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# Judicial Review of Agency Deregulation: Alternatives and Problems for the Courts

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## I. INTRODUCTION

Federal appellate judges, like veteran law professors, correct the errors of administrative agencies during the judicial review of rulemaking actions. Like a stern but forgiving professor correcting the flawed work of a student, the court often expresses its view of the reason for the error and its view of the proper way in which the agency should have carried out its administrative functions. The recent increase in agency deregulatory activity, however, threatens to upset this educational relationship. As agencies have moved to rescind or suspend existing rules, proponents of the affected rules have asked the courts to preserve the rules under theories ranging from those of stare decisis to those of entitlement to the continued existence of a rule. Under the pressure of these challenges the courts subtly have abandoned their concepts of deference to administrative rulemaking decisions. Deregulation has shifted the courts' sympathies from the agencies to the beneficiaries of endangered rules.

This Article takes a preliminary look at how deregulation has fared in the courts and at the significance of the evolving federal appellate and United States Supreme Court case law for future agency rulemaking decisions. Part II of this Article examines the various categories of regulation and the aspects of each category that may be subject to deregulation. Part III defines deregulation and explores some of the reasons why an agency may wish to deregulate. Part IV examines the utility of judicial oversight of deregulation, and part V then discusses the mechanics of deregulation, focusing on the various means by which an agency may

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nullify a rule and the procedures needed for each method. Finally, part VI explores the effects of the United States Supreme Court's recent decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[1] on future agency deregulation efforts.

## II. THE CONCEPTUAL CATEGORIES OF REGULATIONS

Federal administrative procedure serves as a uniform mechanism for the adoption of a wide variety of rules. The text of any federal regulation must include standard features identifying the rule's scope, authority, and commands,[2] but the purposes underlying any of the thousands of different rules will vary greatly. A rule's purpose and background will rarely be self-evident. One must examine the purposes behind each category of regulation before debating the merits of deregulatory efforts in that category.

A first category of regulations reflects the economic interest of the government and the regulated parties in preserving a certain economic allocation scheme.[3] An agency intending to permit producers of lemons to allocate markets, for example, adopts a system of regulations through Agricultural Marketing Orders that preserve defined price levels at the expense of consumers.[4] The economic rulemaking systems commonly have special statutory arrangements that legislative supporters have structured to serve economic goals.[5] Deregulation in this area is a subtle form of economic warfare. Regulations promulgated in this type of regulatory system are vulnerable to efforts to reduce consumer costs. Competing economic groups of producers and consumers advocating deregulation may shake the consensus of political support that led to creation of

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1. 103 S. Ct. 2856 (1983).

2. 5 U.S.C. § 553(b) (1982). The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (1982), contains the bulk of federal administrative procedure.

3. For example, the Interstate Commerce Commission controls railroad and truck rates for carriage of goods as a means of managing the conflicting desires of producers, shippers, carriers, and consumers. *See* 49 U.S.C. §§ 10101, 10701-10734 (Supp. V 1981); *see also* Note, *Teamsters, Truckers, and the ICC: A Political and Economic Analysis of Motor Carrier Deregulation*, 17 HARV. J. ON LEGIS. 123, 130-33 (1980).

4. 7 C.F.R. § 910.50-.52 (1983).

5. For example, special and detailed legislation supports the federally subsidized vessels that carry on United States ocean shipping. 46 U.S.C. §§ 1151-1161 (1979 & Supp. V 1981). Other specialty legislation fits the particular needs of regulated submarkets; an example of such legislation is a recent act of Congress that allowed 20,000 turkeys to be slaughtered and marketed without federal meat inspection. Act of June 30, 1982, Pub. L. No. 97-206, 96 Stat. 136.

the regulatory system.[6] The demise of trucking regulation, through a combination of statutory and regulatory action, is a much-studied illustration of this type of economic deregulation.[7]

Another regulatory system encompasses the "safety" considerations that have prompted the government to protect bread purchasers, car owners, cosmetic users, residents of communities with nuclear plants, and other consumers from acute risks of harm through the misfeasance or malfeasance of producers. In this category of safety considerations Congress often has delegated power to a regulator with fewer statutory restraints.[8] Therefore, a common element of regulations for injury prevention is broad discretionary power in the regulator, exercised in reaction to perceived risk categories, according to priorities set by accident or illness statistics.[9] The agency seeks control of the safety risks under powers that were stated broadly in the agency's enabling legislation. An automobile safety standard for collision features[10] or a drug safety rule imposing a warning about a color believed to cause allergic reactions[11] is a responsive regulatory command to an immediately perceived risk. Deregulation in this area gives rise to disputes over the statistical incidence of the accidents or illnesses that prompted the rule and to disagreements concerning the relative public benefits and costs of any particular risk-avoidance rule.[12]

Government authorities design a third type of rule to further environmental goals such as wetlands preservation, air quality, and wilderness protection.[13] The bases of many regulations against

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6. *See generally* S. BREYER, REGULATION AND ITS REFORM (1982). First Circuit Judge Stephen Breyer, a former aide to Senator Edward Kennedy, has written one of the best modern studies of economic deregulation from the legal perspective.

7. *See id.;* R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 40-41 (1983).

8. Safety statutes routinely feature delegations that are more broad and open ended than the delegations in the economic regulation setting. *Compare* 21 U.S.C. § 343 (1982) (food labeling for safety) *with* 7 U.S.C. § 2014 (Supp. V 1981) (distribution of food stamps).

9. *See, e.g.,* Aqua Slide 'n Dive, Inc. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 840 (5th Cir. 1978) (requiring the Commission to demonstrate unreasonable risk through accident statistics).

10. *See, e.g.,* 15 U.S.C. §§ 1381-1431 (1982).

11. *See, e.g.,* 21 C.F.R. § 201.20 (1983).

12. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) (parties disputing appropriate cost/benefit analysis); Sullivan, *The Benzene Decision: A Contribution to Regulatory Confusion,* 33 AD. L. REV. 360 (1981); Sullivan, *The Cotton Dust Decision: The Confusion Continues,* 34 AD. L. REV. 483 (1982).

13. The Environmental Protection Agency (EPA) has adopted some of the most complex environmental rules. The Clean Air Act requires that the EPA set air quality standards and that the states develop plans to implement the standards. 42 U.S.C. §§ 1857-1857*l* (1976). The Act's prohibition of consideration of economic infeasibility added even more

chronic damage to the environment are susceptible to scientific debate.[14] For example, the cost and possibility of achieving benefits such as saving fish and wildlife from "acid rain" are open to debate.[15] In this category of regulations, managers of the deregulating agency are likely to experience opposition to both the environmental costs and the economic benefits of deregulation.[16]

An additional class of regulation is the set of limitations on income transfers or welfare benefits, such as food stamp eligibility rules, that Congress attaches to a beneficiary program.[17] The agency seeking to deregulate this area confronts an established benefit with an established constituency hostile to any possible reduction in benefits. If Congress disagrees with an administrative agency's deregulation through revision of recipient eligibility, it has several means to resist the changes.[18] Congress' ability to prevent change in this category makes this type of deregulation peculiarly subject to a recipient-based political backlash.

No bright line divides the several classes of regulations. The need for reform of an economic regulation might be motivated by the same reasons given for cutting back the eligibility requirements of benefit receipts. The motivating factor may be the budget defi-

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complexity to these rules. *See* Union Elec. Co. v. EPA, 427 U.S. 246, 257 (1976).

14. For example, chlorofluorocarbons may or may not affect the ozone layer of the earth enough to cause skin cancer. The Food and Drug Administration (FDA), however, accepted the scientific arguments for this causation and banned the use of chlorofluorocarbons. 21 C.F.R. § 300.100 (1983).

15. Some meteorological studies suggest that sulfur and nitrous oxides from coal fired power plants affect the acidity of precipitation several hundred miles downwind of the source. The Reagan Administration's early approach to the acid rain controversy, however, focused more on the costs of regulation to the affected industry. In an address to the Kentucky Coal conference, an aide to former EPA Administrator Gorsuch said that the Reagan Administration's decision process on environmental questions would include "common sense and a healthy regard for economic realities." *Senate Acid Rain Amendment Labeled 'Excessive,' 'Premature' by EPA Official*, 13 ENV'T REP. (BNA) No. 16, at 530 (Aug. 20, 1982).

16. The political opposition to environmental regulations is a natural reflection of the differing constituencies of science, economics, and consumer/user attention. These conflicting concerns are represented in both the legislative debates about Clean Air Act provisions and the EPA rulemaking process itself. Uncertainties exist and the EPA has been accorded some deference in resolving them. *See* Ethyl Corp. v. EPA, 541 F.2d 1, 12 n.16 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

17. *See, e.g.*, 7 U.S.C. § 2014(a), (b) (1982) (delegating the power to set food stamp eligibility rules); 7 C.F.R. §§ 273.1-.12 (1983) (implementing the eligibility rules); *see also* Allen v. Bergland, 661 F.2d 1001 (4th Cir. 1981) (distributee's challenge to food stamp eligibility rules).

18. Congress need only continue the funding of the program and refuse to permit the use of funds to terminate the benefits of previously eligible recipients. Prohibiting the administrative agency from cutting off beneficiaries is a persuasive tactic in maintaining eligibility.

cits of the administration, but the basis of change will be different. Environmental rule changes and health protection rescissions are also similar. Both types of changes can arise from conscientious reexamination of the extent of government participation in a particular field and the extent to which the rules are likely to produce the desired result.[19] For purposes of this Article, the attention given to deregulation measures is the same for each class of rules. Devices for rescinding or modifying rules are constant among the varying statutory missions that the different rules serve.

