



THE FUTURE OF THE DUTY TO ENGAGE IN REASONED DECISION-MAKING: THE CHOICE BETWEEN A TEXTUAL APPROACH AND A PRAGMATIC APPROACH

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The duty of an agency to engage in reasoned decision-making is a hardy perennial that courts have applied for over a century.¹ The U.S. Supreme Court famously announced a demanding version of the duty in its landmark 1983 opinion in *State Farm*.² To comply with the duty and avoid a judicial conclusion that an action is arbitrary and capricious, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”³

The *State Farm* Court described the duty of a reviewing court in considerable detail this way:

In reviewing [the agency’s determination], we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, 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.⁴

The Court went on to hold that the National Highway Traffic Safety Administration’s decision to rescind the rule that required automatic seatbelts

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¹ See, e.g., *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). See generally KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* ch. 11 (7th ed. 2024).

² *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

³ *Id.* at 43 (internal citations and quotations omitted).

⁴ *Id.* (internal citations and quotations omitted).

or airbags to be installed in all new cars was arbitrary and capricious because the agency failed to consider an alternative to rescission and acted based on a finding of fact that was inconsistent with the evidence in the record.⁵

The opinion was not unanimous, however. Joined by three justices, Justice William Rehnquist concurred in part and dissented in part, arguing:

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.⁶

The Supreme Court has also long applied a logical corollary to the duty to engage in reasoned decision-making—the duty to explain a change in direction. If an agency decides to make a change in direction, it must acknowledge that it is making such a change and explain it adequately. Indeed, *State Farm* illustrates the corollary as well as the principle.⁷

Federal courts of appeals have adopted a wide variety of mechanisms to enforce the duty to engage in reasoned decision-making and the duty to explain changes in direction. An agency's notice of proposed rulemaking must adequately foreshadow its final rule⁸ and must incorporate all sources of data on which the agency relies,⁹ while the statutorily required statement of basis and purpose that an agency incorporates in a final rule must respond adequately to all well-supported comments that are critical of the proposed rule.¹⁰

The Supreme Court's recent opinions suggest that it continues to consider the duty to engage in reasoned decision-making and the duty to explain changes in direction important parts of a reviewing court's task. The Court referred to the duty to engage in reasoned decision-making as an important doctrine in its 2024 opinion in *Loper Bright Enterprises v. Raimondo*,¹¹ and the Court relied on that duty to explain a change in position in its unanimous 2025 opinion in *FDA v. Wages & White Lion Investments*.¹² Other recent Supreme Court decisions also reflect the Court's continued adherence to these two closely related doctrines.¹³

⁵ *Id.* at 46–56.

⁶ *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

⁷ *Id.* 41–42; *see also*, Hickman & Pierce, *supra* note 1, at ch. 11.6.

⁸ *See, e.g.*, Shell Oil Co. v. EPA, 950 F.2d 741, 750–53 (D.C. Cir. 1991).

⁹ *See, e.g.*, Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375, 399–400 (D.C. Cir. 1973).

¹⁰ *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977).

¹¹ 603 U.S. 369, 394–95 (2024).

¹² 604 U.S. 542, 581–82 (2025).

¹³ *See, e.g.*, Ohio v. EPA, 603 U.S. 279 (2024); Am. Hosp. Ass'n v. Becerra, 596 U.S. 724 (2022); Becerra v. Empire Health Found., 597 U.S. 424 (2022); FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

There have been two recent changes in circumstances, however, that could cause the Court to eliminate or reduce the strength of the duty to engage in reasoned decision-making and the related duty to explain changes in direction and to adopt the view urged by the partially dissenting justices in *State Farm*. First, the six Republican-appointed justices currently sitting on the Court have emphasized their adherence to textualism.¹⁴ It is hard to reconcile the current strong versions of the duty to engage in reasoned decision-making and the duty to explain changes in direction with the text of the Administrative Procedure Act (APA).

Second, President Donald J. Trump has taken most of the important actions of his second Administration directly as President rather than relying on agencies to initiate the actions.¹⁵ By at least one count, 137 statutes confer power on the President to take direct actions.¹⁶ President Trump's success in this regard is likely to inspire future Presidents to behave in a similar manner. It is not at all clear that the duty to engage in reasoned decision-making or the duty to explain changes in direction apply to the President.

