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Requiring the Executive to Turn Square Corners: The Supreme Court Increases Agency Accountability in Department of Homeland Security v. Regents of the University of California

Claudia J. Bernstein
Penn State Dickinson Law

Comments

Requiring the Executive to Turn Square Corners: The Supreme Court Increases Agency Accountability in *Department of Homeland Security v. Regents of the University of California*

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ABSTRACT

Administrative agencies frequently promulgate rules that have dramatic effects on peoples' lives. Deferred Action for Childhood Arrivals ("DACA") is one such example. DACA grants certain unlawful immigrants a temporary reprieve from deportation, as well as ancillary benefits such as work permits. In 2017, the Department of Homeland Security ("DHS") sought to rescind DACA on the basis that the program violates the Immigration and Nationality Act.

This Comment analyzes the recent Supreme Court decision about DACA's recission in *Department of Homeland Security v.*

* J.D. Candidate, Penn State University Dickinson Law, 2022. This Comment is dedicated to Laura N. Jasinsky, the most creative and passionate attorney I know. Thank you to Zoë Matherne for your unwavering patience during this writing process, and to Professor Matthew Lawrence for sparking my interest in administrative law.

Regents of University of California. In rejecting DHS's attempt to rescind DACA, the Court strengthened agency accountability in several important ways. The Court reaffirmed that the Administrative Procedure Act's ("APA") discretion exemption is extremely narrow. It also arguably created a way for courts to fault agencies for failing to consider nonreviewable discretionary policies. Additionally, the Court strengthened the *post hoc* justification doctrine.

This Comment also argues that *Regents* foreclosed agencies from relying on statutory abnegation—that is, disclaiming legal authority previously claimed—to rescind a policy. This deregulatory strategy is problematic because agencies that use it often attempt to circumvent traditional administrative law procedures. By repudiating statutory abnegation, the Supreme Court took another step to ensure that agencies remain accountable to the people whom their policies affect.

More broadly, the Court's decision in *Regents* is part of a line of recent administrative law cases in which the Court has increased agency accountability. In several of these cases, the Court found that the APA's discretion exemption does not apply to an agency action, even where the agency had good cause to believe it should. The Court also recently took steps to curtail the *Auer* deference doctrine. Read together, these cases establish that agencies must "turn square corners" when promulgating policies, or else risk being reversed in court.

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I. INTRODUCTION

Administrative agencies are an integral part of the federal government.[1] Federal agencies oversee a wide range of affairs including taxes, housing, Social Security, education, commerce, immigration, and much more.[2] Operating under the Administrative Procedure Act ("APA") and an organic act,[3] agencies generally have broad leeway to enact rules and regulations in order to effect their policy goals.[4] These rules, regulations, and policies can have substantial impact on peoples' lives.[5] However, because agencies are not directly involved in the political process, the task of holding them accountable generally falls to the courts.[6]

This Comment analyzes the ways in which the Supreme Court is seeking to increase agency accountability by examining a recent decision about an immigration policy called Deferred Action for Childhood Arrivals ("DACA").[7] Enacted in 2012 by executive order, DACA provided both a temporary reprieve from deportation and ancillary benefits to certain immigrants unlawfully present in

1. *See* ALFRED C. AMAN JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW HORNBOOK SERIES 1 (3d ed. 2014) ("[W]e are left with much of government, the part pertaining to the civil affairs of the American people, as the range of administrative law.").

2. *See A–Z Index of U.S. Government Departments and Agencies*, USA.GOV, http://bit.ly/30mLOa0 [https://perma.cc/PL9F-48TY] (last visited Mar. 7, 2021).

3. *See* AMAN JR. & MAYTON, *supra* note 1, at 1 (explaining that an organic act is an act of Congress which delegates power to an agency).

4. *See id.* ("The range of this power so gained and held by agencies is enormous.").

5. *Id.*

6. *See id.* at 5 ("The Administrative Procedure Act assumes that courts have a major role in assuring that agencies stay within their jurisdiction, act lawfully, and make reasonable decisions.").

7. *See infra* notes 33–34 and accompanying text (defining Deferred Action for Childhood Arrivals).

the United States.[8] Following a string of litigation and a change in administration, the Department of Homeland Security ("DHS") sought to rescind DACA in 2017.[9] In response, various groups of plaintiffs alleged in several lawsuits that DHS's action did not comply with APA requirements.[10] In *Department of Homeland Security v. Regents of University of California,*[11] the Supreme Court found that DHS's action did not comply with the APA.[12] Notably, the *Regents* decision increased agency accountability in several important ways.[13]

Part II of this Comment will explain the background of DACA and the court decisions on which DHS based its decision to rescind the program.[14] Next, it will analyze the Supreme Court's decision in *Regents*, highlighting several important ways in which the Court used *Regents* to increase agency accountability in Part III.[15] Specifically, this Comment will analyze how the Court narrowed the APA's discretion exemption,[16] strengthened the *post hoc* justification doctrine,[17] and effectively eliminated the deregulatory strategy of statutory abnegation.[18] Finally, in Part IV, this Comment describes how *Regents* is part of a recent line of cases increasing agency accountability and explains that agencies must "turn square corners"[19] when changing an existing policy, or else risk being overturned in court.[20]

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8. Memorandum from Dep't of Homeland Sec. Sec'y Janet Napolitano to Acting Comm'r of Customs & Border Patrol David Aguilar, Dir. of U.S. Citizenship & Immigr. Servs. Alejandro Mayorkas, & Dir. of Immigr. & Customs Enforcement John Morton (June 15, 2012) [hereinafter Napolitano Memorandum], https://bit.ly/3qidSJP [https://perma.cc/6VER-BFGN].

9. *See infra* Sections II.B–II.C. (detailing the litigation leading up to DHS's decision to rescind DACA in 2017).

10. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1903 (2020) (explaining that multiple groups of plaintiffs challenged the action in three district courts).

11. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

12. *Id.* at 1915.

13. *See infra* Part III (detailing the ways in which *Regents* increased agency accountability).

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Section III.A.

17. *See infra* Section III.B.

18. *See infra* Section III.C.

19. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (quoting St. Regis Paper Co. v. United States, 368 U.S. 208. 229 (1961) (Black, J., dissenting)). By contrast, the *Regents* majority found that DHS cut corners when it rescinded DACA. *Id.*

20. *See infra* Part IV.

II. BACKGROUND

A. The Historical Use of Deferred Action in Immigration Enforcement and the Creation of DACA

The concept of deferred action—that is, a formal decision by the executive branch to decline to institute removal proceedings, terminate proceedings, or decline to execute a final order of removal—has existed in the immigration enforcement scheme for decades.[21] The Code of Federal Regulations defines deferred action as "an act of administrative convenience to the government which gives some cases lower priority."[22] The source of the Executive's authority to defer action for individuals otherwise subject to removal pursuant to the Immigration and Nationality Act ("INA") is ostensibly rooted in his enforcement discretion.[23] There are many practical reasons for enforcement discretion in the immigration context, including conservation of resources[24] and avoiding unjust or unpopular results.[25] Reflecting this practicality, Congress expressly authorized DHS to "[e]stablish[ ] national immigration enforcement policies and priorities."[26] Although the concept of immigration enforcement priorities is similar to prosecutorial discretion in the criminal context, there are some important differ-

21. *See generally* BEN HARRINGTON, CONG. RSCH. SERV., R45158, AN OVERVIEW OF DISCRETIONARY REPRIEVES FROM REMOVAL: DEFERRED ACTION, DACA, TPS, AND OTHERS (2018), https://bit.ly/3oRCqa2 [https://perma.cc/JV8C-SY9P].

22. 8 C.F.R. § 274a.12(c)(14) (2020).

23. HARRINGTON, *supra* note 21, at 4; *accord* Reno v. Am-Arab Anti-Discrimination Comm., 525 U.S. 471, 483–84 (1999) (defining deferred action and explaining that the Executive may exercise its discretion for convenience or humanitarian reasons). The Supreme Court has also explained that the Executive's enforcement discretion is rooted in the United States Constitution. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (explaining that faithful execution of the law does not necessarily entail "act[ing] against each technical violation" and the decision whether to initiate enforcement proceedings is a complex judgement requiring the Executive to balance "a number of factors which are peculiarly within its expertise").