## III. DEREGULATION

If the concept of regulation allows no uniform expression of means and ends, so deregulation as a general concept is not susceptible of a single expression. In general, deregulation is the conscious withdrawal of an earlier command, control, eligibility, or exclusion regulation, regardless of the means chosen for the deregulation.[20]

The range of problems that a rule's elimination or modification might seek to correct, however, is too broad to fit within a general definition.[21] A rule may be functionally obsolete because of engineering advances.[22] A rule may reflect an erroneous estimate of

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19. Two Reagan Administration deregulatory efforts relying on these justifications were the proposals to revoke certain Occupational Safety and Health Administration (OSHA) safety standards, 29 C.F.R. § 1910.4 (1983), and to reduce strip mine regulatory controls, 30 C.F.R. §§ 840-845 (1982). The Administration argued that the revocation did not lessen workers' safety or the mine environment's protection. For an advocacy paper critical of the Administration's deregulation policy, see C. LUDLAM, UNDERMINING PUBLIC PROTECTIONS: THE REAGAN ADMINISTRATION REGULATORY PROGRAM (Alliance for Justice Report, 1981).

20. Deregulation is more than the converse of "rulemaking." Although the definition of rulemaking covers the amending or repealing of a rule, 5 U.S.C. § 551(5) (1982), deregulation also can include nonaction or the choice to adopt adjudicatory rather than rulemaking approaches to a problem. *See infra* text accompanying notes 64-163. Deregulation has been defined simply as "cutting back Federal controls," S. REP. No. 1018, 96th Cong., 2d Sess. 1, 2 (1980).

21. Aligued against the four types of rules in the preceding section, deregulation commonly consists of such actions as elimination of a radio station regulatory requirement by the Federal Communications Commission, modification of a design safety requirement by the Federal Aviation Administration, adoption of a new measuring system such as the combined air emissions "bubble" system of the Environmental Protection Agency, and revision of standards for computing "income" for food stamp recipients.

22. The government initially set railroad safety rules on changing wheels of railroad cars when cars used iron wheels, and altered the rules to lessen the number of replacements required when railroad companies began using more durable steel wheels. Neustadt, *The Administration's Regulatory Reform Program: An Overview*, 32 AD. L. REV. 129, 150 (1980). Likewise, an agency is likely to alter a recordkeeping rule that does not take into account

costs or an underestimate of the number of affected citizens.[23] A rule may allow certain uses of a hazardous material, thus creating a potentially grave danger.[24] Modification or repeal of a rule in these circumstances is more costly for an agency than allowing the perpetutation of the status quo.[25] The agency, however, usually will feel troubled enough by retention of the existing rule to justify taking the more costly deregulatory steps.

Events during the Reagan Administration suggest that some deregulation has a political basis. The electorate chose President Reagan partly because of a platform commitment to decreased federal regulation, and the President in turn selected teams of public officials dedicated to a policy of deregulation. The Reagan Administration acted upon what it perceived to be an electoral mandate supporting deregulation.[26]

Deregulation has become such a popular topic in recent years that some observers incorrectly believe that it was the creation of the Reagan Administration. For decades agencies have allowed rules to lapse or have withdrawn or not adopted rules.[27] Rarely before, however, have agency managers consciously focused on the topic of deregulation. The Reagan Administration first manifested that focus by "freezing," as of Inauguration Day, 1981, many of the newly enacted and pending rules that the Carter Administration

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computerized data collection. *See* 21 C.F.R. § 211.180(d) (1983) (FDA rule concerning microfiche and computer retention of records).

23. Health officials revised black lung statutes to alter the program's eligibility rules after the discovery that 400,000 people, instead of 4000, would have been eligible under the old rules. 20 C.F.R. § 410 (1983).

24. Rules allowing the use of saccharin in foods may be rescinded if saccharin use is later proven hazardous. 21 C.F.R. § 101.11 (1983). The most widely known carcinogen prohibition in federal law, the Delaney clause, 21 U.S.C. § 348(c)(3) (1982), is an example of a legislative command that later-developed information should be used to disqualify previously accepted material in a regulated use.

25. Although the agency has to bear some overhead costs in maintaining a rule, the people seeking to change the rule will generate more costs as the agency managers progress through the requisite levels of approval for the changes. Therefore, managers seldom allocate enough of their limited resources to developing the record needed to make deregulation a success. *See infra* text accompanying notes 246-50.

26. The Administration has claimed that the mandate to reduce regulation is a "response to the growing opposition of the American people to the increasing intrusiveness of government regulations," and that it made regulatory relief one of its first priorities. Office of the Vice-President, Highlights of Regulatory Relief Accomplishments During the Reagan Administration (Aug. 1983). Commentators fully anticipated such a policy position. Brown, *Regulatory Balance May Shift to Dismantlers*, Wash. Post, Jan. 11, 1981, at L5, col. 1.

27. The Carter Administration's effort at deregulation is summarized in Neustadt, *supra* note 22, at 129.

published during its last days in office.[28] This freeze was unique in modern administrative law. Zealous Reagan Administration deregulation replaced zealous Carter Administration regulation-writing. In February 1981 the Reagan government issued commands to hold, retract, and withhold effectiveness from many of the Carter "midnight regulations" published in multiple Federal Register issues during mid-January 1981.[29]

Shortly after Reagan's inauguration, the second shock of deregulation hit the agencies as new officials took office declaring their intentions to reduce their agencies' established budgets and powers. Rivalries created by this policy change gave rise to the many deregulation court challenges from 1982 to 1984.[30] The third shock came in February 1981 when the President issued a stronger executive order on regulatory analysis.[31] The 1981 order was a mild trauma in comparison to the first two events. The first two changes consisted of well-announced actions on prior rules and the installation of new authors for ensuing rules; the third change imposed a conscious limitation on many future rulemaking policies.

To study deregulation as an historical anecdote of the politics of 1981 would be folly. Government officials have practiced deregulation by modification of rules to cure specific problems for years. The Carter Administration undertook an extensive deregulation project, but the Administration's approach was one of quiet reorganization.[32] The Administration refrained from deregulation in

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28. The Reagan Administration nicknamed the 150 final rules that the Carter Administration adopted during its last month in office the "midnight regulations." Fact Sheet: Memo to Executive Branch Agencies Ordering 60-Day Freeze on Regulations (Jan. 29, 1981) (White House press release).

29. The "Freeze Order" was published as Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (1981).

30. Many of the significant court decisions during 1981 to 1984 discussing judicial review of deregulation arose because of active deregulation in early 1981. *See, e.g.*, 46 Fed. Reg. 12,033 (1981) (reopening of the air bags rulemaking), *discussed in* Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2864 (1983); 46 Fed. Reg. 44,198 (1981) (regulation of truck drivers), *discussed in* Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216 (D.C. Cir. 1983).

31. Exec. Order No. 12,291, 3 C.F.R. § 127 (1981). The order imposed a specific limitation on future rulemaking and required reexamination of existing rules. *See id.* § 3(i).

32. For a discussion of the Carter Administration's work, see Neustadt, *supra* note 22, at 129-59. Carter's Reorganization Project considered structural mergers within the Executive Branch, while his Regulatory Advisory Review Group reviewed new rules and his Regulatory Council coordinated new initiatives for the agencies. Memorandum on Strengthening Regulatory Management, PUB. PAPERS, Oct. 31, 1978, at 1905; *see* Tolchin, *Presidential Power and the Politics of RARG*, REG., July-Aug. 1979, at 44.

the health, environmental, and social categories of regulation,[33] and instead concentrated on economic deregulation.[34] President Carter carried out his economic deregulation with the full cooperation of a democratic Congress.[35] Under the leadership of Senator Edward Kennedy, Carter's deregulatory forces scored impressive legislative and rulemaking changes against energy price controls, trucking route allocation, and airline price and route controls.[36] In the few instances when courts reviewed these changes, the courts found deregulation palatable as a type of economically justified adjustment to statutory programs.[37]

## IV. THE UTILITY OF JUDICIAL OVERSIGHT

Just as teachers often cannot solve problems that a student manifests as a result of family difficulties—the student whose problems reflect pain or pressure from parents may be beyond the cure of the schools—the federal courts, while able to offer temporary shelter from the special problems caused by a deregulatory action, rarely can offer relief that will readily and completely cure the underlying problems occasioning the agency action. Therefore, judicial review is not an ideal solution for the problems that an offended advocacy group has with deregulation[38] or that an agency has in its relationships with the President or Congress.

The Administrative Procedure Act (APA) empowers the courts to review administrative rulemaking.[39] The "arbitrary or capricious" standard of review generally governs the courts' review of agency rulemaking.[40] A court will enjoin an agency from adopting a rule modification, or termination, or a court may declare the amended rule invalid, if the court finds that the agency has acted

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33. *See supra* text accompanying notes 2-19.

34. For example, the Carter Administration helped Congress deregulate trucking rates. 49 U.S.C. § 10701 (Supp. V 1981).

35. *See* DeMuth, *The White House Review Programs*, REG., Jan.-Feb. 1980, at 13; Neustadt, *supra* note 22.

36. *See* S. BREYER, *supra* note 6; R. LITAN & W. NORDHAUS, *supra* note 7, at 40-41.

37. No one has compared the number of modified regulations voided on judicial review preceding and subsequent to 1981. Impressions, however, suggest that the pre-1981 efforts at more conservative deregulation met with more success on review than those efforts after 1981. *Compare* Environmental Defense Fund v. EPA, 636 F.2d 1267 (D.C. Cir. 1980) *with* Sierra Club v. Gorsuch, 715 F.2d 653 (D.C. Cir. 1983) (less deferential to agency discretion).

38. Regulatory negotiation may be a superior way for these groups to resolve the problems that deregulation has caused them. *See* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

39. *See* 5 U.S.C. § 706(2) (1982).

