Essay

Restoring Reason: Reformulating the Swerve Doctrine of *Motor Vehicle Manufacturers v. State Farm*

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Introduction

In *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*,[1] the Supreme Court famously imported D.C. Circuit Judge Leventhal's requirement for agencies to conduct a "reasoned analysis" when changing course in administering a statute by way of informal rulemaking.[2] In legitimating this form of "hard look" review in *State Farm*,[3] the Supreme Court

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

2 Justice White wrote that "'[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . .'" *Id.* at 57 (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (Leventhal, J.)); *see also id.* at 42 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

3 By "hard look" review I mean substantive review that evaluates whether the agency below took a "hard look" at the issues before making its policy choices. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) ("If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned, though of course the court must not be left to guess as to the agency's findings or reasons." (footnote omitted)). Professor Bruff summarizes: "Hard look review compares the agency's

did not adopt the position—made by Justice Rehnquist in dissent—that a change in political philosophies concomitant with the coming to power of a new administration can be sufficient justification for a change in agency policy.[4]

Though the subsequent case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[5] seemingly allows political philosophy to play a part in an otherwise well-reasoned policy "swerve" based on reasonable interpretations of ambiguous statutory commands,[6] the Court has never fully endorsed Justice Rehnquist's essential formulation that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."[7] The Court should do so now.

Academic debate rages on about the validity of the judicially created "hard look" rule in light of the judicial-review standards of the Administrative Procedure Act ("APA").[8] For example, a recent edition of *The George Washington Law Review* featured an article and two replies discussing the Court's rulings in *Chevron* and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[9] and the prospects for a long-sought "*Vermont Yankee* II" that would relax, among other things, federal courts' imposition of substantive requirements beyond those required under the APA.[10]

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stated rationale for a decision with supporting or opposing data and policy views gathered by the agency as the 'administrative record' for judicial review. The court identifies the agency's value choices and checks their consistency with the factual basis asserted for them, the agency's other present or past policies, and the governing statute." Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 238 (1984) (noting that the *State Farm* Court adopted "hard look" review, "an approach that had developed in preceding years, principally in the lower courts"). Such substantive review of the agency's policymaking moves beyond review of the agency's procedures and requires more than a "'rational connection between the facts found and the choice made,'" the standard set forth in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), explicating the "arbitrary" or "capricious" standard of § 706(2)(A) of the APA.

4 *See State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

5 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

6 *See id.* at 842–43.

7 *See State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

8 Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

9 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

10 Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 880–82 (2007) (questioning whether *substantive* hard-look review is incompatible with the *procedural* concerns animating *Vermont Yankee* and concluding "*Vermont Yankee* and hard-look review can peacefully coexist"); Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 904–10 (2007) (argu-

This Essay focuses on one such substantive requirement: *State Farm*'s "reasoned analysis" standard and the majority's disregard of the political-philosophy justification advanced by Justice Rehnquist's *State Farm* dissent. A change in political philosophies accompanying a change in presidents may at times be a sufficient basis for a reversal of a prior administration's interpretations of broad, vague, or ambiguous statutory commands, beyond just the more limited interpretive deference accorded under *Chevron*. In the words of the APA, it is neither "arbitrary" nor "capricious," nor necessarily an "abuse of discretion,"[11] for administrative agencies "to assess administrative records and evaluate priorities in light of the philosophy of the administration."[12]

Such "swerves" in policy are not inherently suspect and should not be regarded as such by courts. The citizenry's shifting and developing views on divisive policies—for example, seatbelt regulations in the 1980s,[13] abortion funding in the 1990s,[14] and global warming in the 2000s[15]—can be given legitimate effect through agency interpretations because presidents are politically accountable and (nearly always) popularly elected.[16] So long as those interpretations are within the reasonable bounds of the governing statute, courts are not justified in requiring more than a "'rational connection between the facts found and the choice made'"[17] in the new administration's interpretation.

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ing that hard-look review is unjustifiable under the APA and should be abandoned); Paul R. Verkuil, *The Wait Is Over:* Chevron *as the Stealth* Vermont Yankee *II*, 75 GEO. WASH. L. REV. 921, 922–23 (2007) (arguing that although *State Farm* will not now be overruled, *Chevron*'s "connection to the *State Farm* dissent implies that hard-look review should have been moderated by *Chevron*'s broad acceptance of the role of the political branches in determining policy. After *Chevron*, in effect, hard-look review was supposed to be more bark than bite."). The series revisited Professor Verkuil's 1981 article calling for a "*Vermont Yankee* II" reining in aggressive substantive judicial review then popular in the circuit courts. Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee *II*, 55 TUL. L. REV. 418, 427 (1981) (arguing *Vermont Yankee* should be "read by the Court in the future to moderate the record building demands of *Overton Park*").

11 5 U.S.C. § 706(2)(A) (2000).

12 *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

13 *See id.* at 29 (majority opinion).

14 *See generally* Rust v. Sullivan, 500 U.S. 173 (1991).

15 *See generally* Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

16 Some presidents, of course, do not win the popular vote but win the Electoral College vote prescribed under Article II, Section I and the Twelfth Amendment to the Constitution and 3 U.S.C. §§ 1–21 (2000). Specifically, the presidents elected in 1824, 1876, 1888, and 2000 did not receive the most popular votes. *See* Historical Election Results, http://www.archives.gov/federal-register/electoral-college/votes (last visited June 16, 2008).

17 *State Farm*, 463 U.S. at 43, 52 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

Requiring the version of "reasoned analysis" the *State Farm* majority contemplated to disprove arbitrariness and capriciousness—or, alternatively, to prove a rational relation between facts and policy—exceeds the APA's demands. The requirement artificially constricts the modes by which an agency administering broad, vague, or ambiguous statutory commands can prove that it is moving permissibly within and among policy choices Congress chose not to make. This, in turn, disallows a newly elected president either to respond nimbly to the democratically expressed will of the people—or just to act in his or her best judgment as endorsed by the electorate—on a given issue that admits of more than one valid policy answer not given explicitly by legislation.

Part I analyzes applicable sections of the APA. Part II traces the D.C. Circuit case law giving rise to *State Farm*'s "reasoned analysis" formulation. In particular, this Essay relates the genesis and history of the "reasoned analysis" standard in the D.C. Circuit to evidence that its lineage does not support the application given it by the Supreme Court in *State Farm*. Part III discusses the imported "reasoned analysis" standard as articulated in *State Farm*, and the *Chevron* doctrine that was announced the following year. Part IV concludes with arguments for rescinding the "reasoned analysis" requirement—at least as given effect by the *State Farm* majority—in reviewing swerves in agency policy resulting from changes in control of the executive branch.

I. The Analytical Framework: The APA and Governing Statutes

Any analysis of the proper standards for reviewing agencies' judgments must begin with the text of the statute which governs such review. The necessity of beginning with the statutory text and not judicial glosses thereon, even twenty-four years after the Court's decision in *State Farm*, becomes especially apparent in evaluating the requirement for "reasoned analysis."

Agencies act under governing or organic statutes creating or empowering them to act in some sphere,[18] and the APA applies to most "final agency action" under those statutes.[19] All agree that "final agency action" includes *rescissions* of rules—or "swerves" in policy—as evidently as it does *creations* of rules because the APA defines

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18 For example, see *infra* notes 57–60 and accompanying text regarding such provisions of the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified as amended in scattered sections of 49 U.S.C.).