24. HARRINGTON, *supra* note 21, at 4; *cf.* U.S. Dep't of Just. Off. of Legal Couns., *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, at 1 (2014) [hereinafter OIC Deferred Action Opinion] ("DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year.").

25. *See Reno*, 525 U.S. at 484 n.8 (explaining that internal guidance at the legacy Immigration and Naturalization Service indicated that it would grant deferred action in the presence of sympathetic factors that could generate bad publicity or adversely affect future cases).

26. 6 U.S.C. § 202(5).

ences.[27] Notably, foreign nationals present in violation of the INA remain removable indefinitely unless they otherwise acquire lawful status.[28]

Deferred action does not appear to be based on a controlling, publicly available policy document or agency memorandum.[29] At least one DHS agency manual refers to a deferred action procedure, indicating that foreign nationals should be notified if they have been granted deferred action so they may apply for employment authorization.[30] Historically, however, deferred action was a little-used and *ad hoc* form of discretionary relief granted on an individual or small-scale basis.[31]

On June 15, 2012, Secretary of Homeland Security Janet Napolitano issued a memorandum directing United States Citizenship and Immigration Services ("USCIS") to establish a process to grant certain foreign nationals deferred action on a case-by-case basis.[32] This programmatic form of deferred action became known as Deferred Action for Childhood Arrivals, or DACA.[33] Unlike generic deferred action, DACA has clear eligibility requirements and a designated application procedure.[34] However, DACA and generic deferred action are otherwise identical in that the function of both is to grant a temporary reprieve from deportation.[35] Furthermore, DACA and generic deferred action also "generally confer the same

27. HARRINGTON, *supra* note 21, at 4.

28. *Id*. at 5. Conversely, enforcement discretion in the criminal context often results in a final decision not to prosecute due to relevant statutes of limitations. *Id*.

29. *Id.* at 12–13; *see also Reno*, 525 U.S. at 484 n.8 ("Prior to 1997, deferred-action decisions were governed by internal [legacy Immigration and Naturalization Service] guidelines . . . [t]hese were apparently rescinded . . . but there is no indication that the [legacy Immigration and Naturalization Service] has ceased making this sort of determination on a case-by-case basis.").

30. U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION, AND REMOVAL OPERATIONS POLICY AND PROCEDURE MANUAL, ch. 20.8(c)(1), https://bit.ly/ICEdefact [https://perma.cc/3WET-DHZN].

31. *See Number of Approved Employment Authorization Documents by Classification and Basis for Eligibility, Oct. 1, 2012 – June 29, 2017*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2017), https://bit.ly/3CzbJf7 [https://perma.cc/CD46-5VKZ] (showing that the number of DACA-based employment authorization documents issued each year reached as high as 515,000, while deferred-action based employment authorization documents peaked at 31,000 annually).

32. Napolitano Memorandum, *supra* note 8.

33. *Consideration of Deferred Action for Childhood Arrivals (DACA)* U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 4, 2021), http://bit.ly/USCISdaca [https://perma.cc/LA3U-96W3].

34. HARRINGTON, *supra* note 21, at 13.

35. *See generally id.* (defining deferred action as "a decision not to remove an inadmissible or deportable" foreign national and defining DACA as a "type of deferred action.").

collateral advantages."[36] Some of these collateral advantages include work authorization,[37] driver's licenses,[38] and social security benefits.[39]

B. The Creation of DAPA and Select Associated Litigation

On November 20, 2014, Secretary of Homeland Security Jeh Johnson issued a memorandum that expanded the DACA program and created a similar program called Deferred Action for Parents of Childhood Arrivals, or DAPA.[40] Twenty-six states challenged this memorandum in federal court.[41] The states alleged that the Secretary's action violated both the APA and the Take Care Clause[42] of the Constitution.[43] The District Court for the Southern District of Texas issued a preliminary injunction, finding that DHS likely violated the APA by failing to follow the notice and comment rulemaking process.[44] In its decision, the court addressed neither the substantive APA claim nor the Constitutional claim.[45]

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36. *Id.* at 13; *accord* Arizona Dream Act Coalition v. Brewer, 855 F.3d 957, 975 (9th Cir. 2017) ("Persons with 'approved deferred action status' are expressly identified as being present in the United States during a 'period of authorized stay' for the purpose of issuing state identification cards." (quoting Real ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, §202(c)(2)(B)(viii) (2005))).

37. *See* 8 C.F.R. § 274a.12(c) (2020) (establishing categories of foreign nationals eligible for work permits).

38. Real ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, § 202(c)(2)(B)(viii) (2005).

39. 8 C.F.R. § 1.3(a)(vi) (2011).

40. Memorandum from Dep't of Homeland Sec. Sec'y Jeh Johnson to Dir. of U.S. Citizenship & Immigr. Servs. León Rodriguez, Acting Dir. of Immigr. & Customs Enf't Thomas Winkowski, & Comm'r of Customs & Border Patrol R. Gil Kerlikowske (Nov. 20, 2014) https://bit.ly/3C0ICRV [https://perma.cc/FS3F-VC6S]

41. *See* Texas v. United States (*Texas I*), 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015), *aff'd* 809 F.3d 134 (5th Cir. 2015), *aff'd* 136 S. Ct. 2271 (2016) (explaining that 26 states are seeking injunctive relief).

42. U.S. CONST. art. II, § 3 ("[The president] shall take Care that the Laws be faithfully executed.").

43. *Texas I*, 86 F. Supp. 3d at 607. Before proceeding to the merits of the claims, the District Court first considered at great length whether the states had standing to bring their suit. *Id.* at 614–45. The District Court ultimately found that at least one state—Texas—had established standing resulting from expenses caused by an incidental benefit of DAPA. *See id.* at 643 ("[A]t least one Plaintiff, Texas, stands to suffer direct damage from the implementation of DAPA."). The "direct damage" described by the Court was the financial burden of issuing driver's licenses to DAPA recipients as required by federal law. *Id.* at 617; *see also supra* note 38 (providing that deferred action recipients are eligible for driver's licenses).

44. *Texas I*, 86 F. Supp. 3d at 671.

45. *Id.* at 677.

The Court of Appeals for the Fifth Circuit affirmed.[46] In its opinion, the court concluded not only that DAPA was procedurally defective in violation of the APA[47] but also that it was substantively defective because it was "manifestly contrary to [the] statute."[48] In explaining its reasoning, the court emphasized that the INA "flatly does not permit the reclassification of millions of illegal aliens as lawfully present."[49] Following a divided four-four vote, the United States Supreme Court affirmed without an opinion, and the matter was remanded to the district court to be tried on the merits.[50] However, the case was mooted on June 15, 2017, when Secretary of Homeland Security John Kelly rescinded the DAPA memorandum.[51]

C. The Attempt to Rescind DACA and Select Associated Litigation

Shortly following the DAPA Recission Memorandum, Attorney General Jeff Sessions issued a letter ("Sessions Letter") to Act-

46. Texas v. United States (*Texas II*), 809 F.3d 134 (5th Cir. 2015).

47. *See id.* at 178 (finding that the states established a substantial likelihood of success on the merits of their claim that DAPA violated the APA's procedural requirements).

48. *Id.* at 186. *See generally* Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (codifying Congress' comprehensive scheme for the classification and treatment of foreign nationals within and seeking entry to the United States). The INA expressly defines—with specificity and detail—classes of foreign nationals allowed to be lawfully present in the United States. *Texas II*, 809 F.3d at 179; *accord, e.g.*, 8 U.S.C. §§ 1101(a)(15), 1201(a)(1) (defining classes of nonimmigrants), §§ 1101(1)(42), 1157–1159, 1231(b)(3) (defining and specifying eligibility for refugee status and asylum), §§ 1182(d)(5), 1254(a) (categorizing foreign nationals eligible for humanitarian parole and temporary protected status). The INA also specifically defines which foreign nationals are inadmissible to the United States or deportable from the United States. 8 U.S.C. §§ 1182(a), 1277(a)–(b). Especially salient here, the INA also defines narrow classes of foreign nationals eligible for deferred action. *Texas II*, 809 F.3d at 179; *accord, e.g.*, 8 U.S.C. § 1227(d)(2) (allowing family members of lawful permanent residents killed in combat and granted posthumous citizenship to apply for deferred action).

