity are

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251. See generally WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (positing the tendency of regulators to expand budgets through more regulation); ANDRE BLAIS & STEPHANE DION, *THE BUDGET-MAXIMIZING BUREAUCRAT* 4, 5 (1991) (same). For other responses to these claims, see *supra* note 241 and accompanying text.

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

253. Much of the role of OIRA and the 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* Part II.A.1 (reviewing Trump deregulatory orders and memoranda, and claims about regulatory excess).

254. Metzger, *1930s Redux*, *supra* note 30, at 86 (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339–40 (2001) (discussing such risks)).

255. For review of such multilayered strategic efforts to weaken or escape regulatory strictures in the setting of a massive land-use highway project threatening a vulnerable fishery, see WILLIAM W. BUZBEE, *FIGHTING WESTWAY: ENVIRONMENTAL LAW, CITIZEN ACTIVISM, AND THE REGULATORY WAR THAT TRANSFORMED NEW YORK CITY* 31–51 (2014). The book

a risk, as they are, regulatory-process choices and standards of review need to adjust for those risks as well.<sup>256</sup>

*B. Political-Economic Theory and Abnegation*

This Part now turns to analyzing the central mystery of statutory abnegation. Why would—really, why have—agencies found the statutory-abnegation strategy worth pursuing, despite its doctrinal disadvantages and the 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, further illuminating its troubling legal implications. Legal actors, especially agencies and presidents, are not invariably disinterested agents faithfully hewing to legislative instructions; rather, they are entities responding to their own incentives in a dynamic, political, and interactive environment.<sup>257</sup> Many incentives shaping agency actions are unrelated to what the law says or requires, but legal hurdles remain.<sup>258</sup> This section's analysis also reveals the inadequacies of political-accountability rationales often wielded in battles over the value of, and perils of, the administrative state. Of course, abnegation could include sound claims about the limits of agency authority; it is not necessarily or by definition illegal. However, agencies relying on abnegation claims have almost always also dodged procedural requirements that guarantee accountability and opportunities for public input, made little use of agency expertise, and provided little or no engagement with facts and the earlier action's regulatory track record. They have offered little explanation other than summary linguistic analysis and virtually no close legal comparison of old and new views of agency authority.<sup>259</sup>

When abnegating agencies focus only on statutory clarity or presidential edicts under a new administration, they are relying on two

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traces and analyzes the fourteen-year battle, the “art of regulatory war,” and how partisans fight strategically in multiple venues over time to achieve their goals and identify and seek to exploit regulatory vulnerabilities.

256. See Farber, *supra* note 241 (discussing agency “slippage” from delegated tasks).

257. 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 251, and PPT assumptions. See also *supra* notes 19–21 and accompanying text (citing works describing key elements of PPT); see also William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992) (analyzing legislative processes and how changes in the status quo and branch powers interrelate in dynamic ways).

258. See Wald, *supra* note 249, at 651.

259. See *supra* Part I.A (reviewing a sample of abnegation claims).

facets of regulatory political accountability. Such hierarchical obedience to the president and political appointees does not, however, logically or doctrinally excuse neglect of 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 of the longstanding norms governing the administrative state.<sup>260</sup> This section now analyzes why agencies and presidents may find abnegation rationales for regulatory rollbacks worthwhile, despite doctrinal disadvantages, legal infirmities, and normative concerns.

1. *A Long-Shot but Worthwhile Risk.* If one thinks of agency decisionmaking as not just about a particular regulatory intervention but as reflecting concern with, and also influencing, the agency’s future authority, abnegation may reflect an antiregulatory administration’s long-shot gamble for a long-term diminution in agency power and, concomitantly, an enduring deregulatory result.

The agency actions discussed above involve, in a variety of forms and to different degrees, agencies’ assertions that they simply cannot regulate as before. Because a claim of no power is hard to justify under most statutes, and consistency doctrine requires agency policy shifts to be justified with much more engagement and explanation than actually undertaken by abnegating agencies, most 2017 and 2018 attempts at abnegation are legally vulnerable. But deregulation rooted in abnegation, whether ultimately rejected or successful, can provide both political and judicial benefits. Even an ultimate court defeat for abnegating agencies can offer political benefits, which are reviewed below. But the long-shot chance that courts will bless a power-limiting statutory interpretation is worth analyzing here.

If an agency proffers a “no power” claim, it is making a potentially enduring assertion about its own authority and how the underlying statute must be construed in the future. If a court agrees, especially under a single-venue judicial-review statute or if later embraced by the

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260. See Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1946–55 (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 fundamental legal virtues and needs identified earlier by Lon Fuller outside of the administrative state. *Id.* at 1925–26 (setting forth attributes of “law’s internal morality” identified in LON L. FULLER, *THE MORALITY OF LAW* 38–44 (rev. ed. 1969)).

Supreme Court, then that abnegating statutory interpretation becomes permanent.<sup>261</sup> The statute, and the agency's power under it, would be permanently modified in a diminished form. And during an era of legislative gridlock, a congressional fix 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 regulatory scheme in the long term simply may view such claims as worth a shot, especially if one considers political benefits that may flow from such possibly successful rollbacks and the minimal personal costs associated with a judicial rejection.<sup>262</sup>

2. *Changing Policy-Change Doctrine.* The recent wave of agency statutory abnegation could also be a strategic prelude to arguments for doctrinal change regarding consistency doctrine and hard-look review in the deregulatory setting. No case now embraces 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 a policy shift—must confront underlying facts, assess reliance interests, provide comparative legal reasoning of the old and new approaches, allow for and respond to critical comments, and leave no unexplained inconsistency.<sup>263</sup> The Court has long demanded more explanation by agencies when changing policies than when an agency takes an initial action or simply declines to act.<sup>264</sup> As explained above, this body of law does not set a different or higher

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261. 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. For discussion of this law and possible linkages of abnegation-based deregulation in the Trump administration and 1980s litigation on agency nonacquiescence, see *infra* note 267 and accompanying text.

262. John Graham, OIRA Administrator during the George W. Bush administration, identifies the modest personal costs associated with the usual judicial remand to agencies for failed actions, and possible political gains regardless of long-term success, as sometimes motivating agency policy choices. Email from John Graham, former OIRA Administrator, to author (Jan. 31, 2019, 15:15 EST) (on file with the *Duke Law Journal*); email from John Graham, former OIRA Administrator, to author (Mar. 7, 2019, 11:07 EST) (on file with the *Duke Law Journal*).

263. See *supra* notes 168–99 and accompanying text (discussing Supreme Court opinions rejecting impliedly lower standards for agency policy shifts and embracing rigorous, fact-driven analyses).