40. *Id.* § 706(2)(A).

in an arbitrary or capricious manner in affecting the rule.[41] Recently, courts have begun to address deregulation by pressing the agency to cure its inactivity with more regulatory rulemaking.[42]

The courts' deferential acceptance of policy decisions made by agencies is a widely accepted model of judicial review.[43] Studies of actual judicial review of policy-based rules, however, suggest that the courts strictly scrutinize the rulemaking agency's policy decisions.[44] An agency manager reporting to the President and Congress already has more than 536 elected critics of the agency's performance to restrain the administrator's policy options.[45] If the more than 800 federal judges[46] choose not to defer to the agency on what the agency believes are policy decisions, then much of the policy power will shift from elected officials to the courts, at least in deciding the limits of an agency's policy options. Judicial review of deregulation has done much to crystallize this trend.[47] At one point judges could differentiate policy choices, factual decisions, and interpretations of law, and could find different review approaches for each.[48] Recently, however, the courts have applied a more exacting scrutiny even to the most policy-based instances of deregulation. Recognizing that the judiciary could be a potent opponent of a new policy, the administrations of both parties ob-

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41. Unless an agency's enabling statute provides for another type of review, the court may grant injunctive or declaratory relief. *Id.* § 705; *see* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 193-94 (1965); J. O'REILLY, ADMINISTRATIVE RULEMAKING 264 (1983).

42. *See* Center for Auto Safety v. National Highway Traffic Safety Admin., 710 F.2d 842, 846-47 (D.C. Cir. 1983). Courts are empowered to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (1982).

43. Judicial deference to agency decisions is a widely accepted concept when applied to pure policy matters. McGowan, *Managing the Regulatory Process*, 32 AD. L. REV. 239, 245 (1980) (panel discussion).

44. When courts are reviewing administrative agency action, they more frequently discuss deference than actually give deference to the agency. This trend is discussed in O'Reilly, *Deference Makes a Difference: A Study of the Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 745-46 (1980).

45. Of the 536 elected government officials—435 House members, 100 Senators, and the President—five people wield the most influence: the chairman of the House and Senate appropriations subcommittees for the agency, the chairman of the subject matter committees that perform oversight of the agency functions and control reauthorization of the agency's statutory power, and the President.

46. The complement of federal judges, of course, is far greater than the number of judges who actually hear administrative agency appeals in any given year. Administrative Office of the U.S. Courts, Annual Report of the Director at 3, table 2 (1981).

47. Courts have had much more opportunity to review agency action as opponents of deregulation have attempted to use judicial review as a defensive tool against deregulation. Wines, *Administration, Critics Play Legal Cat and Mouse Game on Agency Rules*, 14 NAT'L J. 2157 (1982).

48. McGowan, *supra* note 43, at 245.

jected to changes in the system of judicial deference on matters of policy.[49]

As the mood of Congress or the President shifts against a particular regulatory system, the agency may feel significant pressures to lessen or eliminate a set of rules.[50] The courts, however, are capable of nullifying the policy change by means of fact-specific enforcement commands, injunctions, and consent orders,[51] if the court finds that deregulatory action was arbitrary, capricious, an abuse of discretion, or contrary to law.[52]

Deregulation poses a new quandary for the socially concerned, activist judge. Congress can retract a regulatory grant or force appropriations upon an agency that would prefer to starve an errant program. With few exceptions, a President can forestall deregulatory actions.[53] When a court enters the fray of overseeing agency discretion, the policy choices the court makes will be much more difficult to anticipate, and the agency's anticipation of the political direction of the President or Congress becomes less useful. The policy administrator, fearful of reversal, will narrow his or her policy options when the court assumes this policy oversight role.[54]

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49. Political opposition to the Bumpers Amendment, which would have eliminated presumptions of validity for agency regulations on review, illustrates the agencies' fear of potential court policy power. *See Hearings on the Regulatory Procedures Act of 1981 Before the House Judiciary Committee*, 97th Cong., 1st Sess. 751, 898 (1981).

50. For example, the Treasury Department withdrew a wine ingredient labeling rule, 46 Fed. Reg. 55,093 (1981), after extensive pressure from the California wine industry lobby. Swallow, *Administration Corks Up a Regulation That Had the Wine Makers in Ferment*, 12 NAT'L J. 1730 (1981). Subsequently, a public interest group challenged the withdrawal of the ingredient labeling rule. The court found the withdrawal "ill-considered and superficially explained," but expressly held that a charge that the agency "succumbed to political pressure" was not a valid objection to a change in a rule. Center for Science in the Public Interest v. Department of the Treasury, 573 F. Supp. 1186 (D.D.C. 1983) (appeal pending).

51. *See* 5 U.S.C. §§ 703, 705 (1982). A court also might grant relief under a special statute from which the agency derived its rulemaking authority. *See* Environmental Defense Fund v. EPA, 636 F.2d 1267 (D.C. Cir. 1980).

52. 5 U.S.C. § 706(2)(A) (1982). In several instances statutes require the courts to apply the substantial evidence standard. 5 U.S.C. § 706(2)(E), (F) (1982). The arbitrariness standard is still preeminent. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856 (1983). An administrative law expert, however, has written about the standard: "Preeminence has not brought clarity. . . . [N]one of us has any very good idea what those words [arbitrary and capricious] mean." Allen, *Chairman's Message*, 35 AD. L. REV. at iii, vi (Spring 1983).

53. The President controls the decisionmaking of Executive Branch agencies as their principal elected "boss." Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981). The President, however, does not have the same control over independent agencies. *See, e.g.*, United States Senate v. FTC, 103 S. Ct. 3556 (1983).

54. When a court takes the policy steering wheel away from an agency and reprioritizes the agency's agenda of rulemaking projects, as the court did in the ethylene oxide

The principal benefit of the Reagan deregulation drive for administrative law has been the clarification of how courts should interpret the arbitrariness standard.[55] Because the Supreme Court expanded the arbitrariness test in 1983 in *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,[56] deregulation challengers will be able to subject future agency efforts to deregulate to a more heightened judicial review.

In addition to clarifying the judicial review standard, deregulation by the Reagan Administration has served to single out the matters that should be left to agency discretion.[57] Prior to the deregulation cases of the 1980's, Congress had delegated so much discretion to the agencies in the safety and health fields that choices were wide open to interpretation and debate and therefore were virtually unreviewable.[58] A set of judicial challenges to agency discretion and inaction, as illustrated in *Chaney v. Heckler*,[59] began to alter this approach. Courts today will review challenged agency inaction as often as they will review challenged agency action.

The Reagan Administration's use of deregulation has caused widespread debate about fundamental questions within all three branches of government. Deregulation has led to a major congressional reexamination of the "arbitrary or capricious" standard of judicial review.[60] Congress has stepped up its use of appropriation

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OSHA decision, Public Citizen Healtb Research Group v. Auchter, 702 F.2d 1150, 1153-54 (D.C. Cir. 1983), an agency manager is unable to predict the future of a particular program, despite the agency's wishes.

55. The extensive Reagan Administration effort to revise agency rules has made the arbitrariness standard clearer. The decisions in cases arising from a review of those efforts, such as Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856 (1983), have added to the general understanding of the meaning of arbitrariness. *See, e.g.*, Allen, *supra* note 52, at v.

56. 103 S. Ct. 2856 (1983); *see infra* text accompanying notes 165-73.

57. The case law since 1981 has explored the issue of what is a matter of agency discretion better than that of any other period in the APA's history. *See* WWHT, Inc. v. FCC, 656 F.2d 807, 816-19 (D.C. Cir. 1981). Since deregulation decisions are so discretion oriented, any judicial review must test the limits of discretion, particularly regarding which rules to pursue. The common law of judicial review, which formerly treated nonaction more leniently than action, has been eroded. Ideally the agency should have an important range of discretion to decide "what an agency wishes to do and not to do, within the broad range of alternatives available under its charter." Scalia, *Chairman's Message*, 34 AD. L. REV. at v, vi (1982).

58. For example, under a statute prohibiting the marketing of drugs not found "safe" by FDA scientists, 21 U.S.C. § 355(a), (d) (1982), the courts would not reverse the FDA on its decision.

59. Chaney v. Heckler, 718 F.2d 1174, 1183-90 (D.C. Cir. 1983) (discussed *infra* notes 78-83 and accompanying text).

60. *See* 5 U.S.C. § 706(2)(A) (1982) (scope of judicial review).

powers as a countermeasure against deregulatory steps.[61] Finally, the executive branch has chosen to make the issue of deregulation's effectiveness a matter of reelection politics.[62]

## V. Devices for Deregulation

A prerequisite to critiquing the courts' review of deregulation is an understanding of deregulation's mechanics. A politically appointed agency head may declare that the agency will deregulate, but expressing the wish does not make it so.[63] To implement deregulation the agency management can choose rescission, modification of scope, avoidance of a new rule, or some combination of these options. This part will examine each of these devices from the intraagency standpoint of what an agency must do in order to use the particular deregulation method. The judicial review of each of these devices differs because courts accord each option varying degrees of deference. Some choices, such as total rescission, are scrutinized quite closely by the courts, while others, such as the decision not to adopt a rule, often are deferentially reviewed.

### *A. Revocation of a Regulation*

Revocation—the repeal, modification, or withdrawal of a rule—commonly occurs when agency management changes either its policy approach to the problem,[64] its factual assessment of conditions subject to the rule,[65] or its understanding of the statutory authority.[66] Revoking the rule commences with notice that the rule has been selected for reexamination, or that the agency proposes to repeal it,[67] or that the agency suspends enforcement of the rule

61. Congress has long exercised power, through appropriations, to command agencies to do or refrain from actions. *See* W. Gellhorn, C. Byse & P. Strauss, Administrative Law 104-07 (7th ed. 1979).