Another recent change in circumstances has the opposite effect, however. Today's conditions of extreme political polarity have the potential to create a legal environment in which the only certain and predictable characteristic of the legal system is that many of the most important policies and rules of law will change dramatically with each new presidential administration. If the courts allow that to happen, the social and economic results will be terrible. The Supreme Court can avoid that result by continuing to apply the current, powerful version of the duty to engage in reasoned decision-making and the duty to explain changes in direction both to agencies and to the President.

I will begin by describing the changes in the political environment that will cause serious harm to society and to the economy unless courts continue to apply a robust version of the duty to engage in reasoned decision-making and to explain changes in direction to all agency and presidential decisions.

I. EXTREME POLITICAL POLARITY HAS INCREASED THE NEED TO APPLY THE DUTY TO ENGAGE IN REASONED DECISION-MAKING

Extreme political polarity has completely changed the patterns of behavior of the executive and legislative branches. Traditionally, when Presidents identified a problem, they met with the leaders of both parties in both chambers

¹⁴ See William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1614–15 (2023).

¹⁵ See KRISTIN E. HICKMAN, RICHARD J. PIERCE, JR. & CHRISTOPHER J. WALKER, SUMMER 2025 UPDATE TO FED. ADMIN. LAW CASES AND MATERIALS (4th ed.) 2–7 (2025).

¹⁶ See BRENNAN CTR. FOR JUST., *A GUIDE TO EMERGENCY POWERS AND THEIR USE* (2025), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [https://perma.cc/YD25-KHKL].

of the U.S. Congress to agree on a solution.¹⁷ After hearings and lengthy negotiations that included many compromises, the participants agreed on a draft of a statute that was designed to address the problem. The resulting bill was then enacted by large bipartisan majorities in both chambers. Typically, the resulting statute described the problem and empowered an agency to address it through use of some combination of rulemaking and adjudication based on a broadly worded decisional standard. That traditional process is illustrated by the approach that President Richard Nixon took when he persuaded Congress to enact the Clean Air Act unanimously in the U.S. Senate and with only one dissenting vote in the U.S. House of Representatives.¹⁸

Gradually, over the past 25 years, Congress has completely lost the capability to compromise and to enact legislation on a bipartisan basis.¹⁹ Any member of either party who even hints at compromise with the leadership of the other party will be the subject of a credible threat to primary him out of office. The combination of gerrymandering and closed party primaries makes it highly unlikely that we will ever return to the days in which the nation can address problems through the process of negotiation, compromise, and enactment of bipartisan legislation.

Modern Presidents rarely even attempt to engage in the process of negotiation and compromise needed to enact bipartisan legislation. The most that any President can realistically expect to accomplish through legislation is enactment of a few statutes on straight party line votes during his first two years in office. After two years, the President's party historically has lost its majority in one or both congressional chambers, and legislative action on anything but the short-term budget becomes impossible. Even the statutes that are enacted during the first two years of a new President's administration must be narrowly crafted to address only issues that fall within the Congress's power to tax and spend to avoid the need to cross the nearly impossible 60-vote threshold needed to overcome a filibuster in the Senate.

That political environment forces the President, regardless of party, to try to find unilateral means of addressing problems. Until the second Trump Administration, Presidents typically called on agencies to take the actions that they considered necessary to address a problem. Agencies responded by taking actions based on interpretations of broadly worded congressional statutes that they administer. The deferential Chevron test emboldened agencies to adopt aggressive interpretations of the statutes that they administer in the belief that a reviewing court might uphold an interpretation that stretched the meaning of the statute.²⁰

¹⁷ See Richard J. Pierce, Jr., *President Trump Is Not the Only Threat to Our Democracy*, REGUL. REV. (Nov. 15, 2016), <https://www.theregreview.org/2025/04/17/pierce-president-trump-is-not-the-only-threat-to-our-democracy/> [https://perma.cc/ML6G-2YEF].

¹⁸ See Shelia Hu, *The Clean Air Act 101*, NAT. RES. DEF. COUNCIL (Aug. 11, 2025), <https://www.nrdc.org/stories/clean-air-act-101> [https://perma.cc/XY6Z-MA8C].

¹⁹ See Pierce, *supra* note 17.

²⁰ See generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

The second Trump Administration is continuing to engage in that practice, but President Trump has also made much greater use of direct exercises of presidential power than any prior President. He has issued hundreds of executive orders that are based on often-strained interpretations of many of the 137 statutes that confer power on the President to take direct action in some circumstances.