264. See *supra* notes 141–46, 170–75 (analyzing the Court's commitment to "hard look" review).

standard of review but rather incorporates elements of hard-look review, requiring agencies to engage with all salient facts, address contested issues, and offer “good reasons” for a policy, be it new or a change. When an agency seeks to alter a preexisting policy, there is simply more that must be analyzed.<sup>265</sup>

Agencies pursuing abnegation may hope to convince courts to create a new doctrinal carveout. Under this view, the argument is, or would be, that if the agency never had authority in the first instance, then the agency should be able to avoid the time and costs of undertaking legally unauthorized factual engagement and explanation.<sup>266</sup> If the earlier claim of power was all overreach and illegal, then such analysis (under this view) has always been legally irrelevant. If the Supreme Court sees fit to devise a new, generally applicable framework that involves less rigorous agency obligations and less searching judicial review of deregulation by statutory abnegation, then the structural similarity of these many recent abnegation claims may make some sense. The numerosity of these claims perhaps reflects a goal of creating many opportunities to recast 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 to test the abnegation rationale for deregulation.<sup>267</sup>

As mentioned above, no case permits agencies to evade the discussion of facts and of harms resulting from deregulation. But most

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265. See text accompanying *supra* note 259; see also *supra* note 153 (exploring the power of agency policy-shift justification obligations).

266. Cf. Ruhl and Robisch, *supra* note 236, at 102–03, 109–10 (identifying and criticizing agencies that claim a lack of discretion in order to avoid hard and political costly work, and characterizing such avoidance as “discretion aversion”).

267. This rash of unreasoned regulatory shifts and their common abnegation rationale could share attributes with the Reagan administration’s pursuit of both changing Social Security policy and testing the executive branch’s latitude to nonacquiesce in court rulings, even when acting in a circuit with established contrary precedent. See William W. Buzbee, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 582–84 (1985) (identifying this practice and reasons it was problematic but acknowledging the difference between intra- and intercircuit nonacquiescence); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735–51 (1989) (analyzing the practice and identifying settings where it could be justified or should be condemned). For a rejoinder to Estreicher and Revesz, see Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 802–03 (1990) (critiquing Estreicher and Revesz’s assumptions and proposed approach to nonacquiescence). The Trump administration may similarly be willing to test its theories and lose, hoping for some wins on the underlying statutory issues or a larger win that reshapes how courts review deregulatory policy shifts.

instances of abnegation have involved courts that disagreed with the agency's statutory claim of no power, so we do not know if judicial acceptance of a particular abnegation claim might also lead such a court to accept or endorse a fast-tracked agency action that neglects comparative legal and factual analysis. Although some courts might be sympathetic to agencies short-circuiting their usual consistency-doctrine analytical obligations when a persuasive abnegation claim is made, close analysis of abnegation-based actions and the logic of deference regimes cuts against the legality of any such short-circuiting.<sup>268</sup> Nonetheless, because doctrinal adjustments smoothing the path for deregulation by statutory abnegation would be of enduring value for all deregulatory and antiregulatory agencies and advocates, fighting for such a doctrinal change might be viewed as worth the price of many losses.

3. *Political and Career Regulator Tensions.* Another explanation for statutory abnegation and related procedural deficiencies is the tension or distrust between political appointees and career officials. Due to their years of service for politically diverse leaders, career officials will usually know how to identify the weaknesses of an agency action and reduce the risk of judicial reversal. Internal distrust, however, can lead political appointees working as change agents to shirk the usual forms of sequential vetting by career experts in pursuing legal change.<sup>269</sup> News stories and some internal agency investigations

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268. See *infra* Part III.E (exploring why even a broad agency claim of having “no power whatsoever” should still be accompanied by the comparative analysis called for by consistency doctrine).

269. 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, 2017, 10:44 AM), <https://www.propublica.org/article/former-lobbyist-with-for-profit-colleges-quits-education-department> [https://perma.cc/CFE7-H2QV]. 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 270 (reviewing such a clash). Similar strategies and resulting flaws plagued the Reagan administration during its deregulatory efforts. See GOLDEN, *supra* note 241, at 45–47 (describing how major change was “sent down” by political appointees pushing deregulation rather than “percolating up” through the agency, as “was customary for agency policy”). She also found other tensions between political and career officials; although there was a wide array of responses, few career officials sought to sabotage the politically led deregulation. *Id.* at 44–60. See generally MICHAEL LEWIS, *THE FIFTH RISK* (2018) (exploring protective roles and innovations prompted by federal agencies, repeatedly recounting Trump-administration “beachhead teams” and inexperienced political appointees arriving at agencies without understanding the agencies’ tasks, divisions, or roles played by knowledgeable

have revealed that agencies in the Trump administration pursued hasty policy changes due to the advocacy of “beachhead teams” drawn from affected industries and lobbying organizations, sometimes without the involvement of career officials.<sup>270</sup> News stories also recount similar tensions between political appointees and career employees within the Department of Justice, the litigator for federal agencies.<sup>271</sup> Similar interactions were found in a study of Reagan-era deregulatory efforts.<sup>272</sup>

Relatedly, regulatory incentives will vary for political and career officials, potentially leading to reasoning gaps and other lapses by agencies. 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 will have an institutional interest in statutes’ ongoing effectiveness, but in reality may be long gone from the political scene

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career officials, and resulting risks and mistakes); *see also* Barbash & Paul, *supra* note 43 (quoting former EPA regulator and Republican lawyer Jeffrey Holmstead about the lack of Trump leadership “experience” and “the Trump team’s ‘complete distrust of the career staff’ at EPA, . . . a professional corps that ‘always gives you good advice, whether or not they agree’ with the president’s politics”).

270. *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) (2017) (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)) (noting that the “beachhead team” cancelled plans for open enrollment despite career officials’ preparation and monetary commitments for 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 the return of émigrés in the United States under TPS. *See supra* notes 44–48 (discussing these actions). *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1089–98 (N.D. Cal. 2018) (granting injunction, reviewing APA claims, and the policy change and the agency’s failure to disclose and explain it); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1132 (N.D. Cal. 2018) (denying motions to dismiss and, after tracking policy changes and tensions between career and political appointees’ views, explaining why agency policy shifts without explanation and justification violate APA requirements).

271. *See* Katie Benner, *Justice Dept. Rank-and-File Tell of Discontent Over Session’s Approach*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/jeff-sessions-justice-department.html> [<https://perma.cc/7GUS-NYGK>] (discussing the results of political leaders ignoring dissent and advice of career attorneys).