62. *See* Office of the Vice-President, Highlights of Regulatory Relief Accomplishments During the Reagan Administration (Aug. 1983). As the 1984 election nears, regulatory reform will he an increasingly important topic. *See* Kurtz, *OMB's Role in Reviewing Federal Rules Under Debate*, Wash. Post, Oct. 9, 1983, at A8, cols. 1-4.

63. Administration managers' policy changes are not self-executing within the agencies; the staff of the agency still must agree to accomplish the political goals.

64. Reviewing courts should grant these policy matters the greatest deference. McGowan, *supra* note 43, at 245.

65. Courts are much less deferential to factual issues than to policy issues. *Id.*

66. Courts are as good or better than agencies at reinterpreting statutes. *Id.* Overall, then, the prudent agency will premise deregulation upon policy grounds.

67. This notice can be found in an agenda of regulations published by the agency on a periodic basis or in a Federal Register announcement of the proposed revocation.

and invites comments on the action.[68] An agency sometimes can declare revocation effective immediately under the exception for immediately effective rules, but using this exception leaves the agency vulnerable to criticism concerning its rush to deregulate.[69] The most direct form of deregulation, thus, is also the most cumbersome.

Revocation constitutes "rulemaking" under the APA.[70] Although the lower courts had approached this view, *State Farm*,[71] a 1983 Supreme Court case, settled any remaining disagreements. The *State Farm* decision concerned the long-running dispute over seat belts and passive restraint devices, such as air bags.[72] In *State Farm* the agency had revoked a regulation requiring air bags in new cars, ten months before the regulation would have become effective. The agency defendant, the intervenor automobile makers, and the plaintiff insurance firms were divided in their views concerning the efficacy of the regulation. Significantly, in *State Farm* the Court clearly stated that the deregulatory action of rule withdrawal must satisfy rulemaking procedures of notice and opportunity for public comment.[73] The Court equated the removal of a rule with the creation of a rule for purposes of identifying the procedures to be followed in revocation.[74] The Court made it clear that procedural compliance was essential to a successful rule revocation.[75] On remand, therefore, the agency is required to follow all the necessary procedural steps, but probably will reach the same substantive result—revocation of the rule.

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68. Notice of suspension and the proposed rescission of a rule are usually published together, for public comment, in accordance with 5 U.S.C. § 553(c) (1982). Modern agencies are more aware of the pitfalls of hasty deregulatory action. *See* Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 816-17 (D.C. Cir. 1983); Council of S. Mountains v. Donovan, 653 F.2d 573, 582 (D.C. Cir. 1981).

69. 5 U.S.C. § 553(d) (1982). Agency suspension of enforcement should be accompanied by a rulemaking notice regarding rescission. *Id.*

70. 5 U.S.C. § 551(5) (1982).

71. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2867 (1983).

72. The air bags proceeding began in 1967 with seat belt standards and progressed with politics and technology to the Supreme Court. For an extended discussion, see Graham & Gorham, *NHTSA and Passive Restraints: A Case of Arbitrary and Capricious Deregulation*, 35 AD. L. REV. 193 (1983).

73. *State Farm*, 103 S. Ct. at 2865-66.

74. *Id.* Plaintiff's effort to save the agency's rule was not a specious argument, but the statutory correlation of several types of actions within "rulemaking," 5 U.S.C. § 551(5) (1982), made it easy for the Court to set a standard of review higher than "unlawfully withheld" action. *Id.* § 706(1).

75. *State Farm*, 103 S. Ct. at 2866.

### B. Deregulation Through Modification and Reinterpretation

New managers of an agency sometimes wish to recede from acquisitions of power accomplished by their predecessors. Abandoning or limiting a past position can be difficult. Modification of the scope of an existing rule can be especially difficult when the regulation affects a community that is sharply divided over the wisdom and efficacy of the rule. When an agency strengthens or weakens the requirements of a rule well-regarded by consumers but disdained by producers, for example, at least one side is sure to fight the modification. Most substantive rules have a legislative scope, and like legislation, they create a constituency with expectations and a target audience with objections. If the court views the rule as an embodiment of clear legislative intent, the agency that seeks to modify the rule will have an uphill battle. In the typical battle over modification, proponents of the old rule argue that the legislative body must approve the change, while the agency seeking changes argues that the legislature delegated choices, not commands, so that the agency maintains the ability to change the rule.[76]

The courts are influenced by several factors when deciding whether to accept the withdrawal of past agency positions. New evidence can justify modification of a fact-specific conclusion.[77] The legislative direction may depend on a set of facts reflecting a past stage of scientific knowledge that current scientific knowledge has altered. Alternatively an agency may concede that it made an error and claim that it now seeks to correct the past mistake. A court may defer to the agency because of its desire to allow the agency to correct flaws in prior rulemaking.

An agency must be sure to modify all relevant aspects of a rule, including the preamble. In the recent case of *Chaney v. Heckler*[78] the Food and Drug Administration's (FDA) attempted modification of the scope of a rule was defeated by an "orphan preamble." The FDA had proposed a rule pertaining to prescribing of drugs for nonapproved uses. In the rule's preamble the FDA had made several remarks about the agency's general policy on the sub-

76. The resolution of these battles will rest on a court's construction of the agency's enabling statute. The court must determine whether Congress intended to force a particular choice on the agency. This process allows a court to alter its statutory construction to fit its view of the "proper" outcome.

77. New evidence may be required as a basis for reexamining a rule. *State Farm*, 103 S. Ct. at 2866.

78. 718 F.2d 1174 (D.C. Cir. 1983).

ject.[79] The FDA later withdrew the proposed rule, but failed to mention the revocation of the general principles contained in the preamble.[80] More than ten years later, the District of Columbia Circuit ruled that the preamble had been a policy statement and had not been expressly revoked;[81] that the preamble had an effect sufficient to characterize the policy statement as a "rule"; and that the agency now could not act inconsistently with the past preamble.[82] If the courts follow the *Chaney* precedent in other situations, agencies that have dozens of similar unwithdrawn preamble comments may be barred judicially from making any future policy modifications. An agency that modifies or withdraws a rule must be careful to eliminate the past preamble statements as well.[83]

Another example of the judicial review of rule modification arose in *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission.*[84] In *Interstate* the plaintiff trade association challenged the Commission's modification of the definition of a key term in the Commission's enabling statute. The Commission had changed the definition of "British Thermal Unit" from the congressional provision in the enabling statute.[85] The term provided the necessary formula for determining the price of gas.[86] The court reversed the Commission's modified definition of the term.[87] In the District of Columbia Circuit's view, Congress chose one particular scale for measuring heat, and the agency did not have the power to alter it.[88] People familiar with Congress' knowledge of details may doubt that a legislative intent concerning

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79. The policy statements concerned limitations on the use of pharmaceuticals for uses not approved specifically by the FDA. *Id.* at 1186. The plaintiffs sought to have this policy applied to impose regulations on the use of lethal drugs in death penalty cases. *Id.* at 1178-79.

80. *Id.* at 1186 n.28.

81. *Id.*

82. *Id.* at 1191-92.

83. Detracting from the precedential value of the *Chaney* case is the established procedure of the FDA to treat the preamble as a form of freestanding policy advice, contrary to the practice of other agencies. 21 C.F.R. § 10.85(d)(1), (e) (1983).

84. 716 F.2d 1 (D.C. Cir. 1983).

85. 15 U.S.C. § 3301 (1982).

86. Gas heating measurement by British Thermal Units is one of the standard technical factors used in adjudications by the Commission. Interstate Natural Gas Ass'n of Am. v. Federal Energy Regulatory Comm'n, 716 F.2d 1, 7 (D.C. Cir. 1983) (addressing the statutory term "btu" in 15 U.S.C. § 3311 (1982)).

87. 716 F.2d at 12.

88. "[H]owever more appealing the dry rule may be to the Commission's sense of scientific aesthetics and accuracy, it is not for the Commission to 'improve' the statutory design chosen by Congress." *Id.* at 15.

as specific a detail as physical measurements of kinetic energy exists; nonetheless, the court was hostile to the Commission's deregulatory action in the face of a relatively clear statutory command.

In contrast to its holding in *Interstate,* the District of Columbia Circuit upheld an agency's modification of an important standard in *Building & Construction Trades Department, AFL-CIO v. Donovan.*[89] A Labor Department rule had revised the standard for wage setting in federal contracts. Labor union advocates challenged the modification in court. The trial court, offended by the agency's unilateral change, ruled that the agency could not modify a rule based on an interpretation of a statute without new legislation.[90] On appeal, the District of Columbia Circuit reversed the trial court and upheld the agency's modification. In an opinion by former Chief Judge McGowan, the court distinguished between the agency's interpretation of a statute and the agency's use of delegated discretion.[91] The court would grant slight deference to interpretations of statutory terms; McGowan himself had articulated that principle in a 1979 address.[92] The court, however, could uphold a rule premised on the agency's use of long-dormant discretion, and in this case did so.[93] If the agency "had some discretion to reach a number of different results rather than [acting in] an area of pure statutory interpretation as to which there is in theory only a single answer," the agency's action would be upheld.[94] "[L]ittle more than clear statement is required" when the agency acts in the area of discretion.[95] One lesson from this case is that the agency presentation makes an important difference. Deregulation through reinterpretation is in greater jeopardy than deregulation through discretionary choice.[96]

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89. 712 F.2d 611 (D.C. Cir. 1983), *cert. denied,* 104 S. Ct. 975 (1984).

90. Building & Constr. Trades Dep't, AFL-CIO v. Donovan, 543 F. Supp. 1282, (D.D.C. 1982), *rev'd,* 712 F.2d 611 (D.C. Cir. 1983), *cert. denied,* 104 S. Ct. 975 (1984).

91. 712 F.2d at 619.