Historically, when a new President replaced a President of the other party, the newly elected President attempted to implement a new agenda that differed incrementally from the agenda of his predecessor. In recent years, however, a new President who succeeds a President of the other party has attempted to implement an agenda that was the opposite of his predecessor's agenda.

This change in patterns of behavior is illustrated well by changes in the positions taken by the U.S. Solicitor General, who represents the federal government before the Supreme Court. Historically, the government flip-flopped—that is, changed its legal position in litigation before the Court—once every other year.²¹ A recent study found that the rate of flip-flopping has increased dramatically to as high as 20 instances during a three-year period.²² That number undoubtedly will increase still further as researchers begin to assemble data on the extraordinary rate of flip-flopping by the Solicitor General during the second Trump Administration.

If each President who replaces a President of the other party is successful in reversing the policies of his predecessor to the extent that the former desires, the nation will lurch from far left to far right every four to eight years with each change in administration. That would have horrible effects on society and on the performance of the economy. I published an article in 2021 in which I illustrated the adverse effects of successful flip-flopping in the contexts of telecommunications policy, healthcare policy, immigration policy, and environmental policy.²³ The potential for severe adverse social and economic effects of successful flip-flopping has increased since then as President Joseph R. Biden adopted particularly aggressive methods of regulation in each of those contexts and many more, and as President Trump has attempted to reverse many of the regulatory policies of not just President Biden but many other Presidents of both parties.²⁴

I believe that the United States can survive and possibly even thrive in a legal and policy environment that is dominated by the values of the right just the same as it can during a legal and policy environment that is dominated by the values of the left. But I do not believe that the United States can fare well as a nation or as an economy if we allow each new President to make all the massive changes in whichever direction that they wish.

²¹ Margaret H. Lemos & Deborah A. Widiss, *The Solicitor General, Consistency, and Credibility*, 100 NOTRE DAME L. REV. 621, 650–54 (2025).

²² *Id.* at 652.

²³ Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L. J. ONLINE 91 (2021).

²⁴ See Hickman, Pierce & Walker, *supra* note 15, at 2–7.

Courts can play an extremely valuable role by allowing Presidents to make major changes in a particular direction only when the President can support those changes with reasons and evidence. That is the pragmatic case for continuing to apply an aggressive version of the duty to engage in reasoned decision-making and the duty to explain changes in direction to agencies and to impose those duties on the President.

II. THE DUTY TO ENGAGE IN REASONED DECISION-MAKING IS DIFFICULT TO RECONCILE WITH TEXTUALISM

The modern version of the duty to engage in reasoned decision-making is based primarily on the APA. The APA describes a three-step process for issuing, amending, or rescinding a rule.²⁵ An agency must issue a notice of proposed rulemaking, provide an opportunity for submission of comments by interested members of the public, and then incorporate a concise general statement of the basis and purpose of the proposed rule in the final rule. The APA then instructs courts to uphold a rule if, among other things, it is not arbitrary and capricious and is within the agency's statutory authority.²⁶

In a concurring opinion when he was then a member of the U.S. Court of Appeals for the D.C. Circuit, Judge Brett Kavanaugh questioned whether the robust version of the duty to engage in reasoned decision-making that courts have been applying for decades is consistent with the language of the APA:

Petitioner's argument would be unavailing if analyzed solely under the text of APA § 553. The APA requires only that an agency provide public notice and a comment period before the agency issues a rule. The notice must include the terms or substance of the proposed rule *or* a description of the subjects and issues involved. After issuing a notice and allowing time for interested persons to comment, the agency must issue a concise general statement of the rule's basis and purpose along with the final rule. One searches the text of APA § 553 in vain for a requirement that an agency disclose other agency information as part of the notice or later in the rulemaking process.

But beginning with the *Portland Cement* case in 1973—which was decided in an era when this Court created several procedural requirements not rooted in the text of the APA—our precedents have required agencies to disclose, in time to allow for meaningful comment, technical data or studies on which they relied in formulating proposed rules.

The majority opinion concludes that the *Portland Cement* requirement does not allow the FCC to redact portions of studies

²⁵ 5 U.S.C. §553.

²⁶ 5 U.S.C. §706(2)(A).

when the studies otherwise must be disclosed under *Portland Cement*. I accept the majority opinion's conclusion as the best interpretation of our *Portland Cement* line of decisions.