272. GOLDEN, *supra* note 241, 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 the *State Farm* case); *id.* at 109–50 (describing stark differences in career and political leadership’s interactions at the Reagan administration’s EPA, 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).

when an agency seeks to shuck off some previously understood authority, settled policy, or task.<sup>273</sup> Career agency lawyers and staff, in contrast, will often focus on longstanding agency practices, policy goals, and long-term concerns about agency power and discretion, and they will presumptively act in accordance with legislative, evidentiary, and judicial constraints requiring technocratic and reasoned decisionmaking.<sup>274</sup> Career officials (whether civil servants or Senior Executive Service) may also, due to their career choices and history of work within an agency, feel a stronger dedication to the overall mission of the agency, while political appointees pushing for deregulation may overtly seek to dismantle the agency's law and regulations.<sup>275</sup> Due to this clash, unreasoned or flawed regulatory changes may emerge.<sup>276</sup> One analysis of the Reagan administration's deregulatory efforts, however, found only rare evidence of career employees intentionally undercutting a new administration's policy changes.<sup>277</sup>

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273. Judge Wald describes this reality as common. Wald, *supra* note 249, at 651–52, 655.

274. See GOLDEN, *supra* note 241, at 151–66 (finding differences in agencies' cultures and interactions of career and political appointees).

275. *Id.*; see also *infra* notes 269–71 and accompanying text (discussing career-political tensions and resulting problems); Benner, *supra* note 271 (describing such clashes at the Department of Justice).

276. Although not identified in the deregulation literature, a form of “work-to-rule” protest could also explain the legal inadequacies of the wave of 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 without fighting for improvement. *Cf.* Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 818–19 (2015) (identifying extreme forms of obedience to rules as a means of protest, including “working-to-rule” strategies in labor law). In 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 10, at 1389. A 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. See *Indigenous Evtl. Network v. U.S. Dep't. of State*, 347 F. Supp. 3d 561, 582–84 (D. Mont. 2018) (identifying inconsistencies and stating that agencies cannot “ignore inconvenient facts” (citation omitted)). Despite the ruling and subsequent injunction, *id.* at 591, President Trump later withdrew his earlier memorandum, “revoked” the earlier permit that had been judicially invalidated, and purported to issue a direct “Presidential Permit.” Presidential Permit of March 29, 2019, Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13,101 (Apr. 3, 2019). This further policy change and permit reversal relied only on “the authority vested in” the president, cited no statutory authority, and neither included nor referenced any legal explanation or analysis of effects previously ruled to be required by a federal judge. *Id.* at 13,101.

277. See GOLDEN, *supra* note 241, at 109–50 (pulling together insights from agency-specific chapters about reasons for sloppy or unsuccessful policy shifts, and finding only rare examples of career efforts to undercut an administration's new policy directions); see also *supra* notes 269–71



4. *Political Benefits Even if Vulnerable to Judicial Rejection.*

Perhaps the best explanation for these many disavowals of agency power is also the most troubling from the perspectives of the rule of law, legislative supremacy, and political accountability—rationales that underlie the legitimacy of the administrative state. Disavowals of agency power and the regulatory rollbacks that accompany them can, and indeed are likely to, generate political benefits wholly unrelated to their legal merits. In fact, an agency's embrace of rollbacks and the diminution of its power may be of maximum political benefit where the agency and presidential administration can reject the 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's base or perhaps an electorally important region.<sup>278</sup> Legal disruption may not be a mistake or reflect imprudence; it may be precisely the political goal. Agency statutory abnegation hence could be a form of political speech, totally apart from its legal merits.<sup>279</sup> If so, 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 see abrupt deregulatory relief and accompanying rhetoric as the delivery on political promises, even if illegal under governing law and lacking a supportive factual basis.

Further, targeted regulatory rollbacks can provide unusually focused and tangible political and business benefits to industry actors, akin to variances and exemptions from otherwise uniform and broadly

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(citing additional sources regarding career-political official tensions and resulting flawed agency actions).

278. The many Trump-administration regulatory rollbacks aimed at Midwestern and Appalachian mining and oil-and-gas businesses have been broadly viewed, and even claimed, as meant to benefit those regions and, in particular, coal interests. *See* Friedman, *supra* note 237 (reviewing the proposed rule's effects, statements of President Trump about helping coal country, and other coal-linked rollbacks); *see also* Emails of John Graham to author, *supra* note 262 (identifying political motivations and benefits even for legally vulnerable regulatory shifts).

279. *See generally* 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); *cf.* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2014–25 (2018) (discussing state legislatures taking away local governments' powers and questioning the wisdom and legality of states punishing local officials for their statements and votes).

imposed regulatory obligations.<sup>280</sup> 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 often has been during 2017 and 2018—linked not to some nuanced dispute over the best policy or statutory interpretation but, when examined in overall context, to agencies’ direct and overt opposition to governing laws and regulations that presidents and agencies are nonetheless constitutionally obligated to “take care” to “faithfully execute[.]”<sup>281</sup> Notably, none of the abnegation actions reviewed above involve agencies expanding on or adjusting means to achieve the protective goals behind (and usually stated within) statutes. Across the board, these actions reflect a goal of reducing burdens on businesses.

Because federal laws, by their very nature, tend to set national goals and require uniform applicability, agencies and presidents delivering promises of regulatory relaxation for particular sectors, regions, or political supporters will often be acting in a legally suspect manner.<sup>282</sup> Statutes rarely permit consideration of such criteria. Thus, deregulatory rollouts and accompanying political events have sometimes made the intended beneficiaries clear; the actual regulatory

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280. AARON L. NIELSON, ADMIN. CONFERENCE OF THE U.S., WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION: AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES 11–25 (2017) (reviewing cases on nonenforcement unreviewability and scholarship); *id.* at 24–25, 60 (identifying concerns with nonenforcement and the risk an agency could “nullify a valid act of Congress,” act for “insiders” or with bias, and do so without transparency); Alfred C. Aman Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 323–28 (analyzing capture concerns with the use of regulatory exceptions, but also identifying benefits of regulatory tailoring and flexibility); *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 an exceptions process but identifying extensive risks, mainly power accretion and loss of political accountability).

281. U.S. CONST. art. II, § 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, 1930s Redux*, *supra* note 30, at 88–91.

282. *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 a 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. However, courts have allowed regionally focused action in the enforcement-remedy setting when rational and not prohibited. *E.g.*, *Ctr. 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).

documents, in contrast, have used language with little or no attention to distributional or political consequences.<sup>283</sup>

Furthermore, targets of regulation will often gain financially from the delay between a president's deregulatory directions, agency abnegation claims, and eventual resolution in the courts.<sup>284</sup> The time required by this process 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.<sup>285</sup> And even if old regulations remain in force in the interim, every brief filed and case appealed provides another press-worthy declaration of political and regulatory priorities and loyalties.<sup>286</sup>

Paradoxically, one of the central tenets of skepticism about the regulatory state and regulatory excess—that agencies are insensitive to the economic burdens of regulation—can partly explain agencies' many (likely fruitless) attempts at abnegation.<sup>287</sup> Because administrative officials are personally insensitive to squandered resources, they may see repeated failed regulatory rollbacks as nonetheless a victory due to related political benefits. They are unlikely to personally pay for failed rollbacks, litigation expenses, wasted agency resources, or harms befalling those left unprotected due to

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283. See text accompanying *supra* note 274 (discussing coal-protective deregulation and overt regionally focused appeals by the administration and supporters). The ACE proposed-rule notice does not have a regional focus and rarely even mentions coal. See *supra* notes 76–79 (discussing the genesis and substance of this proposed rule, and 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); Press Release, White House, WTAS: Support for Trump Administration's Proposal to Replace the Costly and Overreaching Clean Power Plan (Aug. 22, 2018), <https://www.whitehouse.gov/briefings-statements/wtas-support-trump-administrations-proposal-replace-costly-overreaching-clean-power-plan> [<https://perma.cc/SBL3-X9XG>] (containing four pages of quotes from politicians and interest groups supporting the rollback and claiming Obama-administration overreach and benefits for the coal industry).