92. "[W]hile courts are at pains to take into account the agency's experienced and informed reading of statutes, courts speak with some comfort and an authority of their own on such issues." McGowan, *supra* note 43, at 245.

93. "The fact that no secretary has previously abandoned the practice does not take away from the current Secretary's power to fine tune his exercise of discretion." 712 F.2d at 622. In a similar setting, the same circuit in 1978 upheld a rule that the agency derived from what it said was dormant authority implicit in 1938 legislation. The court found no barrier to rediscovering that buried treasure of implicit statutory power. National Confectioners Ass'n v. Califano, 569 F.2d 690, 694 n.11 (D.C. Cir. 1978).

94. 712 F.2d at 619.

95. *Id.*

96. In Ford Motor Co. v. ICC, 714 F.2d 1157 (D.C. Cir. 1983), the District of Columbia Circuit found another, yet more amorphous, limitation to an agency's use of deregulatory

Modification of a rule, rather than outright repeal, is a less confrontative strategy for a new political leader of an agency. No agency, however, can make changes in a rule without first considering the possibility of judicial review.[97] The illustrative cases suggest that a measured, not a drastic, change, adopted with a preamble claiming discretion to change and avoiding any clearly statutory requirements for definitions, will most likely succeed. One of the notable phenomena of agency actions in the period from 1981 to 1984 has been agency managers' willingness to announce modifications of prior rules as ideological or political achievements for the Republican Party's policy of deregulation.[98] If a court finds that politics provided the sole motivation for the modification, the court will reverse the agency.[99]

### C. *The Conscious Nonimplementation of a Requirement*

An agency can enforce a statute or rule that commands or controls certain private action at any time after its effective date. An

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modification. The ICC, as part of its general plan for deregulating the railroad industry, had changed its method for handling shippers' complaints from an individual procedure to a class procedure. Responding to a shipper's challenge to the modification, the court held that even though the modification was within the agency's power, the change must be reversed because it was not a measured retreat from regulation, but was a drastic change. *Id.* at 1164-66.

97. One of the most significant judicial considerations is the need for an adequate administrative record. A prudent agency should have "a set of procedures for presenting and organizing that detail [of rulemaking factual support] in a principled way before a rule is promulgated." Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 35, 74 (1975).

98. Vice-President Bush, in announcing certain rule modifications, said: "To date it is estimated that these actions will result in a total of approximately $150 billion being saved . . . which can now be used for new jobs, investment and research and development." Letter from Vice-President Bush to the Author (Aug. 11, 1983) (accompanying booklet on *Highlights of Regulatory Relief Accomplishment During the Reagan Administration* (Aug. 1983)).

99. Political influence in rulemaking is not forbidden, of course, and many courts consider the practice legitimate so long as the agency does not violate the APA. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981); *see also* Cutler, *Panel: Managing the Regulatory Process*, 32 AD. L. REV. 239, 243 (1980); Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1411-12 (1975); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 988 (1980). The mere desire to end a politically undesirable regulation is not a factually supportable basis for a rulemaking. Even policy changes require adequate support. Part of the problem may be that the political claims for the Reagan Administration deregulation actions are more extreme than those made in past administrations, while the reviewing courts receiving appeals from the deregulation include more than 200 judges appointed by former President Carter from 1977 through 1980. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 3 (1981).

agency, however, may attempt deregulation through a policy of conscious nonenforcement of the target statutes or rules. Deregulation through nonenforcement is different from the prosecutorial discretion to select cases for adjudication. In challenges to adjudication, a court usually will not review closely the means by which the agency selected its targets, but the choice itself is reviewable on grounds of arbitrariness.[100] In *Dunlop v. Bachowski*[101] the Supreme Court held that a court may review an agency's failure to take action when properly requested. In *Dunlop* the Labor Department had refused to take action upon a union member's complaint. The Supreme Court, siding with the aggrieved member, allowed courts to demand a statement of the agency's reasons for its decision not to bring an enforcement case.[102]

The deregulating agency may make a qualitative choice to do less extensive interpretation of a statutory command or a quantitative choice to decrease the number of enforcement inspections and other actions.[103] The former choice is subtler, and merely requires top management to veto specific cases. Opponents can attack such nonaction only after a pattern or practice develops. The latter is a visible budget choice, but the agency can defend the decrease as a fiscal rather than an ideological decision.[104] An agency's deregulatory choice under either approach is often controversial.[105] Gov-

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100. Prosecutorial discretion in case selection is reviewable for "abuse of discretion." 5 U.S.C. § 706(2)(A) (1982). An agency's decision to file complaints generally is not reviewable. *See, e.g.*, FTC v. Standard Oil Co., 449 U.S. 232 (1980). Likewise, the decision to commence a court enforcement action probably will not be reviewed before initiation of the action. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-99 (1950).

101. 421 U.S. 560 (1975).

102. *Id.* at 571. In reversing a broader principle set by the lower court, the Supreme Court allowed the courts to remand if the agency inadequately disclosed its reasons, but the Court cautioned that the agency's nonenforcement decision would be reversed if it were so irrational that it could be considered arbitrary. *Id.* at 575.

103. "Regulations impose no costs and produce no benefits if they are not enforced and complied with . . . even if new regulations continued . . . with the same potential impact as in previous years—relief could be provided through relaxation in enforcement." R. LITAN & W. NORDHAUS, *supra* note 7, at 126.

104. A reduced budget as a result of reduced enforcement may be the underlying goal of Reagan administration deregulation. *Id.* at 126-28.

105. Controversy arose, for example, when the Department of Agriculture attempted to decrease the number of inspections at meat plants. *See USDA Considering Modifications of Noncontinuous Inspection Bill*, FOOD CHEMICAL NEWS, Sept. 6, 1982, at 3. Similarly, the FDA was criticized for its reduction in prosecution and seizure actions under the Reagan Administration. In 1977 the FDA conducted 32 prosecutions, issued 40 injunctions, and initiated 530 seizure actions. In 1981 the FDA conducted 18 prosecutions, issued 13 injunctions, and initiated 276 seizure actions. Food and Drug Administration, Statistics on Enforcement Actions Update, Talk Paper T82-89 (Dec. 6, 1982).

ernmental deregulation through conscious nonenforcement of existing rules also is not as desirable from the viewpoint of the regulated community as is elimination of the rules.[106] The steelmaker does not benefit, except in the short term, from the Environmental Protection Agency's nonenforcement of water emission standards by decreasing monthly inspections.[107] The standards still exist and the enforcement penalty exposure continues. The inchoate risk always is present because the regulator may select a firm as a target at any time. When the keeper of the arsenal changes, the arsenal remains fully equipped, and if the old administrator was ousted for inaction, the new keeper of the arsenal will be likely to overreact in favor of enforcement.

Courts are less likely to overturn conscious nonenforcement than they are to overturn revocation or modification. Challengers seek to control conscious nonenforcement through section 706(1) of the APA, which provides for judicial review of an agency's failure or refusal to act.[108] The Supreme Court in *State Farm* differentiated between this type of failure to act and a rescission of a completed rule.[109] This distinction should not be obscured; clearly, plaintiffs will find it a more difficult task to challenge inaction than to attack a particular Federal Register announcement.[110]

One can draw an analogy between failure to enforce a rule and mandamus relief in equity. The mandamus writ would lie when an officer failed to carry out a ministerial duty, but the writ was not available to command the performance of a discretionary action.[111]

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106. Governmental elimination of active enforcement alleviates some exposure to penalties in the short term, but increases the cost disadvantage to full compliance firms in comparison to less responsible competitors. For a discussion of the economic effects of the decline in rule enforcement, see R. LITAN & W. NORDHAUS, *supra* note 7, at 126.

107. Large capital equipment and maintenance expenditures will remain unaffected by the frequency of the agency's inspectional visits. The change in inspections may affect the volume of paperwork and the frequency of fines, but this decrease is unlikely to be significant in overall compliance costs.

108. A court can review action "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (1982); *see* Center for Auto Safety v. National Highway Traffic Safety Admin., 710 F.2d 842, 846 (D.C. Cir. 1983); Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 636 (1983).

109. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866 (1983).

110. The inactive agency always can assert that it bas not yet taken final action. This barrier of ripeness is sometimes difficult to overcome. *See, e.g.*, Center for Auto Safety v. National Highway Traffic Safety Admin., 710 F.2d 842 (D.C. Cir. 1983); Scalia, *Rulemaking as Politics*, 34 AD. L. REV. No. 3, at v, vii (1982).

111. The federal statutory cause of mandamus has replaced the writ of mandamus. Pub. L. No. 87-748, 76 Stat. 744 (1962) (codified at 28 U.S.C. § 1361 (1976)); *see In re*

A court will examine an agency's failure to enforce a rule by first reviewing the type of command Congress imposed upon the agency. If the court finds that Congress delegated complete discretion to the agency for either part of the choice or the total program, then the court, as in mandamus, will deny relief.[112]

### *D. Failure to Promulgate an Arguably Required Regulation*

One could theorize that an agency which did not choose to promulgate a rule would receive great judicial deference, but recent cases indicate that the more the agency has done toward rulemaking, before choosing not to adopt a rule, the less likely the court is to allow the agency to stop.[113] The agency manager wishing to stop a regulation before it becomes "official" faces a dilemma. Past experience suggests that courts routinely would uphold abandonment of a rule for sound, discretionary reasons of resource priorities, except when Congress has ordered mandatory adoption of the rule; but modern political friction among agencies, Congress, the President, and potential litigants makes the termination of a rulemaking much more difficult. For example, a court may impose an abandoned Carter Administration project upon the reluctant Reagan Administration if the court finds that the prior rule was developed so fully in the record that abandonment only could be capricious.[114]

An agency interested in deregulating can decide not to initiate rulemaking procedures. A supporter of the rule in question can file

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Appeal of FTC Line of Business Reporting, 595 F.2d 685, 704-05 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 958 (1979). Mandamus by statute, however, is not available to compel discretionary action. *See* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 319-20 (1967).