49. *Texas II*, 809 F.3d at 184.

50. United States v. Texas (*Texas III*), 136 S. Ct. 2271 (2016) (per curiam); s*ee also* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1903 (2020) (explaining that the matter continued to be litigated in district court for about a year following the Court's decision to uphold the injunction).

51. Memorandum from Dep't of Homeland Sec. Sec'y John Kelly to Acting Comm'r of Customs & Border Patrol Kevin McAleenan, Acting Dir. of U.S. Citizenship & Immigr. Servs. James McCament, Acting Dir. of Immigr. & Customs Enf't Thomas Homan, Acting Gen. Couns. Joseph Maher, & Assistant Sec'y for Border, Immigr., & Trade Pol'y Michael Dougherty (June 15, 2017) https://bit.ly/3F2Pxvt [https://perma.cc/B2QY-45YM].

ing Secretary of Homeland Security Elaine Duke.[52] Relying largely on the Fifth Circuit decision and Supreme Court affirmance, Attorney General Sessions stated that DACA "has the same legal and constitutional defects" as DAPA.[53] Citing potentially imminent litigation against the DACA policy that would "likely yield similar results" to the DAPA litigation, Attorney General Sessions directed Secretary Duke to terminate the DACA program.[54] Secretary Duke promptly issued a memorandum ("first DACA Recission Memorandum") instructing USCIS to terminate DACA.[55]

Following the first DACA Recission Memorandum, several lawsuits were filed in federal courts to enjoin the DACA termination.[56] Relevant here,[57] the D.C. District Court considered several claims raised by various plaintiffs in two cases, which it consolidated.[58] The various plaintiffs brought suit on behalf of DACA recipients, alleging, *inter alia*, that the first DACA Rescission Memorandum violated the APA both procedurally and substantively and that it was unconstitutional in several ways.[59] The D.C. District Court ultimately rejected the plaintiffs' procedural APA claim[60] and declined to rule on the constitutional issues.[61] However, it found in favor of the plaintiffs on the substantive APA claim, holding that the first DACA Rescission Memorandum was arbitrary

52. Letter from Att'y Gen. Jefferson Sessions to Dep't of Homeland Sec. Acting Sec'y Elaine Duke (2017) (on file with Department of Justice) [hereinafter Sessions Letter], https://bit.ly/3e1ik8x [https://perma.cc/KF7R-HXW6].

53. *Id.*

54. *Id.*

55. Memorandum from Dep't of Homeland Sec. Acting Sec'y Elaine Duke to Acting Dir. of U.S. Citizenship and Immigr. Servs. James McCament, Acting Dir. of Immigr. and Customs Enf't Thomas Homan, Acting Comm'r of Comm'r of Customs and Border Patrol Kevin McAleenan, Acting Gen. Couns. Joseph Maher, Assistant Sec'y, Int'l Engagement Ambassador James Nealon, and U.S. Citizenship and Immigr. Servs. Ombudsman Julie Kirchner (Sept. 5, 2017) [hereinafter first DACA Recission Memorandum], https://bit.ly/3qmuL67 [https://perma.cc/K5YG-RWCE].

56. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1903 (2020) (explaining that multiple groups of plaintiffs challenged the action in three District Courts).

57. See *infra* note 147 for a discussion of why the *NAACP* decision is particularly relevant to this analysis. *See generally* NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018) (finding the first DACA Recission Memorandum arbitrary and capricious in violation of the APA), *aff'd sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

58. NAACP, 298 F. Supp. 3d at 222–23, *aff'd sub nom. Regents*, 140 S. Ct. 1891 (2020).

59. *Id.*

60. *Id.* at 237.

61. *Id.* at 246.

and capricious[62] because it insufficiently explained the agency's reasons for its action.[63]

The district court issued an order to vacate the first DACA Recission Memorandum but stayed the order to permit DHS to issue a new memorandum offering a fuller explanation for its decision to terminate DACA.[64] Secretary of Homeland Security Kirstjen Nielsen then issued the requested memorandum ("second DACA Recission Memorandum").[65] The court considered the second DACA Recission Memorandum before finding it was also insufficient, and the matter worked its way up to the Supreme Court.[66]

In what became *Department of Homeland Security v. Regents of University of California*,[67] the Supreme Court ultimately held that DHS's explanation for terminating DACA was arbitrary and capricious in violation of the APA.[68] To arrive at this conclusion, the Court found that it could not consider the second DACA Recission Memorandum.[69] Surprisingly, the Court also emphasized that

62. *See* 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). Under this standard, it is not the court's role to substitute its own judgement for that of the agency. AMAN JR. & MAYTON, *supra* note 1, at 438. Rather, the court's goal is to ensure that the agency engaged in reasoned decision-making. *Id.*

63. *NAACP*, 298 F. Supp. 3d at 243.

64. *Id.* at 245.

65. Memorandum from Dep't of Homeland Sec. Sec'y Kirstjen Nielsen (June 22, 2018) [hereinafter second DACA Recission Memorandum], https://bit.ly/3ko2c4i [https://perma.cc/G3KE-4BAB].

66. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (explaining that the Court granted certiorari on three petitions and consolidated the cases). Shortly following Secretary Duke's memorandum rescinding DACA, various groups of plaintiffs filed separate actions against the government in three district courts. Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 298 F. Supp. 3d 1304 (N.D. Cal. 2018), *rev'd* 140 S. Ct. 1891 (2020); Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018), *vacated sub nom. Regents*, 140 S. Ct. (2020); NAACP v. Trump 315 F. Supp. 3d 457 (D.D.C. 2018), *aff'd sub nom. Regents*, 140 S. Ct. (2020). All three district courts ruled in favor of the plaintiffs, and the government appealed to the Ninth, Second, and D.C. Circuits, respectively. *Regents*, 140 S. Ct. at 1904–05. While the three appeals were pending, the government filed three petitions for certiorari which the Court granted, consolidating the cases for argument. *Id.* at 1905.

67. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

68. *Id.* at 1915. This decision was a close five-four split of the justices, with CHIEF JUSTICE ROBERTS, Justice Ginsburg, JUSTICE BREYER, JUSTICE KAGAN, and JUSTICE SOTOMAYOR representing the majority; while JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH made up the dissent. *See generally id.* (listing the justices that joined the opinion and dissents).

69. *Id.* at 1908–09.

DHS should have made other policy considerations "even if it is illegal" for DHS to promulgate the DACA program.[70] The Court ultimately remanded the issue to DHS "so that it may consider the problem anew."[71] As this Comment will analyze, the Court's reasoning for each of these findings caused increased agency accountability.

III. *REGENTS* IMPACTS ADMINISTRATIVE LAW BY INCREASING ACCOUNTABILITY

The *Regents* majority opinion increased agency accountability in several ways. First, it is somewhat surprising that the Court decided DACA's recission is reviewable.[72] By doing so, the Court reaffirmed that the APA's discretion exemption[73] is extremely narrow.[74] The Court also arguably created an opportunity for courts to fault agencies for failing to consider discretionary actions—even when the agency's decision whether to take the action is unreviewable.[75] Next, the decision to disregard the second DACA Recission Memorandum strengthened the *post hoc* justification doctrine.[76] Perhaps most surprisingly, *Regents* says that a policy's illegality is not a sufficient basis to justify its recission.[77] Read together, *Regents* represents a shift toward increased agency account-

70. *Id.* at 1912.

71. *Id.* at 1916.

72. *See id.* at 1932 (ALITO, J. concurring in part) (explaining that DACA's recission should be unreviewable under the APA); *accord* Ilan Wurman, Opinion, *Administrative Law and the DACA Decision*, NEWSWEEK (June 20, 2020, 7:00 AM), http://bit.ly/WURdaca [https://perma.cc/A2LL-3YGW] ("If forbearance is a matter of prosecutorial discretion, then refusing forbearance is also an act of prosecutorial discretion for which the executive need provide no explanation.").