284. See Blais & Wagner, *supra* note 241, at 1711–15 (discussing benefits of delay for regulatory targets, and citing supportive sources).

285. See Buzbee, *Federalism Hedging*, *supra* note 58, 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).

286. See Emails of John Graham to author, *supra* note 262 (identifying political motivations and benefits even if a policy action is unlikely to succeed in court).

287. *Id.*

regulatory stasis or policy reversals.<sup>288</sup> Such costs of failed deregulation remain off the agency's ledger, apart from the work involved with new action following a judicial remand. Legal requirements may ultimately be enforced, but the incentives created by the political and fiscal costs and rewards may nonetheless drive more failed deregulatory efforts.

C. *Abnegation, Politicized Regulation, and Political Accountability's Forms*

Agencies justifying deregulation with statutory abnegation have generally offered little in the way of explanation or scale-tipping rationales, tending instead to make conclusory claims about past excess and circumscribed statutory authority. Some abnegating agencies cite presidential executive orders in tandem with the partial dissent of 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.<sup>289</sup> Presidential involvement is presented as a "plus," if not implicitly viewed or presented as a decisive factor to justify these regulatory rollbacks. This section analyzes forms of political involvement and accountability and the statutory-abnegation strategy, arguing that judicial resistance to this strategy is appropriate.

If one links the presidential-involvement rationale for statutory abnegation to unitary-executive theorists' views of the administrative state—and deregulatory statements by President Trump and agency heads echo such sentiments<sup>290</sup>—then a more fully fleshed-out argument for abnegation appears inchoate, even if ultimately unpersuasive. That is, agencies are deregulating consistent with the elected president's political preferences, and such vertical, hierarchical accountability and respect for presidential wishes make the president directly and overtly accountable for the regulatory shift. And, so the argument goes, this direct alignment of agency and presidential views heightens the constitutional legitimacy of agency action. Justice Kagan's scholarship, when she was a professor, offered a somewhat consistent view. She argued that presidents should have presumptive authority to be involved in agency decisionmaking if not statutorily prohibited;

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288. *Id.* (identifying the minimal costs of failed policy actions to agency and agency leadership as a reason vulnerable actions may be pursued, and also noting the political benefits of playing to constituents).

289. *See supra* notes 149, 155, 166–67, 176–84 and accompanying text (presenting and discussing agency reference to some of this language and *State Farm*).

290. *See supra* Parts I.A and I.B (presenting deregulatory proposals and accompanying rationales and politics).

however, she did not argue that presidential involvement creates a proagency presumption.<sup>291</sup> Justice Kavanaugh’s lengthy concurrence about political accountability and the place of independent agencies in *In re Aiken County*<sup>292</sup> (written when he was still an appellate judge) is similar but goes further.<sup>293</sup> He constructs a president-centric theory of “political accountability” and argues that presidential agency leadership and the power to fire agency officials at will is a constitutionally required feature of the administrative state.<sup>294</sup> Much of that dissent builds on broad language in the far narrower context of layered for-cause protections from dismissal addressed in *Free Enterprise*.<sup>295</sup>

Before questioning the adequacy of such hierarchical, president-focused accountability rationales, one caveat is necessary. A president’s ability to nudge agencies to consider an action that would further a president’s priorities, or to involve the White House in regulatory deliberations if not prohibited by statute, are both generally acceptable and even run-of-the-mill interactions.<sup>296</sup> In addition, presidents have the constitutionally rooted power to seek agency reports.<sup>297</sup> Similarly, both executive-agency heads and independent-agency appointments will unsurprisingly involve political considerations.<sup>298</sup> Thus, any legal infirmities and normative concerns with agency abnegation claims should not rest on the mere reality of the president’s broad powers and usual efforts to nudge agencies in preferred policy directions.

Instead, the point is that although presidents are routinely involved in agency appointments and regulatory decisions, that reality

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291. Kagan, *supra* note 254.

292. *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011).

293. *Id.* at 438–48 (Kavanaugh, J., concurring).

294. *See id.* In closing, Judge Kavanaugh softens his argument in light of precedent, but he nonetheless repeatedly argues that the president’s constitutional position logically should include the unfettered power to dismiss executive-branch officials. *Id.*

295. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–514 (2010).

296. *See Buzbee, The Tethered President, supra* note 10, at 1427–29 (identifying such leadership nudges as legitimate and ordinary).

297. Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of Myers, Humphrey’s Executor, Morrison, and Freytag*, 32 CARDOZO L. REV. 2255, 2258 (2011) [hereinafter Strauss, *Difficulties of Generalization*] (discussing the president’s constitutionally rooted right to seek opinions in writing from executive-branch officials).

298. *Id.* (discussing tensions between presidential authority and congressional choices about agency design and regulatory goals).

does not provide cover for violations of other legal edicts.<sup>299</sup> Presidential involvement cannot excuse failures to act in accordance with the politically accountable modes required by statutory and regulatory law, along with centuries of administrative-law doctrine.<sup>300</sup> More than presidential electoral accountability matters to the legality of agency actions and policy changes.<sup>301</sup> These intertwined bodies of doctrine emphasize legislative supremacy and the need for agencies, presidents, and courts to respect and enforce the substantive and procedural choices of Congress.<sup>302</sup> Presidents and politics can often work to influence an agency choice, but only within the confines of what Congress provides or delegates for agency discretion.<sup>303</sup> As developed more in the following discussion, political accountability as a cross-doctrine value does not, upon closer analysis, do much to advance the argument for 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.<sup>304</sup> In thousands

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299. See Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 750–53 (2007) [hereinafter Strauss, *Overseer or “The Decider”?*] (distinguishing between the president’s usual ability to oversee agencies and questionable efforts to supplant the delegated agency with presidential decisions).

300. 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 a variety of 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 a focus on the different forms of political control over agencies due to congressional and constitutional choices).

301. See generally Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761 (2007) (discussing cases where courts review agency actions with a focus on whether the agency exercised its authority “in a democratic fashion”).

302. Strauss, *Difficulties of Generalization*, *supra* note 297, at 2275 (emphasizing the president’s obligation to respect the placement of power in agencies subject to statutorily set criteria and procedure).