I write separately to underscore that *Portland Cement* stands on a shaky legal foundation (even though it may make sense as a policy matter in some cases). Put bluntly, the *Portland Cement* doctrine cannot be squared with the text of § 553 of the APA. And *Portland Cement*'s lack of roots in the statutory text creates a serious jurisprudential problem because the Supreme Court later rejected this kind of freeform interpretation of the APA. In its landmark *Vermont Yankee* decision, which came a few years after *Portland Cement*, the Supreme Court forcefully stated that the text of the APA binds courts: Section 553 of the APA established the *maximum procedural requirements* which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.

Because there is nothing in the bare text of § 553 that could remotely give rise to the *Portland Cement* requirement, some commentators argue that *Portland Cement* is a violation of the basic principle of *Vermont Yankee* that Congress and the agencies, but not the courts, have the power to decide on proper agency procedures. At the very least, others say, the Supreme Court's decision in *Vermont Yankee* raises a question concerning the continuing vitality of the *Portland Cement* requirement that an agency provide public notice of the data on which it proposes to rely in a rulemaking.

I do not believe *Portland Cement* is consistent with the text of the APA or *Vermont Yankee*. In the wake of *Vermont Yankee*, however, this Court has repeatedly continued to apply *Portland Cement* (albeit without analyzing the tension between *Vermont Yankee* and *Portland Cement*). In these circumstances, this three-judge panel must accept *Portland Cement* as binding precedent and must require the FCC to disclose the redacted portions of its staff studies.²⁷

In his concurrence, Judge Kavanaugh argued persuasively that the D.C. Circuit's version of the duty to engage in reasoned decision-making is inconsistent with the modest statutory requirements that the APA imposes on agencies when they issue, amend, or rescind a rule. He could have made the same persuasive argument about the version of the duty that the Supreme Court announced in *State Farm* if he considered it appropriate for

²⁷ Am. Radio Relay League v. FCC, 524 F.3d 227, 245–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring) (internal citations and quotations omitted).

a judge on a federal court of appeals to question the basis for a Supreme Court decision.²⁸ As a member of the Supreme Court, however, Justice Kavanaugh is now free to use his text-based reasoning as the basis for a Supreme Court decision that overrules *State Farm* and announces a greatly reduced version of the duty to engage in reasoned decision-making.

The statutory basis for the Supreme Court's decision in *State Farm* is the provision of the APA that instructs courts to overturn agency actions that are arbitrary and capricious.²⁹ Courts have attributed many meanings to the undefined phrase "arbitrary and capricious." At the time that Congress enacted the APA, the most recent Supreme Court opinion that defined and applied the arbitrary and capricious test was its 1935 opinion in *Pacific States Box & Basket Co. v. White*.³⁰ The version of the arbitrary and capricious test that the Court applied in that case is far less demanding than the version that the Court announced and applied in *State Farm*. The Court did not require the agency to make any findings of fact, to explain why it took the action it took, or to support the factual predicates for its action with evidence in the record. The Court upheld the agency action based solely on the argument of counsel for the agency that the agency might have had a plausible theoretical justification for its action.

The Court can make a good textualist case for overruling *State Farm* and dramatically reducing the strength of the duty to engage in reasoned decision-making if it wants to take that action. It would be even easier for the Court to decline to apply a robust version of the duty to engage in reasoned decision-making on the President. The Court has consistently held that the APA does not apply to the President because the President is not an agency.³¹ No statute imposes any duty to engage in reasoned decision-making on the President.

III. CONCLUSION

The Supreme Court can overrule *State Farm* and reduce dramatically the strength of the duty to engage in reasoned decision-making using textualist reasoning. I hope that it does not take that action. I believe that the Court needs to apply a strong version of the duty to engage in reasoned decision-making both to agencies and to the President to avoid a chaotic and unpredictable legal environment that would have terrible economic and social consequences for the nation.

The conservative majority might overrule *State Farm*, however, because of a realistic expectation that its action would produce results that would please most conservatives. Overruling *State Farm* would provide Republican

²⁸ See generally Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981); Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Berman & Lawson*, 75 GEO. WASH. L. REV. 902 (2007).

²⁹ 5 U.S.C. §706(2)(A).

³⁰ 296 U.S. 176, 186 (1935).

³¹ See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

Presidents with a much easier and faster path to widespread deregulation, while the predominately Republican-appointed judges of the U.S. Court of Appeals for the Fifth Circuit could be reasonably relied on to stop any future Democratic President from implementing any significant new regulations. The Fifth Circuit issued fourteen injunctions that stopped the Biden Administration from implementing most of its major initiatives.³²

³² Developments in the Law–Court Reform, *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1705–06 (2024).