73. *See* Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (exempting agency actions from judicial review when the action is committed to agency discretion by law).

74. *Regents*, 140 S. Ct. at 1905 ("To 'honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly.'") (quoting Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv. 139 S. Ct. 361, 370 (2018)).

75. *Infra* notes 108–123 and accompanying text.

76. *See Regents*, 140 S. Ct. at 1934 (KAVANAUGH, J. concurring in part) ("I am aware of no case from this Court, and the Court today cites none, that has employed the *post hoc* justification doctrine to exclude an agency's official explanation of an agency rule."). The *post hoc* justification doctrine is a judicial creation to help define the scope of the administrative record which forms the basis for rationality review. AMAN JR. & MAYTON, *supra* note 1, at 44. "Specifically, the record cannot include materials produced post hoc, as by agency attorneys trying to justify a rule to a reviewing court." *Id.*

77. *Regents*, 140 S. Ct. at 1912; c*f. id.* at 1922 (THOMAS, J. concurring in part) (asserting that the majority's holding that an agency is required to continue enforcing an illegal policy has no basis in law).

ability that should affect the agency decision making process going forward.

A. Regents *Continued the Supreme Court's Trend of Reading the Discretionary Decisions Exception to Judicial Review Narrowly*

The APA provides that actions left to an agency's discretion are immune from judicial review.[78] The seminal case in which the Supreme Court explained the discretion exemption is *Heckler v. Chaney*.[79] In that case, the Court heard arguments on whether the Food and Drug Administration (FDA) was required to take enforcement action to prevent states from using certain drugs for lethal injection in violation of federal law.[80] The Court ultimately concluded that it could not compel the FDA to act, explaining that an agency's refusal to institute enforcement proceedings is exempt from judicial review "unless Congress has indicated otherwise" in the agency's enabling statute.[81] In so deciding, the Court acknowledged a legal "tradition" of exempting such decisions from judicial review because they often involve a "complicated balancing of factors" best left to the agency.[82]

In analyzing the issues in *Heckler*, the Supreme Court also carefully considered another important administrative law case, *Citizens to Preserve Overton Park, Inc. v. Volpe*.[83] In *Overton Park*, the Secretary of Transportation had authorized the use of federal funds to construct a highway through a public park in Memphis, Tennessee.[84] A federal statute provided that a highway may not be constructed through a public park unless there is no other "feasible and prudent" alternative route.[85] A group of plaintiffs sued, contending that the Secretary of Transportation violated the statute by authorizing the construction without explaining why there were no "feasible and prudent" alternative routes.[86] Explaining first that the Secretary's decision is subject to judicial review, the Court said that Congress gave clear and specific directives in the federal statute.[87]

78. Administrative Procedure Act, 5 U.S.C. § 701.
79. Heckler v. Chaney, 470 U.S. 821 (1985).
80. *Id.* at 823.
81. *Id.* at 838.
82. *Id.* at 831–32.
83. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).
84. *Id.* at 405–06.
85. *Id.* at 405.
86. *Id.* at 406–08.
87. *Id.* at 410–11. In *Overton Park*, the Court explained that the Department of Transportation Act and the Federal-Aid Highway Act "are clear and specific directives" to which the Secretary of Transportation was required to adhere when

The Court also said the discretion exemption is "very narrow" and relevant only when "there is no law to apply."[88] The Court concluded that the statute at issue was clearly the "law to apply" and that if it was "to have any meaning, the Secretary [of Transportation] cannot approve the destruction of parkland unless he finds that alternative routes present unique problems."[89] Distinguishing *Overton Park*, the *Heckler* Court asserted that "*Overton Park* did not involve an agency's refusal to take . . . enforcement action" but rather "involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given."[90]

In *Regents*, the Supreme Court looked to *Heckler* when analyzing whether DHS's decision to rescind DACA was subject to judicial review.[91] The facts of DACA and its recission place it somewhere between *Heckler* and *Overton Park*.[92] Like the FDA's enforcement discretion described in *Heckler*,[93] DHS's authority to grant deferred action is understood to be rooted in its enforcement discretion.[94] And unlike the clear directive from Congress in *Overton Park*,[95] there is no congressionally mandated statute that provides a clear directive for determining when DHS should grant deferred action to an individual.[96] Most of the policy reasons for the discretion exemption cited in *Heckler* can be applied with equal force to DACA.[97] However, unlike the FDA's conduct described in

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making his decision. *Id.* at 411. The statutes laid out specific guidelines in plain language with respect to when federal funds may be used to construct highways through parks. *Id.*

88. *Id.* at 410.

89. *Id.* at 413.

90. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

91. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1906–07 (2020).

92. *Compare Regents*, 140 S. Ct. (reviewing an affirmative agency action based on the agency's enforcement discretion), *with Heckler*, 470 U.S. (declining to review an agency decision not to take enforcement action), *and Overton Park*, 401 U.S. (reviewing an affirmative agency action with a statutory basis).

93. *See Heckler*, 470 U.S. at 832 ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review.").

94. *See supra* note 23 and accompanying text (providing background on deferred action in the immigration context).

95. *Overton Park*, 401 U.S. at 410–11.

96. C*f. supra* note 23 and accompanying text (explaining that deferred action is rooted in enforcement discretion).

97. *See Heckler*, 470 U.S. at 831–32 (explaining the policy reasons for the APA's discretion exemption). The court elaborated:

> An agency decision not to enforce often involves a complicated balancing of a number of factors . . . the agency must . . . [assess] whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action

Heckler, DACA's formal adjudication process is arguably more than a mere refusal to take enforcement action.[98] Although the adjudication process is not an "affirmative act of approval under a statute" as was the case in *Overton*, it could be characterized as an "affirmative act of approval" under an agency rule.[99]

In his *Regents* dissent, JUSTICE ALITO applied *Heckler* to assert that "to the extent DACA represents a lawful exercise of prosecutorial discretion, its recission represented an exercise of that same discretion, and it would therefore be unreviewable under the [APA]."[100] The majority, however, did not agree.[101] Categorizing DACA as "not simply a non-enforcement policy," the Supreme Court asserted that the program's recission is subject to judicial review.[102] In so deciding, the Court focused on DACA's formal application, standardized review process, and formal decision notices.[103] The Court acknowledged neither the fact that deferred action is rooted in enforcement discretion nor that the agency's "affirmative act of approval" springs from an agency rule, not a statute.[104]

In finding that DHS's action was subject to judicial review, the Supreme Court kept with its tradition of reading the APA's discretion exemption narrowly.[105] The Court's reasoning on the issue is nevertheless notable. Finding DHS's action reviewable was the Court's first step toward using *Regents* to increase agency accounta-

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> requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. These considerations were foundational to DHS's initial decision to create the DACA program. *See* Napolitano Memorandum, *supra* note 8 ("[A]dditional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases."). Notably, following a change of presidents, DHS reassessed and revised the enforcement priorities on which DACA was based—eliminating tiered enforcement priorities completely. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017) ("I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.").

98. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1906 (2020).

99. *Id.*

100. *Id.* at 1932 (ALITO, J. concurring in part).

101. *Id.* at 1907 (majority opinion).

102. *Id.* at 1906–07.

103. *Id.* at 1906.

104. *Cf. id.* at 1906–07 (explaining reasons why the decision to rescind DACA is subject to judicial review).

105. *Id.* at 1905; *see supra* note 73 for an explanation of the APA's discretion exemption.

bility.[106] There were several plausible arguments for why DHS's action should have fallen within the APA's discretion exemption.[107] By rejecting those arguments, the Court preserved its ability to review agency actions when the agency's discretionary authority is less than certain.

Another aspect of *Regents* makes the reviewability decision interesting. After finding the DACA recission reviewable, the Supreme Court moved on to its arbitrary and capricious analysis.[108] In that analysis, the Court first determined that DHS rescinded DACA because of the program's illegality.[109] It then looked to the Fifth Circuit opinion *Texas v. United States*[110] ("*Texas II*") to understand the legal defects on which the DACA recission was based.[111] In *Texas II*, the Fifth Circuit found the similar DAPA program[112] illegal "because it 'would make 4.3 million otherwise removable aliens' eligible for work authorization and public benefits."[113]

The Supreme Court next stated that the DACA program is more than just benefits such as work authorization.[114] Instead, the Court characterized the decision to defer removal—what the Court called "forbearance"—as DACA's defining feature.[115] Noting that the *Texas II* decision underscored that DHS was not required to

106. *Cf. Regents*, 140 S. Ct. at 1909 ("[H]ere the rule serves important values of administrative law . . . [by] promot[ing] 'agency accountability.'") (quoting Bowen v. Am. Hosp. Assn., 476 U.S. 610, 643 (1986)).