303. For additional analysis of settings and degrees of presidential control, see Buzbee, *The Tethered President*, *supra* note 10 at 1427–41, and *supra* notes 269–77 and accompanying text (citing and discussing career and political official tensions and how they can influence agency actions).

304. See John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1046–58 (2014) (providing a historical perspective on such clauses and the powers they conferred); see also Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1639 (2015) (citing John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 6–7 (2014)) (questioning the Supreme Court’s

of laws, Congress has stated policy priorities, designated the responsible regulatory actors, set forth the process through which agencies act, and provided criteria to guide each agency's multitudinous regulatory tasks.<sup>305</sup> All agency actions need to conform to these congressional choices. And, conversely, agencies cannot decline their roles, ignore required process, or base their decisions on factors outside the law.<sup>306</sup> Even if a president becomes involved in an agency action, the action's legality is still assessed for conformity with congressional choices.<sup>307</sup> And courts, too, are not to second guess the goals and means chosen by Congress.<sup>308</sup> Those are choices for Congress, although enforced by the courts.

Furthermore, that the president holds executive authority conferred by the Constitution does not mean that authority is unfettered. Under the Constitution, the president must also "take care" that the law of the land is "faithfully executed."<sup>309</sup> As mandated in *Massachusetts v. EPA* and dozens of other Supreme Court and lower-court decisions before and after, agencies and presidents cannot toss aside regulatory tasks assigned by Congress based on factors outside the relevant statute.<sup>310</sup> As the Supreme Court stated in *City of Arlington*,<sup>311</sup> agencies' "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."<sup>312</sup> Similarly, in the recent, unanimous *Weyerhaeuser*<sup>313</sup>

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resistance to innovation and lack of deference to how Congress allocates authority to agencies due to the Necessary and Proper Clause's "textual assignment" of this power to Congress).

305. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 462–63 (3d ed. 2017) (discussing agency accountability and how congressional choices shape what agencies can do).

306. See *supra* Part II.A.4 (discussing *Massachusetts v. EPA* and consistency-doctrine cases establishing substantive and procedural statutory prerequisites for agency policy change, some of which involved abnegation claims).

307. See Seidenfeld, *supra* note 21 (acknowledging politics in regulation but arguing that judicial review must focus on the agency action for conformity with the law, as evidenced by the agency's stated justifications and explication of tradeoffs).

308. See, e.g., *TVA v. Hill*, 437 U.S. 153, 194–95 (1978) (enforcing the mandates of the Endangered Species Act and explaining the need for courts to respect congressional choices).

309. See generally Stack, *supra* note 300 (discussing the roots of presidential obligations to respect congressional choices); Strauss, *Overseer or "The Decider"?*, *supra* note 299 (same).

310. For discussion of *Massachusetts v. EPA*, 549 U.S. 497 (2007), see *supra* notes 32–41 and accompanying text.

311. *City of Arlington v. FCC*, 569 U.S. 290 (2013).

312. *Id.* at 297–98.

313. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).

decision, the Court affirmed the “familiar” principle that agencies must “consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion.”<sup>314</sup>

Relatedly, the APA’s presumptively applicable procedural modes and framework for judicial review also reflect an enduring congressional commitment to the regularity of agency procedure and a mandate for agencies to explain and justify their choices.<sup>315</sup> The courts’ longstanding requirement of “reasoned decisionmaking” and, in reviewing recent 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.<sup>316</sup>

Moreover, despite the breadth of agencies’ conferred powers, judicial review of agency actions has long been viewed as essential for agency legitimacy and as an important element underpinning judicial acceptance of broad delegations of power to agencies.<sup>317</sup> Courts insist that agency actions rise and fall based on the justification provided contemporaneously with the action.<sup>318</sup> Agency actions, even if possibly acceptable in result, will be rejected if not adequately explained or justified, a requirement that enables courts to fulfill their reviewing function.<sup>319</sup> And that judicial function is contingent on agencies acting through participatory and transparent processes and in conformity with substantive and procedural requirements. As noted in *Sierra Club*

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314. *Id.* at 371.

315. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (stating courts should not have to “speculate on reasons that might support an agency’s decision”). Section 559 of the APA, by making its requirements presumptively applicable and requiring express contrary indications by Congress before agencies can ignore the APA, reflects Congress’s enduring embrace of the reasoned decisionmaking of agencies and robust judicial review. Courts rigorously enforce these requirements. Buzbee, *The Tethered President*, *supra* note 10, at 1403–07 (reviewing “reasoned decisionmaking” doctrine and its importance to review of deregulatory rollbacks).

316. *See Metzger, Embracing Administrative Common Law*, *supra* note 24, at 1359–70 (discussing administrative law’s development in a common law–like manner); Sunstein & Vermeule, *supra* note 260, at 1947–55 (discussing “rule of law” values, consistency doctrine, and reliance interests as forms of “morality” enforced by administrative law).

317. MANNING & STEPHENSON, *supra* note 305, at 860 (quoting Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL’Y 73 (2010) and David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2 (2010) for this proposition).

318. *See SEC v. Chenery Corp.*, 318 U.S. 80, 89–90 (1943) (discussing the standard for determining what is fair and equitable).

319. *Id.* at 93–95.



*v. Costle*,<sup>320</sup> regulation is in part a political process that leaves room for some unrecorded and informal communications within and among the branches.<sup>321</sup> 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.<sup>322</sup>

Lastly, Congress creates agencies in a remarkable array of forms. Agency abnegation due to obeisance to a president's preferences or edicts will often run afoul of congressional choices. Among the variables reflected in those agency forms are nuanced differences in the criteria agencies are to weigh and the procedures through which they must act. The more a president could influence an agency choice with nonstatutory mandates or mere off-the-record nudges, the more that agency action could stray from congressionally reticulated mandates.<sup>323</sup> When Congress imposes on agencies specific tasks, criteria, and procedures, the room for politically driven agency action dwindles.<sup>324</sup> Furthermore, Congress often chooses to create and harness independent agencies, with their usual stable but rotating multimember commission structure and protections against dismissal without cause. When it does so, Congress has chosen to add even more agency insulation from the oscillating political whims of presidential administrations.<sup>325</sup> This could reflect a congressional preference for legal stability, for technocratic or science-based decisionmaking, or for policy moderation less buffeted by partisan rancor.<sup>326</sup>

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320. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

321. *Id.* at , 405–08.

322. *See* Strauss, *Overseer, or “The Decider”?*, *supra* note 299, at 713 (quoting EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 80–81 (4th rev. ed. 1957)) (questioning the constitutionality of presidents claiming broad power to displace congressional choices).