112. The APA precludes review of the limited class of cases in which "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). This narrow class of actions, however, is rarely encountered in typical administrative decisionmaking. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

113. A claim that the decision not to promulgate a rule is a valid exercise of agency discretion will not shield the agency since "the judgment whether or not to pursue a particular area or manner of regulation ceases to be a political judgment once regulation has been initially imposed." Scalia, *supra* note 110, at vii; *see also*, Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1158-59 (D.C. Cir. 1983) (court reversed agency's refusal to regulate and ordered reprioritization of the agency's rulemaking projects).

114. *See* Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1158 (D.C. Cir. 1983). If the agency has rescinded a rule capriciously, the court may demand that the agency quickly announce the future date on which the rule again will be effective. *See* Center for Science in the Public Interest v. Department of the Treasury, 573 F. Supp. 1168 (D.D.C. 1983).

a petition demanding the issuance of the rule under section 553(e) of the APA, and the agency must answer and provide reasons supporting its nonactivity.[115] The decision not to regulate is a "nonregulatory" decision, something conceptually distinguishable from deregulation. Unlike the nonenforcement option,[116] a challenge to the agency's deregulatory choice to forego the issuance of a rule often arises from a previous request for rulemaking by the party who is challenging the agency in court.[117]

As a general rule, courts will accept an agency decision not to institute a rulemaking proceeding. The District of Columbia Circuit, however, closely scrutinizes the omission of a rule if the challenger asserts that the agency failed to comply with a statute. The District of Columbia Circuit requires the agency to show "reasoned decision making" in its rulemaking denial.[118]

The District of Columbia Circuit articulated its "scrutiny" standard in a 1979 case concerning a proposed requirement in securities disclosure rules.[119] The Securities and Exchange Commission (SEC) has discretion to require public corporations to make disclosures of information to the investing public. The court upheld the choice of the SEC not to adopt special disclosure rules on environmental and social issues as a matter of reasonable agency discretion. The court found that the decision considered both the exercise of statutory discretion and a procedurally adequate record.[120]

In more recent cases, the District of Columbia Circuit has developed law in the inaction category. The court appears to approach agency inaction in economic regulation deferentially, while closely examining agency inaction in health and safety regulation.

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115. 5 U.S.C. §§ 553(e), 555(e) (1982). These sections govern petitions—the former for filing, the latter for responding. *See* J. O'REILLY, ADMINISTRATIVE RULEMAKING § 17.01 (1983); *see generally* M. ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES (1973).

116. *See supra* notes 100-12 and accompanying text.

117. *See, e.g.*, Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1152 (D.C. Cir. 1983); Center for Science in the Public Interest v. Department of the Treasury, 513 F. Supp. 1168 (D.D.C. 1983).

118. *See* Public Systems Health Research Group v. Federal Energy Regulatory Comm'n, 709 F.2d 73, 86 (D.C. Cir. 1983); United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1222 (D.C. Cir. 1983).

119. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1047-49 (D.C. Cir. 1979).

120. *Id.* If the record had not been adequate, the court would have required remand to the agency for reconsideration of the petition through proper procedural steps. *Id.*

When the communications industry challenged the Federal Communications Commission's refusal to adopt certain international communications rules, for instance, the court accepted the agency's nonaction decision.[121] The same circuit, however, closely scrutinizes most challenges asserting safety or health grounds for promulgation.[122] In fact, the court has gone as far as requiring new schedules and new requirements for rulemaking in cases concerning an agency's failure to regulate polychlorinated biphenyls[123] and ethylene oxide.[124] These cases illustrate a novel and very intrusive form of judicial review. An agency, therefore, must be careful not to delay health related regulations, or it risks a reprioritization of its rulemaking agenda by the courts.

Another new trend suggests that the District of Columbia Circuit regards inaction itself as "rulemaking."[125] The most extreme case of nonadoption was the circuit's finding in *Center for Auto Safety*.[126] The court held that the agency, which had a set time period within which to make a certain rulemaking choice, had made a "rule" when it did not make a choice within the period.[127] The statutory delegation related to automobile fuel economy. Similar to most modern regulatory statutes, Congress adopted a technology-forcing target that was governed by a specified schedule for fuel economy improvements.[128] The statute provided that the Transportation Department could adopt interim fuel economy rules, but the rules had to be adopted before a set date in order to affect certain car model years. The agency failed to promulgate any rules by the given date. The court treated the agency's choice not to act as an action for which a comprehensive record of public participation was required. The District of Columbia Circuit compelled the agency to make its choice of inaction upon the same

121. *See* ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1245-46 (D.C. Cir. 1983), *cert. granted*, 104 S. Ct. 334 (1984). *But see* Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979) (an example of an older, less deferential case).

122. *See, e.g.*, Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983); Note, *supra* note 108, at 628-29.

123. *See* Environmental Defense Fund v. EPA, 636 F.2d 1267 (D.C. Cir. 1980).

124. Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983); *see also* Note, *supra* note 108, at 633-37.

125. *See* WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981); Natural Resources Defense Council v. SEC, 606 F.2d 1031 (D.C. Cir. 1979); Scalia, *supra* note 110, at vii.

126. Center for Auto Safety v. National Highway Traffic Safety Admin., 710 F.2d 842 (D.C. Cir. 1983).

127. *Id.* at 848-49.

128. *Id.* at 847 (citing 15 U.S.C. § 2002 (1982)).

criteria as it would employ in actual rulemaking.[129]

### *E. Stays of Effectiveness*

An agency can deregulate by staying the effective date of a rule, thereby precluding enforcement of the rule.[130] If the agency stays the effective date, the agency rule is in suspended animation, while proponents of the rule can challenge the agency delay by seeking judicial review of the stay.[131]

When an agency stays a rule rather than modifying or withdrawing it, the agency action has a temporal dimension—ending on the date the agency chooses to remove the stay or modify the rule. Quite often, a ripeness issue arises.[132] A challenger seeks review of the stay, and the agency responds that the court should not consider the action until the agency officially withdraws the rule for repromulgation with modifications.[133] Courts with crowded calendars of "active" administrative reviews may dismiss stay challenges in order to avoid wasting time on unripe controversies.

Unlike other means of deregulation, a stay freezes final action already taken.[134] A rule that the agency has defended successfully in the courts in one administration may later be the subject of a stay.[135] Once-victorious proponents of the adoption of the rule can

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129. *Id.* This judicially created requirement converted the procedural posture for review from one of unlawfully withheld action, 5 U.S.C. § 706(1) (1982), to action chosen but with insufficient legal basis, 5 U.S.C. § 706(2)(A) (1982).

130. If an agency stays the effective date of a rule, the final rule is not enforceable until that time. *See* 5 U.S.C. § 553(d) (1982).

131. The stay constitutes "action," and since it is withheld to the detriment of the person seeking the rule, it may be appealed. 5 U.S.C. § 704 (1982). This includes both actual stays, Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 817 (D.C. Cir. 1983), and constructive stays (actions having the net effect of a stay), Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 711 F.2d 370, 380 (D.C. Cir. 1983). This type of stay authority is distinguishable from the power of a court to stay a rule that an agency wishes to make effective. *See* 5 U.S.C. § 705 (1982); *see, e.g.,* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

132. A lack of ripeness claim challenges the appropriateness of judicial review at the current stage of the controversy. *See, e.g.,* Abbott Laboratories v. Gardner, 387 U.S. 136, 148-51 (1967); J. O'REILLY, *supra* note 115, § 14.08; *see generally* Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action,* 51 IND. L.J. 817, 819-59 (1976).

133. *See, e.g.,* Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 815 (D.C. Cir. 1983); Natural Resources Defense Council v. EPA, 683 F.2d 752, 761-65 (3d Cir. 1982); Council of S. Mountains v. Donovan, 653 F.2d 573 (D.C. Cir. 1981); *see generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25:13 (2d ed. 1983).

134. *See* Council of S. Mountains v. Donovan, 653 F.2d 573, 576-79, 582 (D.C. Cir. 1981).

135. The Reagan Administration, immediately upon assuming office, ordered a stay action for all new and pending rules. *See supra* notes 26-29 and accompanying text.

challenge the stay of that final rule. From the perspective of a successful advocate for the rule, the agency's grant of a stay after the close of rulemaking is a bitter disappointment, "seizing defeat from the jaws of victory."

Very few recent cases discuss the judicial review of stays. A pending case, however, may clarify many of the issues pertaining to the judicial review of stays.[136] The pending case concerns rules that the National Highway Traffic and Safety Administration (NHTSA) promulgated on tire quality grading.[137] In an earlier case, a tire manufacturer challenged these rules as inconsistent, citing varied test results. The court, however, upheld the rules after acknowledging that the agency testing procedures for the rules minimized variability of results.[138]

The pending suit arose when the agency placed a stay on the effectiveness of the rule. The agency suspended the final rule in February 1983, announcing that the accuracy and reliability of the tests were not as good as expected and that the rule therefore might mislead consumers.[139] The pending suit charges that the suspension by stay was arbitrary. Since the agency utilized a rulemaking procedure in issuing the stay, however, it probably has satisfied at least one of the judicial review elements that previously have led to reversal.[140]

The NHTSA may experience trouble on review because of the "deja vu" quality of the challenge. The court has already heard the agency justify its tire quality grading rule[141] and is unlikely to be patient with later contradictory arguments justifying suspension of the rule. Unless new information or a significant error may be shown, an agency will encounter difficulty in justifying the stay of a hard fought rule.