19 *See* 5 U.S.C. § 704 (2000).

"agency action" to include "the whole or a part of an agency rule, [or] order"[20] and defines "rule making" as "formulating, amending, or repealing a rule."[21]

The APA requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[22] In reviewing hearings on the record as part of formal rulemaking or adjudications provided by the APA or an agency's organic statute, courts may also set aside findings "unsupported by substantial evidence."[23] Key here is that informal rulemaking does not involve hearings and is not adjudicatory—and therefore is not subject to the statutory "substantial evidence" standard.

A comparatively easy case emerges if, for instance, an organic statute under which the agency purports to act clearly mandates "the agency shall not consider the political philosophy of any member of the administration" or directs an agency simply to add some set of numbers collected, compare the sum to a chart provided in the statute, and order the stipulated result correlating to the given sum, "considering no other factors whatsoever." In either hypothetical case, the statute would make it "not in accordance with law" under § 706(2) to consider the President's political philosophy on how the result should come out. This much seems uncontroversial.

Most statutes are not so plain, of course, and many incorporate (either expressly or by silence) the "arbitrary or capricious" standard of the APA in evaluating "final agency action."[24] The proper standard of review for rescissions or swerves in policy, then, is for arbitrariness, capriciousness, abuse of discretion, or violation of a governing statute. As we shall see, the *State Farm* Court reached this same conclusion before effectively supplanting it with the more burdensome "reasoned analysis" requirement borrowed from the D.C. Circuit.[25]

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20 *Id.* § 551(13).

21 *Id.* § 551(5).

22 *Id*. § 706(2)(A).

23 *Id.* § 706(2)(E).

24 *E.g.*, National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 103(b), 80 Stat. 718, 719 ("The Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this title.").

25 To be clear, some would point out that "reasoned analysis" is not technically the "standard" courts apply; the standard is still the "arbitrary" or "capricious" standard or the "substantial evidence" standard of 5 U.S.C. § 706(2)(A) or (E), respectively. But courts now require "reasoned analysis" to *satisfy* either standard, thus essentially narrowing the paths by which agencies can disprove that they acted arbitrarily, capriciously, or without substantial evidence. The difference is a matter of kind, not just degree, and the distinction is both doctrinally and analytically significant.

Where the APA applies, then, the incumbent President's political philosophy is an invalid basis for agency judgments (e.g., rulemakings, statutory interpretations) in the administration of particular statutes only if the use of the President's political philosophy as a basis for decisionmaking is arbitrary, capricious, an abuse of discretion, or not in accordance with the governing statute. But it is not arbitrary or capricious for agencies to fill gaps left by Congress—whether by statutory interpretation, rulemaking, adjudication, or other administrative mechanism—by analyzing existing policies, national priorities, and even inconclusive data in light of the President's political philosophy.

Taken by themselves, the terms "arbitrary" and "capricious" seem to require only that there be some intrinsically motivating factor behind a choice—for example, that the choice is not accidentally or intentionally ignorant of existing policy.[26] According to Webster's, caprice is "impulsive" and "seemingly unmotivated."[27] Wholly unexplained shifts in policy dictated by an agency head to his or her staff with no prior signal or discussion are capricious (and highly unlikely). Something arbitrary (1) "depend[s] on individual discretion" that is "not fixed by law," (2) is marked by "unrestrained" power, or (3) is "based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something," or "coming about seemingly at random or by chance or as a capricious and unreasonable act of will."[28]

As to the first of these, all agency policy must be within the bounds established by the organic statute, even if those bounds are broad, vague, or ambiguous. Policy choices that fall within the range of options left open by statute are within the range "fixed by law." Webster's example for the first of these definitions makes this distinction: for example, a judge inflicting an arbitrary form of punishment not within the options provided by law. But one would not consider arbitrary two judges who each choose a punishment properly within the range of legal options just because each judge chooses a different punishment from the other. A similar argument applies to the second definition involving "unrestrained" power: the organic statute cabins, even if broadly, the range of policy choices available to an agency.

As to the third definition, one might at first argue that it is an "unreasonable act of will," or an act of "individual preference or convenience" not based on the policy's "necessity" or "intrinsic nature,"

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26 For example, see *infra* text accompanying note 47.

27 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 183 (11th ed. 2005).

28 *Id.* at 63.

to change agency policy based upon a change in administrations with concomitant change in political philosophy. Upon close analysis, this argument fails.

Imagine a set of index cards placed face-down on a large table, each containing a policy position written on its hidden side. Now imagine two people asked to state their policy preference. Person A does not know or care and conveniently chooses a card at random and states its contents as his policy preference. Person B, already knowing his preference, states it aloud without looking at any cards, even though his is contained on one of the cards facing down.[29] Neither has stated a rationale for his choice, and Person A did not even state why he chose to choose a card at random. Person B already had considered the issue and chose one of the available choices not for his convenience but for its intrinsic value, that is, for his belief in its correctness. This is an act of will (as most acts are), but it is hardly unreasonable; and his choice of the policy is for its content, its intrinsic nature. A policy chosen for its intrinsic value is not arbitrarily chosen.

This reflects common sense: when something has intrinsic value, its selection is for a reason. Arbitrariness implies plucking from available options with no consideration of value. Policies of presidential administrations, right or wrong, are the product of thought, debate, and analysis at least at some level. Typically that level is even national in scope, e.g., the abortion gag rule preceding the 1992 election or the role of global warming and EPA regulation in current politics. The change in policies is itself made because of the administration's and the agency's belief in the correctness of the content, the intrinsic value, of the act of changing policies.

Where organic statutes leave room for agency discretion, one must remember it was Congress that left the gap to be filled, possibly so that shifting political philosophies could indeed be implemented and tested over time. Policy swerves are subject to congressional amendment, and are not impulsive or lacking in intrinsic value when they are within the purview of the organic statute and flow from the voters' election of a president promising to analyze government policies according to a particular philosophical orientation, e.g., prioritizing cost-benefit analysis over social welfare analysis or vice versa.

This is why it matters that requiring "reasoned analysis" (a positive requirement) is different from requiring that something not be

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[29] To carry the analogy forward in the administrative agency context, imagine that Person B's assistant turns each card over in turn until he finds the one that states Person B's preference, then stops turning cards over and implements the matching policy.

"arbitrary" or "capricious" (a negative requirement). Requiring reasoned analysis does not just step up the *degree* of review required, but wholly changes the *kind* of review required. Instead of asking straightforwardly whether the product of a rulemaking is by itself arbitrary or capricious—such as by utterly disregarding existing policy without noting that it is mindfully being changed—courts assess whether a rule or policy is supported *in substance.* This kind of review is more akin to judicial evaluation of adjudications, for which a "substantial evidence" standard applies. So where did this requirement for "reasoned analysis" originate, and what are its implications?

II. An Etymology of "Reasoned Analysis"

A. The Breeding Ground: Greater Boston Television Corp. v. FCC *and Other D.C. Circuit Precedents*

The APA existed for some twenty-four years prior to Judge Leventhal's opinion in *Greater Boston Television Corp. v. FCC*,[30] the 1970 D.C. Circuit opinion declaring that "[j]udicial vigilance" was necessary "to enforce the Rule of Law in the administrative process" when an agency's "policies are in flux."[31] Without citing a single provision of the APA—not even for determining the court's jurisdiction or scope of review—the *Greater Boston* court reviewed a Federal Communications Commission adjudication granting a broadcast license to one of four applicants.[32] Because the agency's policy preferences surrounding the evaluation of broadcast applicants had changed in the course of the adjudication,[33] the court discussed at length the implications of a policy change upon private parties competing for limited government licenses.