323. Unrecorded influence in politicized notice-and-comment rulemakings is allowed, *Sierra Club*, 657 F.2d at 406–08, but the agency action still must be justified under the law and the agency record. *See also* *Vt. Yankee Nuclear Pwr. Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (prohibiting judicial imposition of process not required by statutes or agency regulations, but emphasizing that review for substantive justification remains); Seidenfeld, *supra* note 21, at 151 (emphasizing the need for judicial review to focus on agency justifications while acknowledging the ubiquity of political influence).

324. *See infra* Part III.D (discussing cases rejecting abnegation-based policy shifts and noting courts' careful parsing of the APA and enabling acts for their procedural requirements and governing substantive criteria).

325. *See* MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES* 385–96 (2015) (discussing recent resistance to the role of independent agencies and addressing countervailing arguments). *See generally id.* (discussing the logic behind and forms of independent agencies).

326. *See generally id.* (discussing historical goals of expertise and insulation in the context of

*D. Judicial Enforcement of the Agency Obligation to Engage*

*Massachusetts v. EPA* 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 and underlying regulatory contingencies, and to leave no “unexplained inconsistency.”<sup>327</sup> This includes a judicial requirement that agencies explain changes in the agency’s view of its power and the effects of such a change. The crosscutting theme of these decisions is that reasoned decisionmaking is essential for agencies to respect congressional mandates, to preserve agency legitimacy, and to allow courts to fulfill their role as monitors of agency actions.<sup>328</sup> Political accountability in all of its forms remains a strong requirement enforced by the courts.

For example, as reviewed earlier, when the Bush administration’s EPA tried to justify inaction on climate change with reference to presidential priorities and foreign-policy repercussions—as well as abnegation claims rooted in textual analysis, “major questions” precedents, and the claimed need for clearer authorization—the Supreme Court in *Massachusetts v. EPA* resoundingly rejected EPA’s arguments.<sup>329</sup> The Court focused on the statute’s broad language, the lack of statutory grounding for EPA’s rationales for inaction, and the fact that the agency had not yet engaged with the science relevant to the Clean Air Act’s requirements. Both in its discussion of standing and its overall construction of the statute, the Court mandated that the agency undertake whatever actions Congress had required based on the statutory criteria, even if regulation would represent only an incremental step toward a larger goal.<sup>330</sup> The agency’s “reasons for

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major precedents).

327. See *supra* Part II.A.4 (discussing cases articulating the requirements of consistency doctrine for agencies seeking to make a policy change).

328. Justice Kennedy’s opinion for the Court in *Encino Motorcars* explicitly linked the agency obligation to engage in “reasoned decisionmaking” to the more particular variables agencies must address when making a policy change. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–27 (2016).

329. *Massachusetts v. EPA*, 549 U.S. 497, 528–35 (2007); see also *supra* notes 40–41 and accompanying text (introducing the significance of *Massachusetts v. EPA*).

330. See *Massachusetts v. EPA*, 549 U.S. at 533 (noting the statutory limits on EPA’s

action or inaction must conform to the authorizing statute,” the Court declared.<sup>331</sup> It rejected EPA’s declination to act based on a “laundry list” of nonstatutory considerations.<sup>332</sup>

Appellate and district courts ruling on the first wave of Trump-administration deregulatory actions have used similar language and reached similar conclusions. Many of these rulings involved agency efforts to abandon or delay regulations promulgated late in the Obama administration. In doing so, agencies often argued for a delay or stay, promised some return to an alleged status quo, or indicated that future policy change was likely.<sup>333</sup> As shown in Part I’s survey of abnegation claims, most such deregulatory actions involved agency claims that the past administration exceeded its statutory powers, although in some actions agencies parroted industry’s empirical claims of overregulation or doubts about the efficacy of the earlier regulatory strategy.<sup>334</sup> And, as discussed above, most of these delay or stay actions, like abnegation claims more generally, 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 one another’s logic.<sup>335</sup> Two courts found legal error, inadequate explanation, and a violation of consistency doctrine in DHS’s failure to engage with earlier factual considerations and legal views.<sup>336</sup> A third decision did not itself determine the lawfulness of

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discretion); *id.* at 52–25 (stating that “[a]gencies, 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” (emphasis added)).

331. *Id.* at 533.

332. *Id.*

333. See Buzbee, *The Tethered President*, *supra* note 10, at 1376–90 (reviewing a wide array of Trump deregulatory actions); Lisa Heinzerling, *Unreasonable Delays*, *supra* note 209, at 16–47 (analyzing early Trump-administration stay-and-delay actions and judicial rejections).

334. See, e.g., *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814, 820–21, 829 (9th Cir. 2018) (rejecting EPA’s reversal of a proposed revocation of regulation of chlorpyrifos due to the claim that “science . . . remains unresolved,” in light of EPA violating express statutory criteria and deadlines and failing to respond to submitted objections or explain changed agency views about associated risks).

335. The DACA policy and its reversal is introduced in *supra* notes 49–55 and accompanying text.

336. See *Vidal v. Nielsen* 279 F. Supp. 3d 401, 420–22 (E.D.N.Y. 2018) (finding the DACA reversal was rooted in legal error); *id.* at 427–33 (finding the agency committed factual errors,

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; notably, that opinion also did not discuss consistency-doctrine precedents.<sup>337</sup>

A fourth DACA decision found the agency’s legal justification too lacking in any actual explanation to be worthy of affirmation.<sup>338</sup> The judge gave DHS an opportunity to offer a more fulsome legal rationale before imposing a national injunction but, upon a later review, still found the rescission inadequately justified.<sup>339</sup> This court was concerned with the diminished accountability of policy changes rooted in unexplained abnegation, even 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 this accountability.”<sup>340</sup> 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.”<sup>341</sup> The court hence refused to accept the validity of the DACA rescission, on the basis that it was rooted in what were either erroneous or inadequately explained legal views.

The series of regulatory proposals and actions to revise or abandon the Clean Water Rule have similarly relied in part on statutory abnegation, with EPA and the Army Corps under the Trump administration claiming that the Obama administration’s Clean Water

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failed to offer logical legal reasoning, and did not analyze “reliance” interests as required by consistency doctrine); *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1037–46 (N.D. Cal. 2018), *aff’d*, 908 F.3d 476 (9th Cir. 2018) (discussing whether the plaintiffs were likely to succeed on their claim that the rescission was arbitrary and capricious).

337. *Casa de Md. v. U.S. Dep’t. of Homeland Sec.*, 284 F. Supp. 3d 758, 774 (D. Md. 2018). That court did, however, enjoin the department from utilizing information submitted by Dreamers in response to DACA.

338. *See NAACP v. Trump*, 298 F. Supp. 3d 209, 238 (D.D.C. 2018) (“This scant legal reasoning was insufficient to satisfy the department’s obligation to explain its departure from its prior stated view that DACA was lawful.”); *see also NAACP v. Trump*, 315 F. Supp. 3d 457, 473 (D.D.C. 2018) (reconsidering DHS actions in light of a new government rationale, but adhering to earlier conclusions that the rescission was arbitrary and capricious).