107. *See id.* at 1932 (ALITO, J. concurring in part) ("[T]o the extent DACA represented a lawful exercise of prosecutorial discretion, its recission represented an exercise of that same discretion, and it would therefore be unreviewable under the [APA]."); *see also id.* at 1906 (majority opinion) ("The Government contends that a general non-enforcement policy is equivalent to the individual non-enforcement decision at issue in *Chaney*."); Reno v. Am-Arab Anti-Discrimination Comm., 525 U.S. 471, 483–84 (1999) (defining deferred action as an act of discretion).

108. *Regents*, 140 S. Ct. at 1907–15.

109. *Id.* at 1910.

110. *Texas II*, 809 F.3d 134 (5th Cir. 2015).

111. *Regents*, 140 S. Ct. at 1911. Although *Texas II* was about DAPA, not DACA, the decision was nonetheless crucial to both the first DACA Recission Memorandum and the *Regents* Court's analysis. *Id.* The logic in *Texas II* applied with equal force to both DACA and DAPA because the programs were so substantially similar. Sessions Letter, *supra* note 52; *see also* second DACA Recission Memorandum, *supra* note 65 (explaining that DAPA and DACA are substantially similar).

112. *See supra* note 40 and accompanying text (describing the creation of DAPA); *see also* second DACA Recission Memorandum, *supra* note 65 ("Any arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful.").

113. *Regents*, 140 S. Ct. at 1911 (quoting *Texas II*, 809 F.3d at 181–82).

114. *Id.*

115. *Id.*

alter its class-based enforcement priorities, the Supreme Court faulted DHS for failing to consider the possibility of "removing benefits eligibility while continuing forbearance" when it rescinded DACA.[116]

The Supreme Court did not address that class-based immigration enforcement priorities fall squarely within the DHS Secretary's discretion.[117] *Texas II* explains "the two legs"[118] on which DACA and DAPA stand:

> The Secretary has broad discretion to 'decide whether it makes sense to pursue removal at all' . . . . Part of DAPA involves the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deems to be low-priority illegal aliens. But importantly, the states have not challenged the priority levels he has established, and neither the preliminary injunction nor compliance with the APA requires the Secretary to remove any alien or alter his enforcement priorities. Deferred action, however, is much more than nonenforcement: It would affirmatively confer "lawful presence" and associated benefits on a class of unlawfully present aliens.[119]

Without ancillary benefits, a forbearance-only policy is nothing more than a decision to "decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation"[120]—that is, an unreviewable decision to decline to take immigration enforcement action.[121]

The Supreme Court has previously said that when an agency provides a reviewable reason for an otherwise unreviewable action, the action is nonetheless unreviewable.[122] In *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*,[123] ("*Brotherhood*") the Supreme Court considered whether it could review a

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116. *Id.* at 1911–12.

117. *See Texas II*, 809 F.3d at 166 ("[I]mportantly, the states have not challenged the priority levels [the DHS Secretary] has established.").

118. *Regents*, 140 S. Ct. at 1913.

119. *Texas II*, 809 F.3d at 165–66 (quoting Arizona v. United States, 567 U.S. 2492, 2499 (2012)).

120. Reno v. Am-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (1999).

121. *See id.* ("This [is a] commendable exercise in administrative discretion."); *see also* Heckler v. Chaney, 470 U.S. 821, 838 (1985) ("The general exception to reviewability . . . for action 'committed to agency discretion' remains a narrow one . . . but within that exception are included agency refusals to institute investigative or enforcement proceedings.").

122. Interstate Com. Comm'n v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 283 (1987).

123. Interstate Com. Comm'n v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270 (1987).

decision by the Interstate Commerce Commission (ICC), wherein the ICC denied reconsideration of an earlier order.[124] The Brotherhood of Locomotive Engineers (BLE) contended that because the ICC provided substantive reasons for the denial, review on the merits of the underlying order was appropriate.[125] The Court explained that review of such decisions is limited only to the lawfulness of the refusal to reconsider.[126] When, as here, the party requesting review does so on the basis of "material error"—that is, claiming that the agency made a legal mistake in its underlying order—the agency's denial of a petition for rehearing is unreviewable.[127] The Court stated that it is irrelevant that ICC discussed the merits of the underlying claim when it denied rehearing.[128] It instead emphasized that an unreviewable agency action does not become reviewable when the agency provides a reviewable reason for the action.[129] To illustrate the point, the Court offered an example of a prosecutor declining to press criminal charges because he believes the evidence will not sustain a conviction.[130] The Court stated that, even though courts can decide whether evidence would sustain a conviction, "it is entirely clear that the refusal to prosecute cannot be the subject of judicial review."[131]

Although it is not a direct parallel, the chain of logic in *Regents* arguably takes a step back from the principle set out in *Brotherhood*. *Regents* found DHS's action to be arbitrary and capricious because the Secretary failed to consider an unreviewable policy of forbearance only.[132] This is an especially salient point because forbearance is, in fact, a decision not to prosecute.[133] Faulting DHS for failing to consider a "forbearance only" policy seems to stand in opposition to what the Court said in *Brotherhood*. Applying *Regents*, there are some circumstances in which an agency's failure to consider options wholly within its discretion might be deemed arbitrary and capricious under the APA.

In the wake of *Regents*, agencies should take care to fully explain their decision-making process—even when they believe their

124. *Id.* at 276–77.

125. *Cf. id.* at 280 ("It is irrelevant that the [ICC's] order refusing reconsideration discussed the merits of the unions' claims at length.").

126. *Id.* at 278.

127. *Id.* at 280.

128. *Id.*

129. *Id.*

130. *Id.* at 283.

131. *Id.*

132. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020)

133. *Supra* notes 115–121 and accompanying text.

action is discretionary. With good reason, DHS understood DACA to be an unreviewable act of prosecutorial discretion.[134] Yet, DHS failed to anticipate that the programmatic nature of DACA would bring it within the ambit of judicial review.[135] *Regents* therefore warns that agencies that fail to explain their decision-making because they believe their actions fall under the APA's discretion exemption risk being reversed in court.

B. Regents *Strengthened the* Post Hoc *Justification Doctrine*

The *Regents* Court took care to emphasize that, in order to comply with the APA, an agency must explain its reasons for the action at the time the action was taken.[136] Accordingly, a court must not give weight to any *post hoc* rationalizations for an agency's action.[137] The *Regents* Court thus found that it could not consider the second DACA Recission Memo.[138] This holding surprised some legal scholars for two reasons.[139] First, the *post hoc* justification doctrine has historically been used to exclude arguments advanced as "convenient litigating positions"[140] such as attorney arguments and litigation affidavits.[141] Additionally, the second DACA Recission Memorandum was by itself an independent agency action under the APA.[142] By refusing to consider the second DACA Recission Memorandum, the Supreme Court increased

134. *See Regents*, 140 S. Ct. at 1905 (explaining DHS's argument for why its action is exempt from APA review); *see also id.* at 1932 (ALITO, J. concurring in part) ("[T]o the extent DACA represented a lawful exercise of prosecutorial discretion, its recission represented an exercise of that same discretion, and it would therefore be unreviewable under the Administrative Procedure Act.").

135. *Id.*

136. *Id.* at 1907 (majority opinion). Although this might sound like nothing new, the *post hoc* justification doctrine had previously been used only to restrict counsel arguments and litigation documents used in court. *Infra* Section III.A.1; *see also Regents*, 140 S. Ct. at 1934 (KAVANAUGH, J. concurring in part) ("I am aware of no case from this Court, and the Court today cites none, that has employed the *post hoc* justification doctrine to exclude an agency's official explanation of an agency rule.").