The court permitted that an "agency's view of what is in the public interest may change, either with or without a change in circumstances,"[34] but that "an agency changing its course must supply a *reasoned analysis* indicating that prior policies and standards are being deliberately changed, not casually ignored."[35] The court warned that "if an agency glosses over or swerves from prior precedents without

30 Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970).

31 *Id.* at 852.

32 *Id.* at 844.

33 *See id.* at 849–50.

34 *Id.* at 852 (footnote omitted).

35 *Id.* (emphasis added).

discussion it may cross the line from the tolerably terse to the intolerably mute."[36]

These general propositions are Judge Leventhal's syntheses of several prior statements made in opinions (mostly by Judge Leventhal himself) reviewing agency adjudications of private rights, not informal rulemakings like the one at issue in *State Farm*.[37] Each proposition and the authority cited to support it is considered in turn: first, the permissibility of agencies' change in policies and, second, the creation of the "reasoned analysis" standard.

1. *Permissibility of Agencies' Change in Policies*

First, for the proposition that agencies may change their policy of what best serves the public interest, Judge Leventhal cited his own 1967 opinion in *City of Chicago v. Federal Power Commission*,[38] involving an adjudication by the Federal Power Commission of a settlement agreement. Judge Leventhal noted:

> The Rule of Law does not forbid an agency from modifying its regulatory policy . . . . Indeed one of the signal attributes of the administrative process is flexibility in reconsidering and reforming of policy. What is required by the Rule of Law is that agency policies and standards, whether or not modifications of previous policies, be reasonable and non-discriminatory, and flow rationally from findings that are reasonable inferences from substantial evidence.
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> . . . It is not necessarily invidious that a change in approach may reflect a change in personnel; indeed, it may well be a blessing rather than a vice that the rigidity of staff bureaucracy may be minimized by changes of agency membership that can initiate a fresh look at old problems, rather than a mechanical perpetuation of what has been done in the past. In any event, judicial review is not abdicated by a doctrine that accepts an agency discretion to change policies, but rejects rulings based on improper pressures on or even secret

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[36] *Id.* Although this language would seem to presage a rejection of the Agency's "swerve," the court indeed upheld the Agency action as "reasonable" and "supported by substantial evidence," the latter matching the APA standard that would apply under § 706(2)(E), though the court chose not to cite it. *See id.* at 863.

[37] *See* Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 33–34 (1983).

[38] City of Chicago v. Fed. Power Comm'n, 385 F.2d 629, 633, 637 (D.C. Cir. 1967) (Leventhal, J.), *cited with approval in Greater Boston*, 444 F.2d at 852 n.26.

> contacts with administrators, the exercise of pure whim, or other irrational or arbitrary bases of decision.[39]

In both paragraphs, Judge Leventhal gives with one hand and takes with the other—and uses little language from the APA. Hailing administrative flexibility, he nonetheless provides several bases for courts to overturn swerves they do not find "reasonable," "non-discriminatory," and "flow[ing] rationally from findings that are reasonable inferences from substantial evidence."[40] Like many judicial standards, these are alluring standards and sound unobjectionable; however, a close reading indicates that Judge Leventhal incorrectly applied standards that the APA requires for reviews of adjudicatory *decisionmaking*, not for the choice of underlying *policies* agencies establish to guide their adjudicatory decisionmaking.

Underlying policies are to agencies what rules of decision are to courts. A change of agency policy essentially changes the applicable rules of decision agencies will apply in adjudications like the one in *Greater Boston*. And the APA provides, in 5 U.S.C. § 706(2)(A), for better or worse, that agencies get to modify those policies so long as modification is not arbitrary, capricious, abusive of discretion, or contrary to the agency's organic statute. Substantial evidence is not required. Instead, it is the individual adjudicatory outcomes flowing from those underlying policies that must be based on substantial evidence per § 706(2)(E).

Judge Leventhal similarly appears to defer to swerves arising from personnel changes but provides for judicial reversal based on a court's detection of "improper pressures," "secret contacts," "exercise of pure whim, or other irrational or arbitrary bases of decision."[41] Logically, his dicta imply that a change in policy based on a change in agency personnel is not included in the category of "other irrational or arbitrary bases of decision." Indeed, both in *City of Chicago* and *Greater Boston*, Judge Leventhal cited approvingly Judge Prettyman's 1956 observation in another adjudication case, *Pinellas Broadcasting Co. v. FCC*,[42] which is the earliest precedent cited in *Greater Boston* for the "reasoned analysis" requirement:

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39 *Id.* at 637–38 (footnotes omitted).

40 *Id.* at 637.

41 *Id.* at 638.

42 Pinellas Broad. Co. v. FCC, 230 F.2d 204 (D.C. Cir. 1956) (Prettyman, J.) (adjudication for permit to build TV station), *cited with approval in* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 n.26 (D.C. Cir. 1970).

> [T]he Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational; e.g., both free trade and protective tariff are rational positions. All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary.
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> In the case at bar there appears some suggestion that the Commission has changed, or is changing, its view as to the dominant importance of local ownership and as to the evil of a concentration of the media of mass information. But in so doing it is operating within the area of legislative-executive judgment. The courts cannot interfere so long as the process, the premises, and the judgment are not arbitrary. The rationality of some basic theses as to the public good is self-evident, and of some others is so well known as to require judicial notice. But it may sometimes be that the supporting philosophy of a general policy on such matters is so obscure as to require explanation. In such a case, if the conclusion is challenged as arbitrary, it would seem that the court, in the process of adjudicating that issue, can require a statement of the premises for and the reasoning toward the general policy.[43]

Here, Judge Prettyman acknowledges that it is not irrational to have opposing philosophies control at various times on certain matters of public policy. Notably, he asserts that only when both "the supporting philosophy" of an agency's policy is "so obscure as to require explanation," *and* the agency's conclusion is challenged as arbitrary, should a court then require a statement of the premises for and reasoning toward the policy.[44] This statement contrasts starkly with the later statements made by Judge Leventhal in the cases discussed in this section; for one, Judge Prettyman more precisely distinguishes underlying policy from individual adjudications.

Judge Prettyman's formulation almost surely represents the understood meaning of the APA's "arbitrary" or "capricious" standard of judicial review prior to its judicial reformation beginning in the 1960s and culminating in the 1983 *State Farm* opinion.[45] Agencies'

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43 *Id.* at 206.