339. *See NAACP v. Trump*, 298 F. Supp. 3d at 249 (vacating the decision to rescind DACA, but staying the order of vacatur for ninety days to allow DHS to provide a better explanation); *NAACP v. Trump*, 315 F. Supp. 3d at 467–69 (finding that the new government explanation 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).

340. *NCAAP v. Trump*, 298 F. Supp. 3d at 249.

341. *Id.*

Rule exceeded the agencies' statutory authority.<sup>342</sup> The first court decision rejected the addition of a new "applicability date" that worked to suspend the Clean Water Rule's requirements.<sup>343</sup> The court in no way granted the agencies greater latitude to revise, rescind, or delay the 2015 finalized rule based on the 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 neglect 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."<sup>344</sup> Otherwise, "government [would] become 'a matter of the whim and caprice of the bureaucracy.'"<sup>345</sup> The court noted that its finding of legal infirmities was consistent with a raft of other rejections of "similarly hastily enacted rules."<sup>346</sup> This last comment appears to indicate an additional degree of judicial skepticism for agency policy changes that lack the usual factually driven and slow-moving deliberative process leading to regulatory change.

In *Bauer v. DeVos*,<sup>347</sup> the court rejected the Trump Department of Education's effort to delay implementation of the 2016 "Borrower Defense Regulations."<sup>348</sup> The form of abnegation attempted there 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, a separate statutory provision, the "Master Calendar Provision," required the agency (in its view) to delay any implementation of the Obama-era regulations until July 2019.<sup>349</sup> The department thus claimed it had no choice but to do so. The court rejected the department's interpretation of section 705 as authorizing stays, its sidestepping of a statutory negotiated-rulemaking mandate,

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342. These actions are introduced *supra* at notes 80–95 and accompanying text.

343. See *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D.S.C. 2018) (vacating the new "Suspension Rule" after finding it arbitrary and capricious).

344. *Id.* (quoting *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring)).

345. *Id.* (quoting *N.C. Growers' Ass'n*, 702 F.3d at 772 (Wilkinson, J., concurring)).

346. *Id.* at 965; see *id.* at 966 & n.2 (citing eight judicial decisions rejecting new agency rules).

347. *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.C. Cir. 2018).

348. *Id.* at 78–79.

349. *Id.* at 85 (citing 20 U.S.C. § 1089(c)(1) (2012)).

and the claim that it had no choice but to provide a multiyear delay.<sup>350</sup> The court also noted that the department failed to provide a balanced comparative assessment of the effects of the implementation delay on those regulated and on students losing regulatory protections, explain inconsistencies in approaches under the 2016 regulations and the delay attempts, or engage rigorously with its own contrary legal analysis of the need for the Borrower Defense Regulations and its own regulatory powers.<sup>351</sup> More than other cases, the court repeatedly criticized the department for leaving so much “unexplained.”<sup>352</sup> Agencies must, the court stated, provide explanation “that will enable the court to evaluate the agency’s rationale.”<sup>353</sup> Here, again, a court emphasized the importance of clear comparative legal explanation by the agency, in part so the court could fulfill its own role in ensuring that the agency had acted legally and through a process providing political accountability and legitimacy.

In *Pennsylvania v. Trump*,<sup>354</sup> the Department of Health and Human Services fared no better in defending an “interim final rule” that was issued without a preceding notice-and-comment process.<sup>355</sup> This new rule would have allowed employers to opt out of no-cost contraceptive coverage under the Patient Protection and Affordable Care Act.<sup>356</sup> Here too, the agency relied on a mix of claims about inherent authority and its power under the APA, and on a new claim that it lacked discretion under the statute and hence had to reject its earlier action and provide the requested relief.<sup>357</sup> The court rejected the agency’s construction of the APA, its view of statutory requirements for religious accommodation, and its interpretation of the Affordable

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350. *Id.* at 95–96 (stating that although the department claimed its “hands were tied,” it was not given *Chevron* deference, and its reading of the “Master Calendar Provision” was invalid).

351. *See id.* at 96–110 (presenting and rejecting the department’s numerous arguments).

352. *Id.* at 100, 109–10. The court disagreed with the department’s claims about having no statutory choice and also disagreed with how the court construed substantive law and the APA. *Id.* at 95–96, 109.

353. *Id.* at 108 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)).

354. *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017).

355. *See id.* at 585 (concluding “that a preliminary injunction [was] warranted” to enjoin the interim final rule).

356. *Id.* at 563. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at scattered sections at U.S.C. chs. 25, 26, & 42).

357. *Pennsylvania v. Trump*, 281 F. Supp. 3d at 571–81. 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.

Care Act.<sup>358</sup> It concluded that the agency had failed to weigh congressional policy choices to protect women’s health in the Act.<sup>359</sup> The agency had to provide a full notice-and-comment process, as evidenced by the massive interest in the original policies and in response to the interim final rule.<sup>360</sup> The agency’s concerns with “uncertainty” and “speculation, unsupported by the record” were inadequate to justify the agency’s actions.<sup>361</sup> The court called the agency’s effort to “sidestep . . . the strictures of the notice and comment procedure . . . matryoshkanesque in its construction.”<sup>362</sup> The agency’s reliance on three statutes to claim it had no choice was wholly rejected.<sup>363</sup>

These opinions reviewing abnegation claims, all of which involved minimal agency engagement with past 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.<sup>364</sup> 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 factual or scientific findings relevant to the original and revised action.<sup>365</sup> No court excuses the required analysis in cases of abnegation. Similarly, although courts dutifully quote key language from administrative-law doctrine, including the usual room for presidents to pursue different regulatory priorities, none view conformity with the president’s wishes as shielding the agency from ordinary judicial 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 statutes’ substantive and procedural

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358. *Id.* at 571–81.

359. *See id.* at 584 (stating in its discussion of the “balance of the equities” prong that “Congress has already struck the balance” to “bridge the significant gender gap in healthcare costs between men and women”).

360. *Id.* at 574.

361. *Id.* at 573–74.

362. *Id.* at 571. The court appears to be referring to this complicated, multistatute-based argument as akin to nesting Russian dolls.

363. *Id.* at 571–73 (rejecting the agency’s argument that a combination of statutes required the provision of religious relief and that the agency could bypass notice and comment).

364. *See supra* Part II.A.4 (setting forth key elements of consistency doctrine).

365. *See supra* notes 168–205 and accompanying text.

requirements and look for indicia that agencies acted through “reasoned decisionmaking.” Political accountability in all of its forms remains essential.