137. *Regents*, 140 S. Ct. at 1908 (majority opinion).

138. *Id.*

139. Wurman, *supra* note 72.

140. *Regents*, 140 S. Ct. at 1909 (quoting Bowen v. American Hospital Assn., 470 U.S. 610, 643 (1986)).

141. *See id.* at 1934 (KAVANAUGH, J. concurring in part) ("I am aware of no case from this Court, and the Court today cites none, that has employed the *post hoc* justification doctrine to exclude an agency's official explanation of an agency rule.").

142. *Id.* at 1933 (KAVANAUGH, J. concurring in part); *accord* 5 U.S.C. § 551(4) (defining an agency "rule" for the purposes of the APA), 5 U.S.C. § 551(13) (defining an agency action for the purposes of the APA).

agency accountability by strengthening the *post hoc* justification doctrine.

1. The Post Hoc Justification Doctrine Was Historically Used to Exclude Litigation Affidavits and Attorney Arguments

There are two seminal cases on which the *post hoc* justification doctrine is based, both called *Securities & Exchange Commission. v. Chenery Corp.*,[143] often referred to as *Chenery I* and *Chenery II*. In *Chenery I*, the Court explained that a court must evaluate an administrative action by the administrative record establishing the basis for that action.[144] In *Chenery II*, the Supreme Court elaborated on that concept and said:

> [A] simple but fundamental rule of administrative law . . . is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency*. If these grounds are inadequate or improper, the court is powerless to affirm the administrative action.[145]

Following *Chenery I* and *Chenery II*, the Supreme Court invoked the *post hoc* justification doctrine frequently to exclude litigation affidavits and attorney arguments from the administrative record.[146] Lower courts applied the *post hoc* justification doctrine "not [as] a time barrier," but rather "to prevent courts from considering rationales offered by anyone other than the proper decision makers."[147]

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143. SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943); SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194 (1947).

144. *See Chenery I*, 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

145. *Chenery II*, 332 U.S. at 196 (emphasis added).

146. *See, e.g.*, Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action."); Bowen v. Georgetown University Hosp., 488 U.S. 204, 479–84 (1988) (same); Investment Co. Institute v. Camp, 401 U.S. 617, 627–28 (1971) (same); Fed. Power Comm'n v. Texaco Inc., 417 U.S. 380, 397 (1974) (same); NLRB v. Metro. Life Ins. Co., 380 U.S. 438, 443–44 (1965) (same); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962) (same).

147. NAACP v. Trump, 315 F. Supp. 3d 457, 466 (D.D.C. 2018) (quoting Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006)), *aff'd sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020). Notably, the *NAACP* opinion is one of the three consolidated cases on which *Regents* was based. *See supra* note 66. In *NAACP*, the D.C. District Court's analysis focused on the plaintiffs' APA claim, concluding that it could review the second DACA Recission Memorandum but that the agency action was nonetheless arbitrary and capri-

In *Regents*, however, the majority made clear that the *post hoc* justification doctrine applies equally to agency decision-makers because "the problem is the timing [of the justification], not the speaker."[148] Examining the Daca Recission Memoranda, the majority concluded that the latter "bears little relationship" to the former.[149] Thus, it said that the second DACA Recission Memorandum was not properly before the Court because it was an impermissible *post hoc* justification.[150] In explaining its reasoning for excluding the second DACA Recission Memorandum, the Court emphasized "[t]he basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted."[151]

The Supreme Court offered several policy reasons for its holding on this issue. Among them, the Court cited instilling public confidence in the administrative process, ensuring the public and parties can timely and fully respond to an agency order, and facilitating the process of judicial review.[152] Perhaps most importantly, it asserted that "requiring a new decision before considering new reasons promotes 'agency accountability.'"[153] Proclaiming that "the Government should turn square corners in dealing with the people,"[154] the Court emphasized that the *post hoc* justification doctrine "appl[ies] with equal force" regardless whether the reasons are raised for the first time in court or by an agency decision-maker.[155]

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cious. *NAACP*, 315 F. Supp. 3d at 473. By contrast, the other two cases on which *Regents* is based chose to analyze the plaintiffs' equal protection claims. *Regents*, 140 S. Ct. at 1904. Although the Supreme Court followed the D.C. District Court by analyzing the APA claim, the Supreme Court's view of the second DACA Recission Memorandum and the *post hoc* justification doctrine was markedly different. *Compare Regents*, 140 S. Ct. at 1908 (explaining that the second DACA Recission Memorandum listed three reasons for recission, only one of which was present in the first DACA Recission Memorandum), *with NAACP*, 315 F. Supp. 3d at 466 (comparing the legal and policy reasons advanced in the second DACA Recission Memorandum with those on which the first DACA Recission Memorandum was based and finding them to be sufficiently similar).

148. *Regents*, 140 S. Ct. at 1909.

149. *Id.* at 1908.

150. *Id.* at 1909.

151. *Id.*

152. *Id.*

153. *Id.* (quoting Bowen v. American Hospital Assn., 476 U.S. 610, 643 (1986). *But see id.* at 1934 (KAVANAUGH, J. concurring in part) ("It . . make[s] little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly *post hoc*, and then to turn around and remand for further explanation by those same agency personnel.").

154. *Id.* at 1909 (majority opinion) (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

155. *Id.*

2. Regents *Used the* Post Hoc *Justification Doctrine to Exclude an Official Agency Action*

When a court finds that an agency failed to adequately explain the reasons for its action, the agency has two options. First, the agency can provide a fuller explanation for its action.[156] Alternatively, the agency can start over and "deal with the problem afresh."[157] If the agency is required to utilize the notice and comment rulemaking process, it is obvious if the agency chooses to begin anew: in that case, it will publish a new proposed rule—with new reasoning—in the Federal Register.[158]

However, DHS's action to rescind DACA was not subject to the notice and comment rulemaking process. Instead, DHS's only option, whether it chose to elaborate or begin anew, was to publish an additional memorandum.[159] This fact blurs the distinction between the two possibilities, particularly because under the APA, the second DACA Recission Memorandum might have been interpreted as an independent agency action.[160] Thus, DHS's action when it issued the second DACA Recission Memorandum could have been to affirm its prior decision to terminate DACA.[161] Because DHS's action was not subject to the APA's notice and comment requirement, the agency's only option was to do exactly what Secretary Nielsen did—issue a new memorandum.[162] It is therefore difficult to draw a distinction between the agency's decision to provide further explanation or begin anew; moreover, attempting to do

156. *Id.* at 1908.

157. *Id.* at 1907–08 (quoting *Chenery II*, 332 U.S. 194, 201 (1947)).

158. *Regents*, 140 S. Ct. at 1907–08. Notably, the notice and comment rulemaking process affords interested parties a timely opportunity to voice their opinions—a policy goal cited as important by the *Regents* majority. *Id.* at 1909; *see also supra* note 142 and accompanying text (explaining that requiring an agency to explain its action contemporaneously ensures that interested parties can fully respond to an agency order). However, because the various memoranda that created and rescinded DACA were not published to the Federal Register, this particular policy goal was never implicated in this case. *But see Regents,* 140 S. Ct. at 1909 (explaining that the *post hoc* justification doctrine clearly served important administrative law values in this case).

159. Wurman, *supra* note 72.

160. *Regents*, 140 S. Ct. at 1933 (KAVANAUGH, J. concurring in part); *accord* 5 U.S.C. § 551(4), (13) (defining "agency rule" and "agency action").

161. *See* second DACA Recission Memorandum, *supra* note 65 ("This explanation reflects my understanding of the Duke memorandum and why the decision to rescind the DACA policy was, and remains, sound.").