44 *Id.*

45 *See* Beermann & Lawson, *supra* note 10, at 880–82 ("Since the late 1960s, courts con-

swerves in underlying policy, if not arbitrary, capricious, or contrary to statute, were largely unreviewable in 1952; by 1967, under Judge Leventhal's formulation, they were reviewable for reasonableness, discrimination, and substantiality of evidence.[46]

2. *"Reasoned Analysis" for Agencies' Changed Policies*

Next, for the proposition that an agency "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored,"[47] Judge Leventhal in *Greater Boston* cited his own 1966 opinion in *New Castle County Airport Commission v. Civil Aeronautics Board*,[48] another agency-adjudication case, in which he noted:

> An administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to precedent. It may switch rather than fight the lessons of experience. An agency reversing its course should supply an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the need for adherence to standards.[49]

The imprecision of this statement is unfortunate and demonstrates how unnecessary judicial glosses on statutory terms can confuse the state of the law. Students and practitioners of administrative law understand this gloss to mean that an agency cannot be permitted to ignore existing policy and effect a change by merely stating their policy to be X when it has long been Y and rule according to X without further discussion. A natural reading of the final sentence, however, is that courts may properly more closely scrutinize policy swerves because they do not adhere to existing standards. Such language provides precedent for a court to rely on the "may switch" language to affirm swerves that the court favors, but to rely on the

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cerned about industry capture of administrative agencies have used [5 U.S.C. § 706(2)(A)] to apply tough substantive standards to agency decision making."); Pierce, *supra* note 10, at 906 ("Hard-look review is massively unpredictable in its application and effects. Moreover, it arose through the same kind of arrogant and illegitimate judicial decision-making process that spawned the practice the Court condemned in *Vermont Yankee*.").

46 *See City of Chicago*, 385 F.2d at 637; *supra* note 40 and accompanying text.

47 Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

48 New Castle County Airport Comm'n v. Civil Aeronautics Bd., 371 F.2d 733 (D.C. Cir. 1966) (Leventhal, J.) (adjudication for airline's "certificate of public convenience and necessity"), *cited with approval in Greater Boston*, 444 F.2d at 852 n.27.

49 *Id.* at 735 (footnote omitted).

"indifferent to the need for adherence to standards" language to overturn swerves that it disfavors.

Perhaps Judge Leventhal meant to clarify three years later in his opinion in *Marine Space Enclosures, Inc. v. Federal Maritime Commission*,[50] another adjudication case cited in *Greater Boston* as support for the "reasoned analysis" requirement:

> An agency may modify or even reverse its past policies and announcements, but the confidence of a reviewing court that these adjustments are made in accordance with the requirements of law is not enhanced when the prior precedents are not discussed, the swerves and reversals are not identified, and the entire matter is brushed off once over lightly.[51]

Taken at face value, this language merely indicates that a change in policy should be noted as such, so as to be deliberate and not accidental or invidious—what the APA calls arbitrary or capricious. Surely there is no objection to this requirement that an agency acknowledge its change in policy explicitly.[52] "Reasoned analysis," while alluring and unobjectionable in itself, is hardly necessary, however, to signal an agency's mindful change in policy. Again, the APA itself provides all that is needed: disallowing arbitrary or capricious policy swerves, which entirely silent swerves surely are.

B. *Analyzing the* Greater Boston *Predecessors and Their Resulting "Reasoned Analysis" Standard*

Notably, not a single one of the six cases—all cited by the *Greater Boston* court as support for the "reasoned analysis" standard—cited a single provision of the APA. And, each involved *adjudication* of private rights, not generally applicable legislative *rulemaking*. Thus, 5 U.S.C. § 706(2)(E)'s "substantial evidence" standard applied to the adjudicatory decisionmaking and the agency's reasoning toward those

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50 Marine Space Enclosures, Inc. v. Fed. Mar. Comm'n, 420 F.2d 577 (D.C. Cir. 1969) (Leventhal, J.), *cited with approval in Greater Boston*, 444 F.2d at 852 n.28.

51 *Id.* at 585 (footnote omitted); *see also* WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (Leventhal, J.) (adjudication for waiver of rule's application), *cited with approval in Greater Boston*, 444 F.2d at 852 n.28.

52 *E.g.*, Rust v. Sullivan, 500 U.S. 173, 187 (1991) (upholding President George H.W. Bush Administration's change of interpretation of a statute providing for federal funding of family-planning services to disallow abortion counseling in funded clinics, and noting agency's clear statement that one factor in its policy shift was "a shift in attitude" about abortion funding). President Clinton famously lifted President Bush's "gag rule" soon after taking office. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2318–19, 2378 (2001) (discussing President Clinton's reversal of his predecessor's "gag rule").

decisions, not the arguably less demanding "arbitrary" or "capricious" standard of § 706(2)(A).

"Judicial vigilance" in search of "reasoned analysis" of the evidence supporting a trial-like adjudicatory outcome may be desirable in the context of an adjudication for highly desired and exclusive private rights or privileges subject to government control. The "reasoned analysis" should be, however, an analysis of the *evidence* in the individual case, not of the underlying *policies*. As Judge Prettyman delineated in *Pinellas Broadcasting*, agencies may modify the latter so long as the policy is not arbitrary, capricious, abusive of discretion, or contrary to the agency's organic statute.[53]

When applying those policies, as in agency adjudications, then agencies must act upon substantial evidence, which almost surely must be analyzed in a "reasoned" way in the course of decisionmaking. But it is judicial sleight of hand to apply a standard like "reasoned analysis," more properly applicable to the process of evaluating evidence (per 5 U.S.C. § 706(2)(E)), to the process of changing policies (per § 706(2)(A)). Even as a judicial measure of administrative evaluation of evidence, "reasoned analysis" most precisely demonstrates the *accuracy* of the evaluation of evidence, not the *weight* or *amount* of evidence in support of a decision; the APA's "substantial evidence" standard sufficiently gauges the weight or amount of evidence.

This is where the *Greater Boston* standard goes wrong: it does not distinguish "reasoned analysis" of evidence from "arbitrary" or "capricious" policymaking or policy swerves. The standard disregards—or fails to distinguish—the terms of the APA and fails to apply faithfully the particular APA judicial review standards to the particular agency actions to which each is applicable. The change is one of *kind* and not merely *degree*: "reasoned analysis" is a noun, not an adjective like "arbitrary," "capricious," or "abusive." The former is something affirmatively required, not a description of what agency action may not be. To be sure, "reasoned analysis" might be one path to a decision that is not arbitrary, capricious, or abusive of discretion. But that does not mean it is the *only* path.

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[53] *See* Pinellas Broad. Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir. 1956); *see also supra* notes 42–44 and accompanying text.

III. *"Reasoned Analysis" in Through the Back Door:* State Farm

A. *The Facts and Politics*

In *State Farm*, the Court considered orders of the National Highway Traffic Safety Administration ("NHTSA") rescinding a safety standard requiring automobile manufacturers to install passive restraints—either automatic seatbelts or airbags—in cars.[54] The case involved not adjudication but rulemaking.[55] As the Court detailed, the history of the standard was rife with politics: after initial passage of the governing statute by a Democratic Congress and President, the passive restraint standard was initially implemented by a Democratic administration, then strengthened by President Nixon's Republican Administration, partly repealed by statute by a Democratic Congress responding to public outcry, partly suspended by President Ford's Secretary of Transportation, revived full force by President Carter's Democratic Secretary, and, finally, essentially eviscerated by President Reagan's Secretary.[56]

So much fluctuation in policy was made possible by the governing statute, which gave the broadest of mandates to the Secretary of Transportation. It commanded that the Secretary "shall establish by order appropriate Federal motor vehicle safety standards," and that each "standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms."[57] It directed that

> [i]n prescribing standards . . . the Secretary shall (1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this Act . . . and (4) consider the extent to which such standards will contribute to carrying out the purposes of this Act.[58]

The Secretary was "authorized to issue, amend, and revoke such rules and regulations as he deems necessary to carry out" the statute's directive.[59] The statute stated plainly, "The Administrative Procedure

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54 Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983).