Successful agency opposition in judicial review of a stayed rule is unlikely when "constructive rescission" is present. The District of Columbia Circuit has been most active in recent "constructive rescission" actions. The court's approach, expressed in a hazardous

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136. *See, e.g.*, Public Citizen v. Sneed, No. 83-1327 (pending D.D.C. 1983).

137. 49 C.F.R. § 575.104 (1982), *withdrawn*, 48 Fed. Reg. 5690 (1983).

138. B.F. Goodrich Co. v. Department of Transp., 541 F.2d 1178, 1186-89 (6th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977), *on later appeal*, 592 F.2d 322 (6th Cir. 1979).

139. 48 Fed. Reg. 5690 (1983).

140. The agency initially proposed the stay, 47 Fed. Reg. 30,084 (1982), in an attempt to avoid a remand for further procedures under an expansive view of the term "rulemaking."

141. *See* B.F. Goodrich Co. v. Department of Transp., 541 F.2d 1178, 1191 (6th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977), *on later appeal*, 592 F.2d 322 (6th Cir. 1979).

waste case, indicates its close scrutiny of health or safety related deregulation attempts.[142] Sometimes the agency's behavior before the stay establishes a form of estoppel against the agency. In a recent nuclear power plant license case the regulatory agency required certain compliance steps subject to strict deadlines.[143] Although this license amendment process could not be defined as rulemaking under the APA,[144] the District of Columbia Circuit held that the agency's practice of staying the deadlines required the agency to provide an "opportunity for public comment when it became necessary to change those [license] deadlines."[145]

In general, a court will examine a stay more carefully than a mid-process correction or a refusal to act. The stay reverses final agency action, suspends a public protection, and is therefore subjected to tougher scrutiny.[146] A form of estoppel arises. The real concern that courts must address is the extent to which estoppel concepts may be introduced into the modern administrative rulemaking system before these concepts inflict it with arthritis. If the courts require an overly high level of proof to justify deregulation, rules will become immutable, perpetual requirements.

### *F. The Choice of Adjudication Rather Than Rulemaking*

As the process of rulemaking becomes more encumbered, can an agency simply deregulate through adjudication? There are two answers. If a rule was already in place, the agency cannot "sweep away" the rule by an adjudicated decision.[147] If the rule was not in place, however, the agency can alter its policy by quasi-judicial action.[148] Many agencies can—and do—use adjudication as a safety

142. If a decision to defer an environmental permitting process "effectively suspends the implementation" of a standard, that is "rulemaking." Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983); *see* Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 711 F.2d 370, 380 (D.C. Cir. 1983).

143. Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 711 F.2d at 380.

144. The rulemaking definition excludes licensing. *See* 5 U.S.C. § 551(6) (1982) (licensing is an adjudicatory process). Since nuclear plant licensing is unique to modern administrative procedure, the analogy to rulemaking is tenuous. *See* Tourtellotte, *Nuclear Licensing Litigation: Come On In, The Quagmire is Fine*, 33 AD. L. REV. 367, 387-91 (1981).

145. Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 711 F.2d at 383.

146. *See, e.g.*, Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 816-17 (D.C. Cir. 1983); Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 711 F.2d at 383 (D.C. Cir. 1983); Council of S. Mountains v. Donovan, 653 F.2d 573, 582 (D.C. Cir. 1981).

147. The rulemaking process, however, may not answer every question. In nonrulemaking cases an adjudication could fill the interstices. Difficulties arise when an agency treats an adjudication as if it were a rule, and then later attempts to change the policy. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

148. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

valve for rapidly evolving policy decisions.

Soon after the adoption of the APA, the Supreme Court determined that adjudication remained a viable option for the announcement of new policies and that a court should not compel rulemaking if the agency held adjudicatory power and exercised it prudently.[149] The Court in *Chenery* found that the "informed discretion of the administrative agency" in choosing its procedural devices could be used to select a policy creation device other than rulemaking.[150] *Chenery,* a 1947 decision, set the pace for the SEC, the National Labor Relations Board (NLRB), and other primarily investigative and adjudicative bodies. *Chenery* was also the premise for *NLRB v. Bell Aerospace Co.,*[151] a 1974 case that upheld the NLRB's discretionary choice to use adjudication to alter the definition of a key statutory exception. The Court noted in *Bell Aerospace* that rulemaking offered a forum for collecting "informed views" of commentators "before embarking on a new course."[152] The Court held, however, that when the adjudication process would produce similar relevant information for the agency and give the respondents most affected a full opportunity to be heard, the agency could choose adjudication. These two Supreme Court cases, recognizing that agencies might choose to do more adjudicating, do not indicate that any particular agency will do less deregulatory rulemaking. Both *Chenery* and *Bell Aerospace* were test cases concerning changes in interpretations: neither concerned direct removal of an agency power or policy as a "pure" deregulation by rule.

Agencies now accustomed to rulemaking will not voluntarily move back to adjudication. Agencies do not wish to lose the national attention, wider scope of deterrence, and increased public participation that rulemaking permits. For successful adjudication, an agency must impose a harsh penalty that will generate attention and deter future similar misconduct. Because the defendant has more incentive to appeal a harsh penalty, adjudications are vulner-

149. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . In performing its important functions . . . an administrative agency must be equipped to act either by general rule or by individual order.

SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

150. *Id.* at 203.

151. 416 U.S. 267 (1974).

152. *Id.* at 295.

able to unexpected results on review.[153] Another adjudicatory problem is the unlikelihood that the same agency managers or successors with identical ideological views will be in charge of the agency when the case finally works its way through the appellate courts.[154] Worst of all, the agency management may invest its funds in adjudicating toward a particular principled outcome and then find that the evidence gathering process or a factual glitch in the record causes the case to fall without a resolution on the merits.

At least one circuit has responded to agency adjudication by rejecting adjudicatory attempts to set policy and requiring formal rulemaking procedures. The Ninth Circuit, in two recent cases, has held that an agency may not use adjudication to establish new law. In *Ford Motor (Francis Ford)*,[155] the Ninth Circuit rejected a Federal Trade Commission (FTC) consumer protection decision concerning auto repossession.[156] The FTC had concluded that the applicable Uniform Commercial Code provision was unfair to consumers. On appeal, the Ninth Circuit reversed the FTC and held that the agency "must proceed by rulemaking if it seeks to change the law and establish rules of widespread application."[157] The court cited the Supreme Court's observation in *Bell Aerospace* that "there may be situations where the [agency's] reliance

153. For example, the agency inspection that led to the damaging evidence in the hearing might be excluded as the result of a later constitutional challenge that would force dismissal of the case. The precedent selection process must take into account the risks of losing a case because of the loss of the specific case's factual portion.

154. The tenure of agency heads is usually significantly less than the time period consumed hy the full adjudication process. *See, e.g.*, Porter, *The Federal Trade Commission v. The Oil Industry: An Autopsy on the Commission's Shared Monopoly Case Against the Nation's Eight Largest Oil Companies*, 27 ANTITRUST BULL. 753 (1982); *The FTC's* Cereal *Fiasco: 'Congress Won't Let Us Bust 'Em Up,'* 13 ANTITRUST L. & ECON. REV., No. 2, 1981, at 57.

155. Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 358 (1982).

156. Respondent car dealer Francis Ford had repossessed cars sold on credit on which the buyer had defaulted. Pursuant to the Uniform Commercial Code (UCC), Francis Ford had credited the wholesale value of the car to the buyer, and then had sold the car and kept the total price received, even if it was above the wholesale price. This method of accounting for repossession proceeds, although not explicitly set out in the UCC, is industry practice. *Id.* at 1010; *see* U.C.C. § 9-504 (1981). The FTC case attacked that interpretation of the statutory provision. The FTC order, if it had been enforced, would have invalidated portions of many states' laws that had followed that interpretation.

157. Ford Motor Co. v. FTC, 673 F.2d at 1009. The court also found relevant the fact that the FTC had considered a trade rule on credit practices that could have covered this aspect of the repossession payments, but had not included it in the rule proposal. *Id.* at 1010.

on adjudication would amount to an abuse of discretion,"[158] and held that the instant use of adjudication constituted an abuse of discretion. The Ninth Circuit determined that an agency should use adjudication only when condemning discrete violations of existing law, but that an agency must use rulemaking when seeking to alter a legal rule followed in virtually every state.[159]

More recently in *Montgomery Ward Co. v. FTC*,[160] the Ninth Circuit further refined the limitation on the use of adjudication to change policy. The court found that the FTC had changed the meaning of one of its credit rules in order to find Montgomery Ward guilty of a violation. The court held that this type of rule amendment must be accomplished by rulemaking and that the FTC's use of adjudication was an abuse of discretion.[161] Agencies[162] and commentators[163] have criticized the Ninth Circuit's approach to use of adjudication as an agency policy tool. The principle of requiring rulemaking for major changes in settled practices is inconsistent with both *Chenery* and *Bell Aerospace*, but only time will determine how the Supreme Court and the other circuits respond to these Ninth Circuit developments. In the meantime adjudication remains as a questionable deregulatory option for an agency.

## VI. THE *State Farm* DECISION AND ITS EFFECT ON FUTURE DEREGULATION DECISIONS OF FEDERAL ADMINISTRATIVE AGENCIES

The Supreme Court spoke directly to the practice and theory of due process in deregulation in its recent decision, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[164] The Court stridently reaffirmed the application of the APA's "arbitrary and capricious" review standard[165] to an

158. *Id.* at 1009 (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974)).

159. Ford Motor Co. v. FTC, 673 F.2d at 1009-10.

160. 691 F.2d 1322 (9th Cir. 1982).

161. "An adjudicatory restatement of the rule becomes an amendment, however, if the restatement so alters the requirements of the rule that the regulated party had inadequate notice of the required conduct." *Id.* at 1329; *see also* Bahramizadeh v. Immigration & Naturalization Serv., 717 F.2d 1170 (7th Cir. 1983) (agency cannot nullify wording of a rule by adjudicatory interpretation); Ruangswang v. Immigration & Naturalization Serv., 591 F.2d 39 (9th Cir. 1978) (agency cannot add a requirement to a rule by adjudication).