162. Wurman, *supra* note 72. JUSTICE KAVANAUGH elaborated that the Court's decision to disregard the second DACA Recission Memorandum in this case seemed particularly mistaken because it shows that DHS did consider precisely the policy issues that the majority says were not considered. *Regents*, 140 S. Ct. at 1934 (KAVANAUGH, J. concurring in part).

so seems like an "idle and useless formality"[163] because in either circumstance the agency has only one way to act.[164]

Although the second DACA Recission Memorandum might have been considered an independent agency action under the APA, the *Regents* Court took a different view of the memorandum. The Court explained that it did *not* consider the second DACA Recission Memorandum to be an independent agency action for two reasons.[165] First, the Court cited the memorandum itself, explaining that Secretary Nielsen said she "declined to disturb" Secretary Duke's recission of DACA.[166] Second, the Court cited to the Government's litigation documents, in which the second DACA Recission Memorandum was described as "additional explanation" for Secretary Duke's recission.[167] Based on these factors, the Court concluded that the second DACA Recission Memorandum "was by its own terms not a new rule implementing a new policy."[168]

Deciding the second DACA Recission Memorandum was impermissibly *post hoc* chafes against the legal maxim that the law values substance over form.[169] However, the Court cited several policy reasons to support its finding.[170] Perhaps most importantly, the Court emphasized that the agency should not cut corners, explaining that "the Government should turn square corners in dealing with the people."[171] The Court clearly felt that increasing agency accountability was of paramount importance in this case.[172]

Going forward, when an agency wishes to elaborate on a proposed action and is not required to utilize the APA's notice and

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163. *Regents*, 140 S. Ct. at 1909 (majority opinion) (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 (1969)).

164. *But cf. id.* ("[H]ere the rule serves important values of administrative law.").

165. *Id.* at 1908.

166. *Id.*

167. *Id.*

168. *Id.*

169. *See, e.g.*, ANTONIN SCALIA & BRYAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 30 (2008). The implication that the second DACA Recission Memorandum would have been considered if Secretary Nielsen merely said "I hereby rescind DACA" shows that the second DACA Recission Memorandum was substantively a new agency action but for a missing bit of formality. *See Regents*, 140 S. Ct. at 1935 (KAVANAUGH, J. concurring in part) ("The Court's decision seems to allow the Department [of Homeland Security] on remand to relabel and reiterate the substance of the Nielsen Memorandum.").

170. *See supra* notes 142–145 and accompanying text (discussing the policy reasons for applying the *post hoc* justification doctrine to the second DACA Recission Memorandum).

171. *Regents*, 140 S. Ct. at 1909 (quoting St. Regis Paper Co. v. United States, 368 U.S. 208. 229 (1961) (Black, J., dissenting)).

172. *See id.* at 1909–10 ("This is not the case for cutting corners.").

comment procedure, the agency should be explicit about whether it is explaining its prior reasoning or reconsidering the problem. This mistake alone was arguably fatal to DHS's attempt to rescind DACA. Had Secretary Nielsen merely included the formal words "I hereby rescind DACA," her memorandum would likely not have been discarded as *post hoc*.[173] Moreover, her memorandum addressed many points the Court said DHS failed to consider—it is very possible that DHS's action could have stood if her memorandum had been admissible.[174] Agencies would therefore be wise to be explicit about their actions to avoid curtailing the reviewable administrative record.

C. Regents *Explains That an Agency's Belief That a Policy Is Illegal, Without More, Is Not Sufficient to Justify the Policy's Recission*

Since its inception, there has been significant debate about DACA's legality among legal scholars.[175] The Fifth Circuit, the highest court to write an opinion on DAPA's legality, found that DAPA was likely both procedurally and substantively defective.[176] The Supreme Court affirmed that judgement without opinion, following a divided four-four vote.[177] Because of the substantial similarities between DAPA and DACA, the Fifth Circuit's reasoning with respect to DAPA's legality could be applied with equal force to DACA.[178] Doing so, Attorney General Sessions found DACA to be illegal.[179] Moreover, the Secretary of Homeland Security—who is responsible for implementing or rescinding DACA—was statuto-

173. *See supra* note 158 (explaining that the second DACA Recission Memorandum was discarded as *post hoc* because it was not explicitly a new agency action).

174. Second DACA Recission Memorandum, *supra* note 65; *see also Regents*, 140 S. Ct. at 1933 (KAVANAUGH, J concurring in part) ("[T]he Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the Executive Branch's action.").

175. *See* Mason Leal, *Trump Card: What the End of Deferred Action for Childhood Arrivals Means for Texas and its Administrative Agencies*, 20 TEX. TECH ADMIN. L.J. 123, 137 (2019) (explaining that more than 100 law and university professors wrote a letter to President Trump asserting DACA is legal).

176. *See generally Texas II*, 809 F.3d 134 (5th Cir. 2015) (discussing the myriad reasons it found the DAPA was both enacted in violation of APA procedure and in violation of statutory authority).

177. *Texas III*, 136 S. Ct. 2271 (2016) (per curiam).

178. *See* second DACA Recission Memorandum, *supra* note 65, at *2 ("Any arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful.").

179. Sessions Letter, *supra* note 52.

rily bound by the Attorney General's legal determination.[180] In short, DHS had sound reasons to assert that DACA was illegal, and it was on that basis that it rescinded the DACA program.[181]

JUSTICE THOMAS vigorously dissented stating that "[t]he decision to rescind an unlawful agency action is *per se* lawful."[182] Yet, with the goal of agency accountability in mind, the majority took a different view.[183] Although the Court acknowledged that "illegality presumably requires remedial action of some sort,"[184] it declined to answer the question of DACA's legality.[185] Instead, the Court asserted that "even if [DACA] is illegal,"[186] that is not by itself sufficient to justify DACA's recission.[187] On its face, such an assertion sounds very shocking.[188] It appears that the Court required DHS to continue to enforce an illegal policy.[189] Moreover, some speculate that it may now be easier to enact an illegal policy than it is to undo one.[190]

The Court, however, greatly increased agency accountability by disallowing illegality to be the sole reason for a policy's revocation. Prior to the Trump administration, "statutory abnegation"—an assertion by an agency that it lacks statutory authority previously

180. *See* 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of . . . laws relating to the immigration and naturalization of aliens . . . [p]rovided, however, [t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling.").

181. First DACA Recission Memorandum, *supra* note 55.

182. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1922 (2020) (THOMAS, J. concurring in part); s*ee also id.* at 1932 (ALITO, J. concurring in part) ("DACA was unlawful from the start, and that alone is sufficient to justify its termination.").

183. *Id.* at 1908–12 (majority opinion).

184. *Id.* at 1908.

185. *Id.* at 1910.

186. *Id.* at 1912.

187. *See id.* at 1915 ("DACA was rescinded because of the Attorney General's illegality determination. But nothing about that determination foreclosed . . . the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.").

188. *Cf. id.* at 1922 (THOMAS, J concurring in part) ("The decision to rescind an unlawful agency action is *per se* lawful).

189. *Id.* ("[T]he majority's contrary holding—that an agency is not only permitted, but required, to continue an ultra vires action—has no basis in law.").

190. *See, e.g.*, *id.* at 1919 ("Under the auspices of today's decision, administrations can . . . adopt[ ] significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications.").

claimed—was an occasionally used deregulatory tool.[191] Under President Trump, however, many agencies turned to statutory abnegation to deregulate in a variety of fields, including immigration, agriculture, and the environment.[192] To be clear, agencies can and frequently do change policy positions.[193] In *Regents*, the Supreme Court explicitly acknowledged that "all parties agree that . . . [DHS] may" rescind DACA.[194] And, although there are some judicial accountability doctrines that must be met, agencies are generally given deference for their own statutory interpretations and policy goals.[195]

However, the administrative law problem with statutory abnegation is that when agencies employed it they generally "offered slender legal reasoning, paid little attention to statutory criteria, avoided past rationales [for enacting the policy originally], and show[ed] little or no engagement with on-the-ground impacts of the old and new policy choices."[196] Certainly that can be said of both the Sessions Letter and the first DACA Recission Memorandum, which relied only on DACA's illegality and litigation risk as justification for terminating the program.[197] When the Supreme Court said that DACA's illegality alone is insufficient to justify the program's recission, it arguably closed the door on statutory abnegation as a stand-alone deregulatory strategy.[198] By so doing, the Court greatly increased agency accountability by ensuring agencies fully support their reasoning for deregulation, rather than hiding behind a mere assertion of illegality.

The Court further expanded agency accountability by faulting DHS for failing to consider reliance interests created by the DACA program.[199] The Government had argued that it did not need to consider reliance interests because "DACA recipients have no 'legally cognizable reliance interests.'"[200] The Government based its

191. William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1513 (2019).

192. *Id.* at 1511.