55 *See id*. at 38 (noting the final rule at issue had been subject to written comments and public hearings).

56 *See id.* at 34–39.

57 National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 103(a), 80 Stat. 718, 719.

58 *Id.* § 103(f), 80 Stat. at 719.

59 *Id.* § 119, 80 Stat. at 728.

Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this title."[60]

In 1967, the Secretary, through the NHTSA, issued an initial order for the installation of manual seatbelts in all cars.[61] When it became apparent people were not using manual seatbelts, the Secretary, a member of President Nixon's Cabinet, moved to require full passive restraint: either airbags or automatic seatbelts, as manufacturers chose.[62] Up to this point, safety concerns appear to have trumped cost-benefit concerns. That would soon change, and the near decade-long political and legal battle culminating in the *State Farm* decision would ensue.

In June 1976, President Ford's Secretary initiated rulemaking proceedings resulting in his order suspending the passive restraint requirement, proposing a period of public education by widespread demonstration of passive restraints in 500,000 cars, and essentially making optional the use of airbags, automatic seatbelts, or manual seatbelts.[63] But Jimmy Carter won the presidential election later that year, and his new Secretary disagreed with the prediction of Ford's Secretary that the public would widely resist mandatory passive restraint systems without initial education.[64] His 1978 regulation ordered the phase-in between 1982 and 1984 of mandatory passive restraints: manufacturers' choice of airbags or automatic seatbelts.[65] As a preview of the battle to come in *State Farm*, the regulation withstood dual challenges by the libertarian Pacific Legal Foundation, which opposed the mandate altogether, and consumer-rights activist Ralph Nader, who argued the mandate was not phased in quickly enough.[66]

The Secretary's expectations, however, that sixty percent or more of manufacturers would choose to install airbags proved wrong: by 1981, when newly elected President Reagan's Secretary took office, it was apparent that ninety-nine percent of new cars would not only lack airbags, but would contain seatbelts that, although "automatic," could

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60 *Id.* § 103(b), 80 Stat. at 719.

61 *State Farm*, 463 U.S. at 34.

62 *Id.* at 34–35. Until the full passive restraints were implemented, carmakers were ordered to install ignition locks disallowing ignition of the car until seatbelts were fastened. *Id.* The move was so unpopular that Congress amended the original statute to disallow ignition locks or continuous buzzers. *Id.* at 36.

63 *Id.* at 36–37.

64 *Id.* at 37.

65 *Id.*

66 *See* Pac. Legal Found. v. Dep't of Transp., 593 F.2d 1338, 1340 (D.C. Cir. 1979).

easily and permanently be detached, never to be used.[67] "Automatic" (or "passive") seatbelts, attached to the doorframe, wrap around the driver or passenger automatically, requiring no action of the driver or passenger. Automatic belts, however, may be either detachable or nondetachable. The 1978 Carter Administration's regulation did not explicitly require nondetachable automatic seatbelts, thereby allowing manufacturers to install seatbelts that, once detached, entirely defeated the purpose of mandatory passive restraints.[68]

President Reagan's Secretary made good on the President's campaign promise to reevaluate automobile industry regulation in light of an economic downturn and what was perceived to be ineffective regulation.[69] Because manufacturers were poised to spend over $1 billion to install detachable automatic seatbelts that might not even increase safety, the Secretary reopened rulemaking on the standard, ordered a one-year delay in implementation, and proposed rescinding the entire mandate.[70] Following public comments and hearings, the Secretary indeed rescinded the passive restraint requirement.[71]

The Agency's sweeping deregulatory effort, however, threw the baby out with the bathwater. In rescinding the entire safety standard merely because it appeared carmakers had chosen the least effective (detachable automatic seatbelts) of the three available options (airbags, detachable automatic belts, or nondetachable automatic belts), the Agency never considered merely eliminating the option for detachable automatic belts and thus requiring one of the other two restraints.[72] As the Court noted, "[t]his judgment reflected not a change of opinion on the effectiveness of the technology, but a change in plans by the automobile industry."[73] Of course, the Agency asserted its view that (1) it was inefficient to require automakers to

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67 *See State Farm*, 463 U.S. at 38–39.

68 *See id.* at 39, 51–57.

69 *See* Michael deCourcy Hinds, *. . .And on the Highways, Betting on Better Drivers*, N.Y. Times, Dec. 5, 1982, at E20 ("When President Reagan took office, one of his primary concerns was the auto industry's poor health. Car manufacturers were reporting losses of $4.3 billion in 1980 and worker layoffs that topped 580,000 [in 1981]. A Presidential task force recommended several remedies, including massive regulatory relief. In April 1981, the highway safety agency started to comply. It proposed revoking, revising or delaying 17 safety regulations or rulemaking procedures on a host of items, from crash-resistant bumpers to battery designs."); *The Reaganites Business Is Watching*, N.Y. Times, Jan. 10, 1982, at sec. 12 (profiling ten of President Reagan's appointees, including NHTSA Administrator Raymond Peck, Jr., and quoting another appointee, Robert Odle, Jr.: "This President has a habit of keeping his campaign promises").

70 *State Farm*, 463 U.S. at 38–39.

71 *Id.* at 38.

72 *See id.* at 46.

73 *Id.* at 38.

spend $1 billion to install detachable belts not likely much more effective than manual belts already installed, and (2) such a regulatory mandate would be viewed by consumers as "an instance of ineffective regulation."[74] Whatever these reasons said for the decision to rescind the *detachable* automatic seatbelt option, they said nothing about the decision to rescind the other two options, airbags and nondetachable belts.[75]

It is critical, then, to separate the *State Farm* decision into two parts to understand the dissenters' argument and the premise of this Essay's thesis: the unanimous finding that *total silence* on the airbag and nondetachable seatbelt options was impermissible; and the 5–4 holding that the reasons given for rescinding the *detachable* seatbelt option were likewise insufficient. Permitting a change in administrations—and the accompanying change in political philosophy—to justify policy swerves need not mean administrative rulemaking by silence. Agencies should be free to openly reanalyze debatable facts in light of a new administration's political philosophy to reach different conclusions fairly drawn from those facts. Rescinding two scientifically validated passive restraint methods without any reason at all (not even a bare "The voters told us they wanted no such safety mandates"[76]) was of course arbitrary and capricious.

As for the detachable seatbelt option, however, there was a rational connection between the facts found—that the detachable belts standard would cost $1 billion, achieve little safety benefit, and, in the Agency's judgment, "poison[ ]" public opinion of safety regulation[77]—and the choice made to rescind that portion of the standard. This alone made the rescission not arbitrary or capricious. The Court's further disregard of the obvious role of the change in political philosophies accompanying the change in presidential administrations effectively delegitimized change in philosophies as a sufficient basis for policy swerves. The practical difference in *State Farm* may seem minimal, but the principle emerging from the Court's divided treatment of the two distinct issues is an important one.

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74 *Id.* at 39.

75 *See id.* at 46, 51; *see also id.* at 57–58 (Rehnquist, J., concurring in part and dissenting in part) (distinguishing the Agency's treatment of the three technologies).

76 *See infra* note 81.

77 *See State Farm*, 463 U.S. at 39 (internal quotation marks omitted).