*E. The “Why Bother” Rationale for Abnegation*

This section concludes the Article with analysis of the argument—or perhaps the implicit assertion of abnegating agencies—that abnegation-based policy changes should be allowed without the usual rigorous comparative analysis called for by consistency doctrine. Why bother with all of that empirical analysis of on-the-ground effects and providing of “good reasons” for a change if the earlier action was rooted in an illegal claim of power? This section argues that courts should reject such an invitation to create a lesser burden of justification for policy changes involving abnegation. Abnegation claims will rarely truly be rooted in a claim of no power. Rather, most involve new claims of excess stringency or an agency changing its view about the range of potentially appropriate actions. And even if an abnegation claim of “no power whatsoever” might now and then be plausible, assessing that claim still requires the agency and reviewing courts to compare legal reasoning and how it relates to effects of the allegedly illegal past action and effects of the new, different view of agency power. Consistency doctrine’s analytical requirements logically should continue to apply even when an agency makes an apparently tenable abnegation claim.

Most importantly, plausible disclaimers of agency power despite contrary earlier claims will be rare. It is notable that no agency asserting that it completely lacked the power previously claimed has yet (as of publication) elicited judicial agreement that the agency actually lacked all such power. Broad agency claims of complete lack of power are, upon examination, often in error; few laws contain such clear mandates or preclusions. Most abnegation actions involve political statements about past regulatory excess or an argument for a different regulatory approach. Several of the political rationales for lowered analytical hurdles for abnegating agencies—time savings, expedited deregulation, and avoidance of politically costly disclosure of the downsides of deregulation—are completely untenable if the agency has options about how to act. Uniform Supreme Court precedent requires full agency engagement and explanation for policy change in a setting where several choices are possible; agencies must



provide an assessment of their relative impacts.<sup>366</sup> If a new choice is better or equally appropriate under the law and relevant facts, the policy shift might be possible, but the agency must justify such a comparative claim. Policy choice, not complete lack of power, is the norm. And agencies must explain and justify a new choice.

Even if an agency makes a tenable claim that the earlier regulatory action was illegal, that claim often focuses on a particular manner of regulating, perhaps due to a claim of unjustifiable stringency or that the earlier regulation relied on a regulatory tool or mode later viewed as inappropriate. In these settings, the possibly tenable claim of illegality would not mean that the agency lacks any power to act. The agency would still need to explain what it will or can do *with the power that it does have*, explain its different statutory construction, and show how its new choice conforms to the statutory power that is conferred (as newly construed). Because statutory interpretation usually involves a language component first, then assessment of triggers (or reasons) for an agency action, and then explanation for the responsive action taken, the new approach must still be shown to conform to law in light of relevant effects and statutory criteria and goals. With these sorts of illegality claims, comparative analysis remains essential for courts to fulfill their reviewing role.

For example, EPA included abnegation-based claims when it proposed to roll back or replace the CPP, but it nonetheless was acting in an area of clear statutory authority to regulate power plants for their GHG emissions.<sup>367</sup> Its shift to a different view of permissible regulatory tools cannot be assessed without some analysis of the comparative effects of the new and old claims of power, since the statute still requires the agency to regulate based on assessment of the “best system” of “emission reduction.”<sup>368</sup> EPA might have latitude to reconceive of what it views as “best” and able to be regulated, but

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366. See *supra* Part II.A.4.

367. For example, EPA has long regulated power-plant emissions. The Supreme Court alluded to EPA’s power to regulate greenhouse-gas emissions under section 111(d) of the Clean Air Act in *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 423–25 (2011). EPA under the Trump administration still does not wholly disclaim power. The Trump EPA claimed it had to regulate “inside the fenceline” and disavowed authority to limit pollution levels to what could be achieved with “generation shifting,” which took into account actions outside of individual facilities. See *supra* notes 56–79 and accompanying text.

368. See *supra* notes 56–66 and accompanying text (presenting the genesis of and statutory basis offered for the CPP).

consideration of “emission reduction[s]” achievable under both views of EPA power would remain a relevant consideration.

To distill this point, even if Regulatory Tool A were rightly claimed to be illegal, that does not logically (or under current doctrine, legally) excuse the agency from fully explaining its later embrace of Regulatory Tool B where the source of risk still remains subject to regulation. And because language and an action’s rationale and effects are all relevant to an agency’s power, consistency doctrine’s requirements would still make sense, even if a court might ultimately agree that Regulatory Tool A was illegal. Comparative analysis and justification would remain essential to allow for judicial assessment of the agency’s new, different choice.

Only if an agency could tenably claim no power whatsoever to act in a realm could one anticipate that courts might be tempted to relieve agencies of their usual consistency-doctrine analytical hurdles. None of the abnegation examples involve such total-lack-of-power claims; the closest example (although quite dubious) was EPA’s claim it had no power at all to regulate reconstructed and refurbished trucks in the “Glider” rule.<sup>369</sup> Even if the agency’s earlier position was rooted in consideration of the effects of some activity seemingly beyond the agency’s reach, or in the use of some allegedly prohibited regulatory method or tool, then the new agency position—that it has no power to regulate—would logically need to engage on these very points in order to explain itself. Again, consistency doctrine’s call for comparative reasoning, “good reasons,” and engagement on issues of underlying science and fact makes sense.

Moreover, an analytical carveout for “no power whatsoever” abnegation claims would foment strategic agency efforts to dodge the burdens of transparent and comparative agency analysis, and leave reviewing courts without critical information. Recognizing such a carveout with attendant reduced analytical burdens would require courts to draw lines between permissible bare abnegation-based policy shifts and policy changes subject to the usual comparative analysis required by consistency doctrine. In the closely analogous *City of Arlington* case, the Supreme Court declined to treat differently claims that an agency acted outside its jurisdiction and claims of other sorts of

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369. See *supra* notes 99–106 and accompanying text (tracing the glider rule’s history).

agency illegality.<sup>370</sup> Such distinctions, the Court concluded, would cause endless strategic maneuvering and confusion.<sup>371</sup>

Similarly, despite the possibility of rare, sound agency claims of complete lack of power, courts should reject entreaties for a new abnegation exception from consistency doctrine. The lines between excess stringency, alleged use of an illegal tool where an agency does have power, and a claim of no power whatsoever will often be a continuum. Rarely will effects of agency power claims and choices be irrelevant. The enduring body of law governing agency policy change remains sound and logical. No abnegation exception to agency obligations to engage in “reasoned decisionmaking” and conform to consistency doctrine should be created.

### CONCLUSION

Although numerous agencies during 2017 and 2018 asserted statutory-abnegation justifications for deregulation, they did so with consistent inattention to substantive and procedural statutory requirements in both the APA and enabling acts. They also generally made little or no effort to 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 of statutory abnegation 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 that they lack power may gain quick political credit. Such new claims of no agency power may also provide benefits for those left less regulated due to the abnegation claim and the related—but likely temporary—regulatory rollback. For enduring policy change, however, current doctrine wisely requires the same full process, deliberation, and sound legal and factual grounding that has always preceded successful agency policymaking.

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370. *City of Arlington v. FCC*, 569 U.S. 290, 297–98 (2013).

371. *Id.*