193. *See id.* at 1512 ("[L]ong-established law states that an agency's initial regulatory views are not frozen in stone. Policy change is not legally suspect.").

194. *Regents*, 140 S. Ct. at 1905.

195. Buzbee, *supra* note 191 at 1512.

196. *Id.* at 1515.

197. Sessions Letter, *supra* note 52; first DACA Recission Memorandum, *supra* note 55.

198. *Regents*, 140 S. Ct. at 1915.

199. *Regents*, 140 S. Ct. at 1913.

200. *Id.*

argument on several premises.[201] First, that DACA was from the outset meant to be a temporary, discretionary policy and a "stopgap measure" rather than a "permanent fix."[202] Next, that DACA status created no lawful status or substantive rights.[203] And finally, that although "law-abiding institutions have 'ordered their affairs' in response to DACA, those interests are 'derivative' of the aliens' ongoing violations of the immigration laws."[204]

The Court rejected that argument, holding instead that reliance interests must be considered when an agency changes an existing policy.[205] It elaborated that "because DHS was 'not writing on a blank slate,' it *was* required to assess whether there were reliance interests."[206] The message is clear: When an agency changes an existing policy, the agency must discuss reliance interests in its explanation—even if it believes that no reliance interests could be legally cognizable.[207]

IV. *REGENTS* AND AGENCY ACTIONS GOING FORWARD

Regents is not the only recent Supreme Court decision that has resulted in increased agency accountability. In fact, *Regents* is part of a line of recent cases in which the Court has sought to curtail the administrative state's broad latitude.[208] In *Kisor v. Wilkie*,[209] the Court limited—but did not abolish—judicial deference to agency rule interpretations, known as *Auer* deference.[210] Although the

201. Reply Brief for the Petitioners at 16–17, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

202. *Id.* at 17.

203. *Id.*

204. *Id.*

205. *Regents*, 140 S. Ct. at 1913 ("[N]either the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any.").

206. *Id.* at 1915 (quoting *id.* at 1929 n.14 (THOMAS J. concurring in part) (emphasis in original)). The Supreme Court went on to elaborate that, although the original DACA memorandum made explicit that the program would not confer any substantive rights, that alone is not sufficient to preclude reliance interests. *Id.* at 1913. Instead, the Court explained that the first DACA Recission Memorandum should have at least discussed reliance interests before deciding whether or how much weight they should carry. *Id.* at 1915.

207. *Id.* at 1915.

208. *See infra* notes 196–208 (explaining a series of recent administrative law decisions).

209. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

210. *Id.* at 2424. *Accord* Connor Raso, *The Supreme Court Curtails but Retains Agency Rule Deference – How Much Will it Matter?*, BROOKINGS (Sept. 24, 2019), http://brook.gs/30mHVly [https://perma.cc/7K25-BJJT]. *Auer* deference is a judicial doctrine which presumes that agencies have the power to authoritatively interpret their own regulations. *Kisor*, 139 S. Ct. at 2412.

Court did not completely eliminate *Auer* deference, its decision in *Kisor* strongly suggests that lower courts should rarely apply *Auer* deference to agency rule interpretations.[211]

The Court also recently decided in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*[212] that a discretionary agency action remained reviewable under the APA.[213] In *Weyerhauser*, the Court decided that the Secretary of the Interior's decision not to exclude an area from "critical habitat" designation was subject to judicial review.[214] Although the Court said the statute clearly conferred discretion on the Secretary, it nonetheless found the decision reviewable because the case involved "the sort of routine dispute that federal courts regularly review."[215] Pointing to the tension between APA § 701(a)(2)[216] and APA § 706(2)(A),[217] the Court reiterated that it must read the discretion exemption "quite narrowly" to honor the presumption of judicial review.[218] Viewing these cases together, it is apparent the Supreme Court is taking small steps toward increased agency accountability.[219] This is notable because, generally, administrative agencies—comprised mostly of unelected officials who are not subject to the political process—have broad leeway to promulgate and enforce policies which substantially impact peoples' lives.[220] By increasing agency accountability to statutory and judicial oversight, courts can better ensure that the people governed by these policies are treated fairly.[221]

Importantly, the Court's recent decisions send a clear message about accountability to administrative agencies. Agencies should be especially cautious when they believe their action is discretionary because *Regents* and *Weyerhauser* teach that agencies are often

211. Frederick Andrew Braunstein, *The State of the Administrative State*, A.B.A. (Feb. 18, 2020), http://bit.ly/30pzsh6 [https://perma.cc/35QU-MBMV].

212. Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv., 139 S. Ct. 361 (2018).

213. *Id.* at 372.

214. *Id.* at 371–72.

215. *Id.* at 370–71.

216. Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (exempting agency actions from APA requirements when the action is committed to agency discretion by law).

217. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (requiring courts to set aside agency actions that are an abuse of discretion).

218. *Weyerhaeuser*, 139 S. Ct. at 370.

219. *See supra* notes 196–207 and accompanying text (explaining the ways in which the Supreme Court has recently increased administrative agency accountability).

220. *See* AMAN JR. & MAYTON, *supra* note 1, at 1 ("[W]e are left with much of government, the part pertaining to the civil affairs of the American people, as the range of administrative law.").

221. *Id.* ("[C]ourts have a major role in assuring that agencies stay within their jurisdiction, act lawfully, and make reasonable decisions.").

wrong on the point.[222] More broadly, the Supreme Court has put administrative agencies on notice that they must diligently adhere to all of the APA's requirements.[223] As JUSTICE ROBERTS explained in *Regents*, "the Government should turn square corners in dealing with the people."[224] The lesson to agencies, then, is simple: Even when there is good cause to believe an agency action is not subject to the APA, a prudent agency should nonetheless comply with the APA's requirements or else risk being reversed in court.

V. CONCLUSION

Administrative agencies have significant power and enact policies with substantial impact on peoples' lives.[225] They are limited only by the requirements of the Administrative Procedure Act, as enforced by the courts.[226] Although agencies generally have broad discretion to carry out their missions, the Supreme Court has recently taken steps to increase agency accountability.[227]

This Comment discussed some of the ways in which agency accountability has increased. In *Department of Homeland Security v. Regents of the University of California*, the Court made several advances in APA oversight.[228] First, the Court continued its narrow reading of the APA's discretion exemption, notwithstanding the fact that deferred action is rooted in the Executive's enforcement discretion.[229] *Regents* also arguably created a path for courts to fault agencies for failing to consider discretionary actions.[230] Next, the Court strengthened the *post hoc* justification doctrine by declining to consider the second DACA Recission Memorandum.[231] Finally, *Regents* arguably foreclosed agencies from using statutory abnegation as a deregulatory tool.[232]

The advances made in *Regents* are part of a trend. The Supreme Court also took steps to increase agency accountability in

222. *Cf., e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1906 (2020) (explaining why DHS believed its action was not subject to judicial review).

223. *Cf. id.* at 1909–10 (explaining that DHS must not cut corners in explaining its reasons for rescinding DACA).

224. *Id.* at 1909 (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

225. AMAN JR. & MAYTON, *supra* note 1, at 1.

226. *Id.*

227. *See supra* Parts III–IV.

228. *See supra* Part III.

229. *See supra* Section III.A.

230. *See supra* Section III.A.

231. *See supra* Section III.B.

232. *See supra* Section III.C.

several other recent administrative law cases.[233] The Court reviewed agency actions that agencies previously considered within their own discretion.[234] The Court also curtailed the *Auer* deference doctrine and signaled that courts should apply it rarely.[235] Taken together, these cases signal that administrative agencies should diligently follow the APA's requirements, even if the agency believes it is acting within its discretionary power.[236] If agencies ensure they "turn square corners," their policies will likely be successful.[237] If they do not, they risk significant litigation and ultimately reversal in court.

233. *See supra* Part IV.

234. *Supra* note 211 and accompanying text.

235. *Supra* notes 197–98 and accompanying text.

236. *Cf., e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1906 (2020) (explaining why DHS believed its action was not subject to judicial review).

237. *Id.* at 1909.

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