B. The Majority Opinion

First, all nine members of the Court acknowledged that Congress had never mandated passive restraints of any kind.[78] If Congress had mandated passive restraints, there would be no basis for the President or his Secretary to refuse to require them. All nine members of the Court also agreed that rescission of the standard was unjustified as related to airbags and nondetachable automatic seatbelts because the Agency had provided effectively "no reasons,"[79] "no explanation at all"[80] for rescinding these options as opposed to either, say, (1) mandating them *instead of* detachable automatic seatbelts or (2) providing sufficient basis for rescinding them *along with* the detachable automatic seatbelt option. If airbags and nondetachable automatic seatbelts were no longer valid options for increasing automobile safety, the Agency did not say why.[81]

All nine members of the Court agreed that the standard in 5 U.S.C. § 706(2)(A) applied to disallow actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[82] All nine also agreed that *at a minimum* an agency must provide a "'rational connection between the facts found and the choice made.'"[83] The majority indicated several different ways a court determines whether an agency action is arbitrary or capricious: "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts

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78 *Id.* at 59 n.* (Rehnquist, J., concurring in part and dissenting in part); *see also id.* at 44–46 (majority opinion).

79 *Id.* at 50 (majority opinion) (airbags); *id.* at 55 (nondetachable seatbelts).

80 *Id.* at 58 (Rehnquist, J., concurring in part and dissenting in part) (expressing full agreement with majority as to Agency's treatment of airbag and nondetachable automatic seatbelts).

81 The Agency also did not provide any political reasons such as the statement hypothesized in JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 528–29 (5th ed. 2003):

> Apparently, the Administrator did not believe that he could simply say: "There has been an election since this rule was promulgated. The Carter administration thought passive restraints were a good idea; we do not. This disagreement reflects a fundamental difference in ideology. When in doubt the Carter administration chose to pursue protection of the public safety, notwithstanding the substantial economic costs and the intrusions on individual choice that such a posture entailed. Faced with these competing considerations, we make the contrary choice." Why should such an explanation not suffice to justify an essentially legislative decision?

82 *See State Farm*, 463 U.S. at 41 (quotation omitted); *id.* at 58–59 (Rehnquist, J., concurring in part and dissenting in part).

83 *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part) (quoting *id.* at 43, 52 (majority opinion) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))).

found and the choice made' ";[84] courts "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment' ";[85] and, lastly:

> Normally, an agency rule would be arbitrary and capricious if the agency has [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [or] [3] offered an explanation for its decision that runs counter to the evidence before the agency[ ] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[86]

With the possible exception of the "failure to consider an important aspect of the problem" factor, the additional gloss provided by Justice White's majority opinion seems to add little to his concise statement in *Burlington Truck Lines, Inc. v. United States*,[87] and quoted in *State Farm*, that agencies must provide a "rational connection between the facts found and the choice made."[88] Perhaps this is why Justice Rehnquist in his concurrence attempted to trim the majority's gloss to the pithier standard requiring a " 'rational connection between the facts found and the choice made.' "[89]

The Court, much like Judge Leventhal,[90] stated two doctrines from which courts can conveniently choose on given sets of facts—and from which the majority and dissenters essentially chose in coming to their split decision. Nodding to the doctrine of *SEC v. Chenery Corp.*,[91] the Court asserted that it " 'may not supply a reasoned basis

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84 *Id.* at 43 (majority opinion) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

85 *Id.* (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

86 *Id.* (empty bracket omits a confusing comma). The Court's sentence is grammatically unsound unless the final "or" clause is read as part of the third "offered an explanation" phrase. Else, the final "or" clause would have the sentence read, "Normally, an agency rule would be arbitrary and capricious if the agency . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

87 Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962).

88 *Id.* at 168. First, an agency determination that relies on factors Congress did not intend would either be in violation of the relevant statute or simply beg the question of what Congress intended by its overbroad, ambiguous, or vague command providing the agency the leeway to fill the gaps with its policy choice. Second, an explanation actually running "counter" to evidence would seem to be self-evidently arbitrary without further analysis. Lastly, and perhaps most dubiously, the "clear error of judgment" gloss imports a standard of review potentially less deferential than the "abuse of discretion" standard commanded by 5 U.S.C. § 706(2)(A), which purportedly the Court here is fleshing out.

89 *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) (quoting *id.* at 43, 52 (majority opinion) (quoting *Burlington*, 371 U.S. at 168)).

90 *See supra* text accompanying notes 37–40; *supra* Part II.A.2.

91 SEC v. Chenery Corp., 332 U.S. 194 (1947).

for the agency's action that the agency itself has not given.' "[92] The next sentence, however, stated the more recent doctrine of *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*[93]: "We will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' "[94]

And, indeed, even Justice Rehnquist and the other three Justices concurred in the portion of the Court's opinion that allowed that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[95] This proposition, however, was more directed at the Motor Vehicle Manufacturers Association's countertextual argument that rule rescissions should be judged not under the APA standard but "by the same standard a court would use to judge an agency's refusal to promulgate a rule in the first place—a standard . . . considerably narrower than the traditional arbitrary and capricious test."[96]

It was in the final paragraph of his majority opinion, which the dissenters did not join, that Justice White most conspicuously imported (by directly quoting) D.C. Circuit Judge Leventhal's requirement for a "reasoned analysis" when an agency changes its course in administering a statute: " 'An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . .' "[97] After its extensive, and appropriate, discussion of the controlling § 706 "arbitrary" or "capricious" standard, the majority, in the final and most conspicuous paragraph, did not return to the APA's language—or even its own "rational connection between the facts found and the choice made" precedent—as the controlling standard for its decision. Additionally, like the *Greater Boston* court, the *State Farm* Court did not anchor the "reasoned analysis" standard in the APA. Justice Rehnquist and his fellow dissenters either were careless in failing to note their dissent from the majority's earlier importation

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92 *State Farm*, 463 U.S. at 43 (quoting *Chenery*, 332 U.S. at 196).

93 Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281 (1974).

94 *State Farm*, 463 U.S. at 43 (quoting *Bowman*, 419 U.S. at 286). As will be seen, the *State Farm* majority essentially was less willing than the dissenters to discern the Agency's path of reevaluating the costs versus the benefits of detachable seatbelts, the only issue upon which the Court split.

95 *Id.* at 42.

96 *Id.* at 41.

97 *Id.* at 57 (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

of that phrase, or, more likely, they simply did not believe the phrase to bear the meaning given it by the majority.

Further, the Court did not provide reason for importing a rule created in the context of agency adjudications of private privileges to a case concerning generally applicable legislative rules implementing broad statutory commands. Instead the majority merely "conclude[d] that the agency ha[d] failed to supply the requisite 'reasoned analysis' in this case,"[98] sneaking into its conclusion what in practice is a different and more demanding standard than one requiring only a "rational connection" between facts and choices. Indeed, the heightened requirement was necessary to the majority's result because they could not credibly say the Agency had not made a "rational connection between the facts found and the choice made" to rescind the mandate for *detachable* seatbelts; that is, they could not and did not say the Agency, on the detachable seatbelt issue, had acted in an arbitrary or capricious manner as the Agency had on the airbag and nondetachable seatbelt issues. But they could say there was not a sufficiently "reasoned analysis," given that those words on their face demand more than mere "rational connection." The switch in words got the majority over the hump of what they acknowledged was a "closer" issue (rescission of the *detachable* seatbelt standard as compared to the airbag standard).[99] And, as already noted, the majority relied strictly on the *Chenery* rule and disregarded the change in political philosophy the dissenters were willing to acknowledge per *Bowman*.[100]

The importation of the tougher standard also permitted the majority to demand two things of the Agency on remand, which almost certainly would not be required under the straightforward § 706(2)(A) "arbitrary" or "capricious" standard: (1) to justify having not engaged in a "search for further evidence,"[101] and (2) to "reconsider its judgment of the reasonableness of the monetary and other costs associated with the Standard," remaining "mind[ful] that Congress intended safety to be the pre-eminent factor under the Act."[102] By commanding the Agency to "search for further evidence" and prioritize safety over cost-benefit considerations, the majority effectively signaled to the Agency which political considerations would be considered rea-

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98 *Id.* at 57.

