When Agencies Do Not Not Have Statutory Power to Regulate

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William W. Buzbee, Agency Statutory Abnegation in the Deregulatory Playbook, 68 **Duke L.J.** 1509 (2019).

When a President who campaigned on a deregulatory platform assumes office, the question immediately arises whether, in light of the unlikelihood of significant statutory assistance by Congress, the new administration will be able to achieve substantial deregulation on its own. In most contexts, agencies looking to ease regulatory burdens have essentially two options: they can engage in a reappraisal of the regulatory record (like the Reagan administration's failed attempt to rescind the passive restraint requirement for new automobiles), or they can reinterpret the statute or statutes underlying a regulatory program (such as the same administration's successful reform of the regulation of "stationary sources" of air pollutants), or both.

In the most exotic permutation of the latter method, employed more by the Trump administration than any previous administration, agencies have occasionally argued that their predecessors lacked statutory power to regulate as they did, leaving them no legal choice but to abandon a prior administration's regulatory program. In Agency Statutory Abnegation in the Deregulatory Playbook, William Buzbee describes, analyzes, and dissects this "statutory abnegation" strategy, and persuasively illustrates that it has been and is likely to remain unsuccessful without major changes to basic principles of administrative law.

Buzbee provides a clear and succinct definition of statutory abnegation: "Acting against a backdrop of unchanged statutory law, an agency reexamines its powers under that law. In a break from past agency power claims and, usually, related actions, the agency newly declares that it no longer has authority it previously asserted. This is an act of agency 'abnegation'—self-denial of authority—because, without any statutory or judicially mandated change, the agency is denying itself statutory power previously claimed." (P. 1518.) Examples of statutory abnegation that Buzbee describes include the EPA's conclusion, under the George W. Bush administration, that it lacked previously asserted statutory authority to regulate greenhouse gases and among many from the Trump administration, its repudiation of the EPA's Clean Power Plan based exclusively on its view that the CPP "exceed[ed] the EPA's statutory authority."

The major impediment to the statutory abnegation strategy is judicial review. Buzbee begins by showing that familiar doctrines of judicial deference to both agency policy decisions and agency interpretations of the statutes they administer might lead an administration to expect that when agencies proclaim that they lack statutory authority to regulate, courts would defer and the agencies would win. This turns out, however, to be a pipe dream. As Buzbee persuasively concludes, "[B]are 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." (P. 1514.)

Why judicial rejection? Buzbee illustrates quite effectively that an administration's deregulatory fervor is likely to be met by reviewing courts doing what they have always done: namely, require agencies to offer well-considered, rational judgments that take into account "the science, data, empirical

assessments, and old and new legal reasoning relevant to evaluating the policy shift." (P. 1515.) These considerations are the bread and butter of judicial review, and administrations ignore them at their peril. Instead, abnegation arguments have often been founded upon "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." (P. 1515.) As Buzbee so eloquently concludes, "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." (P. 1563.) For courts to approve the Trump administration's abnegation arguments, courts would have to abandon these bedrock aspects of administrative law.

Why then, Buzbee wonders out loud, have agencies in the Trump administration been employing "bare statutory abnegation" in so many instances? Although the question invites speculation, Buzbee offers what I find to be a plausible and persuasive account: Presidents and their appointees may be more interested in scoring political points than in actually achieving substantial deregulation. That the Trump administration has been challenging agency action at a record pace may be less salient to the administration's supporters than dramatic announcements of new deregulatory initiatives such as the repudiation of the Obama administration's Clean Power Plan, the toughening of criteria for student loan forgiveness, and the rescission of programs extending deferred action on deportation to "dreamers" (undocumented immigrants who arrived in the United States as children). Further, making new rules based on statutory interpretation is likely to be quicker and easier than rulemaking based on a detailed factual and technical record, allowing the administration to score its political points much more quickly.

One virtue of Buzbee's article is that it anticipates virtually every consideration relevant to understanding and evaluating the statutory abnegation strategy. I want to focus on three of the issues Buzbee discusses. First, Buzbee shows that the Trump administration may have fallen into the same trap that befell the Reagan administration when it rescinded the passive restraint requirement—the temptation to conceive of deregulation as like an agency decision not to act in the first place, which would be reviewed under an exceedingly deferential standard of judicial review. It is black letter administrative law that deregulation by rulemaking is subject to the same standard of judicial review as is applied to agency adoption of a new rule increasing regulatory burdens. Second, one of the most confusing aspects of the *Chevron* doctrine may also be at work here—the notion that courts do not defer to agency decisions on "pure questions of statutory interpretation." When an agency's entire justification for a deregulatory action is that a statute unambiguously requires it, courts are tempted to assume their traditional role as the final arbiters of statutory meaning, i.e. the ever-expanding *Chevron* step one. Finally, Buzbee establishes that the *Fox Television* decision that governs judicial review of agency policy changes is excruciatingly ambiguous on the justification required to validate a significant policy change, leading agencies to believe, perhaps erroneously, that they will receive great deference whenever they change course.

In sum, this article is a great read, highly interesting, relevant and enlightening—just what I look for in a Jot-worthy law review article.

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