99 *Id.* at 51.

100 *See supra* notes 92–94 and accompanying text.

101 *State Farm*, 463 U.S. at 52.

102 *Id.* at 55.

sonable (safety) and which would not (cost-benefit).[103] In this aspect, *State Farm* reveals the teeth behind the "reasoned analysis" requirement: the requirement can be used to wield the tool of judicial review with far more power than § 706(2)(A) contemplates, allowing courts' political preferences to trump agencies' political preferences, as demonstrated by the majority disfavoring the Reagan Administration's cost-benefit analysis.

Politics aside, the Court at minimum should have explicated why "reasoned analysis" satisfied (or perhaps trumped) the many factors it outlined earlier in its opinion in fleshing out the § 706 standards.[104] This is not to say it is not a perfectly reasonable requirement; it just is not the one required by Congress in the APA or contemplated by Judge Prettyman in 1956.[105] Analytically, the Court's decision to import the "reasoned analysis" requirement for agency policy swerves itself suffered a dramatic dearth of reasoned analysis.

C. *The Dissent*

Justice Rehnquist and three other members of the Court disagreed with the majority regarding the Agency's treatment of detachable automatic seatbelts.[106] The four dissenters believed that the Agency's decision to remove detachable automatic seatbelts from the standard was justified by two factors: first, the statutory requirement that safety standards "shall be practicable, [and] shall meet the need for motor vehicle safety,"[107] and, second, the Agency's "conclusion that there is substantial uncertainty whether requiring installation of detachable automatic belts would substantially increase seatbelt usage."[108]

The dissenters' decision was more nuanced than the majority's. In response to manufacturers' choice to "meet" the standard by installing easily detachable automatic seatbelts—self-evidently the least protective option of the three—the Agency had (1) inadequately considered mandating airbags or nondetachable automatic seatbelts to meet the standard, but (2) justifiably concluded the standard need not allow *detachable* automatic seatbelts when they achieved only slightly

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103 Professor Bruff notes, *State Farm* "can be understood as a signal to the agency to craft a rule that satisfies those calling for strict safety measures." Bruff, *supra* note 3, at 239.

104 *See supra* notes 84–86 and accompanying text (discussing these factors).

105 *See supra* notes 42–44 and accompanying text (discussing Judge Prettyman's analysis).

106 *State Farm*, 463 U.S. at 57–59 (Rehnquist, J., concurring in part and dissenting in part).

107 *Id.* at 58 (citing National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 103(a), 80 Stat. 718, 719).

108 *Id.*

more seatbelt usage than existing *manual* seatbelts.[109] In the dissenters' view, the Agency was justified in rejecting an option that had become, in the public's and Administration's view, "an instance of ineffective regulation, adversely affecting the public's view of safety regulation."[110]

The four dissenters—who either overlooked the imported "reasoned analysis" formulation or did not believe "reasoned analysis" required what the majority did—believed the Agency had articulated a "'rational connection between the facts found and the choice made'"[111] concerning the detachable automatic seatbelts. In addition, the dissent famously continued:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. 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.[112]

Recognizing that "a new administration may not refuse to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions,"[113] Justice Rehnquist made a crisp argument (joined by three other Justices) for the validity of changed interpretations based on changed political viewpoints. Although he does not state it explicitly, one must infer that he means that such considerations are not inherently arbitrary, capricious, or abusive of discretion under 5 U.S.C. § 706(2)(A).

Because the dissenters agreed that the Agency's consideration of the airbag and nondetachable seatbelts was inadequate, but that the

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109 *See id.* at 58–59.

110 *Id.* at 39 (majority opinion) (citing Occupant Crash Protection (Notice 25), 46 Fed. Reg. 53,419, 53,424 (Oct. 29, 1981)); *see id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

111 *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part) (quoting *id.* at 43, 52 (majority opinion) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))).

112 *Id.* (footnote omitted).

113 *Id.* at 59 n.*.

Agency's consideration of the detachable seatbelts was adequate, one can assume Justice Rehnquist meant that, on remand, the Agency could assert, for example, that facts demonstrate "public resistance and uncertainties" and call for a "reappraisal of the costs and benefits of [agency] programs and regulations"[114] in light of the Administration's philosophy that cost-benefit analysis is appropriate under the broad mandate of the statute. These would "provide a rational explanation" allowing the Agency to "adhere to its decision to rescind the entire Standard,"[115] even including the airbag and nondetachable seatbelt provisions. Under Justice Rehnquist's formulation, this policy swerve would not violate § 706(2). And, though it was unspoken, it seems evident the majority followed the *Chenery* rule of not relying on arguments the agency fails to advance, while the dissenters believed *Bowman* permitted them to acknowledge the obvious role of changed political philosophy at play.

D. *After* State Farm

In the term following *State Farm*, the Court announced the watershed doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[116] involving a change of administration precipitating a change in interpretation of an ambiguous statutory term. The Court neither cited nor relied on its *State Farm* opinion from the prior term or the D.C. Circuit's opinion in *Greater Boston*. In *Chevron*, the Court permitted the use of cost-benefit considerations[117] because Congress had battled over the competing environmental and economic interests and failed to reach consensus,[118] instead opting to "accommodate both interests" and perhaps even "take their chances with the scheme devised by the agency."[119]

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114 *Id.* at 59.

115 *Id.* at 58.

116 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

117 *Id.* at 865–66.

118 *See id.* at 851–53 (noting that legislative history indicated "Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality"); *id.* at 847 (noting that "Congress, confronting these competing interests, was unable to agree" and so failed to reach "consensus").

119 *Id.* at 865. The Court reasoned:

> Perhaps that body consciously desired the Administrator to strike the balance . . . , thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

But the Court's reasoning makes patent that political philosophy was not a *sufficient*, only a *permissible*, reason, implicitly keeping the *State Farm* "reasoned analysis" requirement alive and well: "[T]he Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[120]

Finally, the *Chevron* Court concluded that

> an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency . . . .
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . .[121]

IV. Reconciling State Farm*,* Chevron*, and "Reasoned Analysis"*

Chevron presented the classic case of a truly ambiguous term, i.e., one that is susceptible to more than one meaning,[122] in that the Agency had to define a "stationary source."[123] *State Farm* did not turn so finely upon the Agency's interpretation of a particular statutory

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Id.

120 *Id.* (footnotes omitted).

121 *Id.* at 865–66.

122 Statutory construction theorists distinguish vagueness and ambiguity: "vague" statutes are "imprecise or indefinite," while "ambiguous" statutes are those susceptible to "two or more meanings." *See, e.g.*, W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 421 (1992).

123 *Chevron*, 467 U.S. at 840.

term but rather its assessment of evidence leading to a policy conclusion within the ambit of a broad mandate. The Agency in *Chevron* "set forth several reasons for" its interpretation of an ambiguously defined statutory term and admitted that those reasons were influenced by the Reagan Administration's political philosophy.[124] The Agency in *State Farm*, of course, was not interpreting any particular statutory term, but was implementing a vague mandate requiring standards that were "practicable" and "stated in objective terms" while "meet[ing] the need for motor vehicle safety."[125] Unlike the Agency in *Chevron*, the Agency in *State Farm* was almost willfully blind to other available options in rescinding the airbag and nondetachable seatbelt options; the Agency simply gave no reasons, political or otherwise. But the Agency in *State Farm* did give reasons for concluding that the detachable seatbelt option should be rescinded.[126]

The Court, in summary, (1) permitted (in *Chevron*) political philosophy to place a thumb on the scale in choosing narrowly between two reasonable interpretations of an ambiguous statute whose framers did not resolve two conflicting political philosophies, but (2) refused (in *State Farm*) to acknowledge, as it did in *Bowman*, that the Agency's path was reasonably discernible—namely, that the Agency had reevaluated the evidence in light of a change in administrations—in choosing broadly among many available options under a vague statute that provided the Agency wide latitude in improving traffic safety.[127] Although passive restraints were not required by the statute—much less particular subcategories of passive restraints[128]—the arbitrariness of the rescission of the two most effective options rendered the rescission of the least effective option likewise arbitrary.

State Farm and *Chevron* together seem to indicate that the incumbent President's political views may influence an agency's choice

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124 *Id.* at 857–58.

125 *See* National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 103(a), 80 Stat. 718, 719.

126 *See supra* note 74 and accompanying text.

127 The Agency could consider, for example, relevant available data and "the extent to which such standards w[ould] contribute to carrying out the purposes of th[e] Act." National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 103(f), 80 Stat. 718, 719. It must be noted that the *State Farm* majority could well have agreed with the dissenters had the Agency at least stated, as Professors Mashaw, Merrill, and Shane posit, its fundamental disagreement with prior administrations' cost-benefit analyses or other political justifications. *See supra* note 81.

128 *See* Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 n.* (1983) (Rehnquist, J., concurring in part and dissenting in part); *see also id.* at 44–46 (majority opinion).

among reasonable options within the purview of the governing statute, provided the agency supplies a "reasoned analysis."[129] The requirement—explicit in *State Farm* and *Greater Boston* and implicit in *Chevron*—that a "reasoned analysis" accompany swerves in policy seems to forestall swerves based *solely* on political considerations (such as applying cost-benefit analysis). That is, a change of administration seems not to be *sufficient* justification for analyzing data to effect a major change in agency policy.[130]

Precisely why fact-bound "reasoned analysis" is the only path to avoiding arbitrariness, capriciousness, or abuse of discretion in decisionmaking resulting in swerves in policy is not altogether obvious. What if President Reagan was elected by a majority who believed President Carter's Administration regulated ineffectively, producing results such as mandatory seatbelts that could be defeated by pressing a button to permanently disable them? Or if President Clinton was elected by a majority who disagreed with predecessor Republican Presidents' "gag rule" on abortion counseling in federally funded clinics?[131] There is nothing patently arbitrary or capricious about a newly elected administration exercising congressionally delegated discretion to implement these policy choices.[132] Such an exercise of power is not arbitrary or capricious when it does not flout any explicit statutory guidelines. Such action cannot be said to be impulsive or random when the merits of the President's guiding political philosophy has been debated publicly for months or years leading up to the Presi-

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129 Other circuit courts have used the same formulation in evaluating such changes in agency policy or interpretations. *See, e.g.*, Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 456 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008); Grace Petroleum Corp. v. FERC, 815 F.2d 589, 591 (10th Cir. 1987).

130 Consider, for example, the Court's approach to evaluating an agency's refusal to initiate rulemaking in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). After endorsing the view that judicial review of agencies' refusals to initiate rulemaking is "extremely limited" and "highly deferential," *id.* at 1459 (internal quotation marks omitted), the majority concluded that the Agency's reasons for declining to initiate rulemaking were nonetheless insufficient: "In short, EPA has offered no *reasoned explanation* for its refusal" to make a threshold determination predicate to rulemaking. *Id.* at 1463 (emphasis added). It is hard to imagine the five Justices in the *Massachusetts v. EPA* majority not requiring something more than the political views of the incumbent administration as justification for a swerve in agency policy.

131 *See* Kagan, *supra* note 52, at 2318–19, 2378 (discussing President Clinton's reversal of his predecessor's "gag rule").

132 *Cf. id.* at 2372–73 (arguing that the *Chevron* and *State Farm* doctrines should be reframed to "take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled" and proposing "a variable deference regime, dependent on the role of the President in an agency's interpretive decisionmaking").

dent's election and presumably motivated the majority of voters to support the President eventually elected.

Some would argue that Congress is the proper place for effecting such a change, but this misses the point. In these instances, Congress necessarily has already legislated without clarity, either speaking very broadly or leaving gaps to be filled by agencies.[133] And Congress unquestionably can legislate again to fill those gaps and eliminate executive discretion.[134] The electorate chose the President, their administrator in chief, to execute the laws in accordance with his or her judgment. If the President's judgment is contrary to the nation's will on the matter, he or she may assent to corrective legislation; or, the Congress, with two-thirds majority, can even legislate without the President's assent.[135] Even in absence of the President's assent, the Congress can hamper administrative attempts to implement undesired policy via committee oversight and budget controls.

The essential point is that the standard that Congress set in the APA—and has long left untouched—is not one requiring "reasoned analysis" but an absence of arbitrariness, capriciousness, or abuse of discretion under the APA.[136] Words matter, especially words used by appellate courts. "Reasoned analysis" is certainly appropriate when agencies act as judicial bodies to adjudicate cases because the neutrality desired of an adjudicator requires them to be free from political influence. That is almost surely what motivated the *Greater Boston* court to invent the phrase to characterize what the D.C. Circuit would require of an agency adjudicating private privileges. But that hardly means that in an administrative policymaking context—an inescapably political context—that mere "reasons" cannot sufficiently indicate the absence of arbitrary, capricious, or abusive policymaking. This is what made the *State Farm* Court's unnecessary importation of the loaded term so unfortunate: in providing absolutely no explanation for the term's use to effectively define (or trump) the § 706(2)(A) standard, the Court artificially elevated what was required of an agency filling gaps left by Congress on topics about which reasonable people can disagree.

133 *See supra* note 119.

134 Congress, for example, eventually wrote the airbag requirement into federal law. National Highway Traffic Safety Administration Authorization Act of 1991, Pub. L. No. 102-240, tit. II, pt. B, § 2508(a), 105 Stat. 2081, 2084–87 (current version at 49 U.S.C. § 30127 (2000)).

135 *See* U.S. Const. art. I, § 7, cl. 2.

136 *See* 5 U.S.C. § 706(2)(A) (2000).

Modifications of such closely divided policies by newly elected administrations permit society its needed breathing space—the ability to expand and contract, even experiment with new ideas and approaches. Agency policymaking resulting from the evaluation (or reevaluation) of agency-assembled evidence—data, research, findings—by a newly elected administration under a new political philosophy should not require more than a "'rational connection between the facts found and the choice made.'"[137]

137 Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 52 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).