162. *See, e.g.*, Agency's Brief to the Ninth Circuit Seeking Rehearing En Banc, No. 79-7647 (9th Cir. 1982).

163. *See, e.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:25, at 179-82 (Supp. 1982).

164. 103 S. Ct. 2856 (1983).

165. 5 U.S.C. § 706(2)(A) (1982).

agency's decision to revoke a rule by construing the Act's definition of "rulemaking"[166] to include revocation of a rule. The Court held that action to rescind an agency rule is to be judged by the arbitrary and capricious review standard even when the rule being rescinded is within the "informal rule" category.[167] The Court stated that the reviewing court should search out a reasoned analysis and satisfactory explanation for the agency's rule withdrawal. The reviewing court must look for the agency's consideration of the relevant factors and must reverse the agency if the agency committed a clear error of judgment.[168]

*State Farm* suggests that rapid decisions to deregulate especially those which reject an argument concerning technological alternatives, will be subjected to stricter standards of review. *State Farm,* like the decision five years earlier in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,*[169] has generated important "food for thought" for agencies considering the removal of their rules. Ultimately, *State Farm* will be as important for rule withdrawal actions as *Vermont Yankee* was for additional procedures "supplementing the record" in informal rulemaking proceedings. *State Farm* also is siguificant because it illustrates the heightened scrutiny that the courts will apply to agency actions affecting safety regulations. An agency must take special care in articulating its reasons for removing a safety based rule.[170] In *State Farm* the agency decided to revoke its rule requiring air bags as passive restraint features in new cars. Part of the agency's rationale in withdrawing the rule stemmed from the increased costs associated with the installation of air bags.[171] The Court found the predominately economic rationale for deregulating inappropriate for an agency to which Congress had delegated safety authority.[172] Of course, cost versus safety debates in rulemaking contexts comparable to that of the air bags regulations are inevitable. In the aftermath of *State Farm,* however, agencies will have to be careful in documenting their basis for deregulation decisions.[173] The agency must take special care when commenta-

166. *Id.* § 551(5).

167. *See State Farm,* 103 S. Ct. at 2865.

168. *Id.* at 2867; *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

169. 435 U.S. 519 (1978).

170. *State Farm,* 103 S. Ct. at 2866.

171. *See* Graham & Gorham, *supra* note 72, at 234-35.

172. *See State Farm,* 103 S. Ct. at 2870.

173. "[A]n agency changing its course by rescinding a rule is obligated to supply a

tors press technological alternatives upon the agency for enhancement of safety goals, but agency managers chose to reject them. This part will explore in more detail the *State Farm* decision and its ramifications.

### A. The Regulation

In the National Traffic and Motor Vehicle Safety Act of 1966,[174] Congress directed the Secretary of Transportation to develop standards for vehicle safety. According to the Act, standards "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms."[175] The agency must consider "relevant" and "available" data and the "extent to which such standards will contribute to carrying out the purposes" of the Act.[176] Pursuant to this Act, the Secretary issued the first seat belt regulation, Motor Vehicle Standard 209, in 1967.[177] Many technical issues and political controversies concerning costs, feasibility for industry, and net public benefits ensued during the sixteen years between promulgation and the challenge to the standard's rescission in the *State Farm* litigation. Over the years, the agency made several politically sensitive decisions, reconsiderations, and modifications. When challengers sought judicial review of these decisions, the courts generally deferred to the agency by upholding its safety oriented rules.[178] The particular decision at issue in *State Farm* was the agency's rescission, ten months before the standard was to go into effect, of the revised Federal Motor Vehicle Safety Standard 208, which set forth automatic crash protection requirements.[179]

### B. The District of Columbia Circuit Decision

In 1981 the Reagan Administration decided to rescind the air bags rule, in part because of the massive economic difficulties experienced by the American automobile industry. Automobile insurers, who had long favored better auto crash restraints, challenged

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reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 2866.

174. 15 U.S.C. §§ 1381-1431 (1982).

175. *Id.* § 1392(a).

176. *Id.* § 1392(f).

177. *See* 32 Fed. Reg. 2408 (1967).

178. *See* Graham & Gorham, *supra* note 72, at 193.

179. *See* 46 Fed. Reg. 53,419 (1981).

the rescission.[180] The Motor Vehicle Manufacturers Association defended the rescission by asserting that the proper standard of judicial review for refusals initially to promulgate a rule was that of APA section 706(1).[181] On the petition for review of the rescission action, the District of Columbia Circuit found that the standard of "arbitrariness" review under section 706(2)(A) applied.[182] The court reversed the rescission. The court found that rescission in this case was "a paradigm of arbitrary and capricious agency action" because the evidence failed to support the decision and because the agency had "artifically narrowed the range of alternatives available to it under its legislative mandate."[183]

The District of Columbia Circuit's reading of legislative discussions about auto safety requirements and air bags was unique among modern appellate opinions—perhaps because the judge writing for the panel had been an active congressional participant before becoming a judge.[184] The court drew an inference of legislative support for air bags from a number of reports, legislative speeches, and other indicia of congressional intent short of actual legislation.[185] The Supreme Court criticized this portion of the lower court opinion and may have left it with little or no precedential value.[186] The Supreme Court, however, shared the District of Columbia Circuit's opinion concerning the appropriate standard of review.[187] The circuit court applied an "arbitrary and capricious" standard because its reading of the evidence of potential future benefits from the air bag rule was contrary to the agency's reading.[188] The court stated that "only a well justified refusal to seek

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180. The National Association of Independent Insurers and State Farm Insurance Company challenged the rescission because of their belief that the rule would reduce their payments to persons injured in automobile collisions. *See* State Farm Mut. Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 214 (D.C. Cir. 1982), *vacated and remanded,* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856 (1983).

181. *Id.* Other parties joining the case were the New York State Insurance Department, the Automobile Owners Action Council, and Consumer Alert on the side opposing repeal, and the Automobile Importers of America and Pacific Legal Foundation on the side of the agency.

182. 680 F.2d at 220 (citing 5 U.S.C. § 706(2)(A) (1976).

183. 680 F.2d at 208-09.

184. Judge Mikva before his appointment to the District of Columbia Circuit in 1979 had served as a congressman for four years.

185. 680 F.2d at 222-30.

186. *See infra* text accompanying notes 231-41.

187. *See infra* text accompanying notes 193-203.

188. 680 F.2d at 231. More commonly, a court will accord deference to the operating agency in its judgment about future statistical incidence of a fact within the agency's jurisdiction. *See, e.g.,* Ashland Exploration v. Federal Energy Regulatory Comm'n, 631 F.2d 817,

more evidence could render rescission non-arbitrary."[189] In this instance the agency had rested its decision to rescind the rule upon "substantial uncertainty," and the court found no justification for the agency's failure to seek more evidence before making its decision. The agency "went one step further than reason can support" when it relied on controversial estimates in rescinding the rule.[190]

The District of Columbia Circuit directed future agencies in similar rescission actions first to make a "reasoned and good faith effort to consider alternative means of advancing the agency's purpose," and then to support the rescission with rational explanation.[191] The court's strongly worded criticism of the agency made headlines and led to significant controversy. The District of Columbia Circuit's opinion confronted the Supreme Court with an unusually difficult test of judicial review powers and with one of the Court's first test cases on the deregulation movement.[192]

### C. *The Supreme Court Decision*

The Supreme Court upheld the portion of the lower court decision that invalidated the rescission but discarded much of the circuit court's analytical basis for its decision.[193] The Court first addressed several basic administrative law matters before it reached the actual rescission at issue.

The automobile manufacturers argued before the Supreme Court that a rule revocation should be judged by the section 706(1) standard that applies when an agency refuses to adopt a rule.[194] The Court, however, found that the agency's enabling statute could not support this argument. More importantly, the Court stated that revocation is substantially different from nonadoption because "[r]evocation constitutes a reversal of the agency's former views as to the proper course."[195] The Court held that the arbitrariness standard of section 706(2)(A) was the proper test to apply to

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822-23 (D.C. Cir. 1980).

189. 680 F.2d at 232.

190. *Id.*

191. *Id.* at 240.

192. *State Farm* was the first major administrative law case precipitated by the Reagan Administration's deregulation efforts to reach the Supreme Court.

193. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856 (1983).

194. *Id.* at 2866 (citing 5 U.S.C. § 706(1) (1982)).

195. *State Farm*, 103 S. Ct. at 2865-66. A factor in the Court's analysis not generally applicable to all deregulation cases is that the vehicle safety statute expressly equated revoking with establishing safety rules. 15 U.S.C. § 1392(b) (1982).

a rescission.[196] The Court seems to have established that the standard of review for revocation is the arbitrariness standard unless some statute expressly provides for a different standard.[197] The Court also held that for an agency's rule revocation decision to survive an arbitrariness challenge, the record must show a "reasoned analysis for the change."[198] The Court in *State Farm* extended the reasoning of two of its earlier cases, *Vermont Yankee,*[199] a landmark 1978 decision, and *Citizens to Preserve Overton Park, Inc. v. Volpe,*[200] the 1971 pioneer case for modern judicial review of administrative action. *State Farm* is not factually comparable to *Vermont Yankee,* but both decisions chastise the errant District of Columbia Circuit for placing too many procedural demands on an agency.[201] *State Farm* is not written on as blank an administrative slate as the Court's decision in *Overton Park,* but both cases require the agency to provide a fuller explanation of its decisionmaking process.[202] The continuity of the Supreme Court's analysis from its earlier cases to *State Farm* is an important stabilizing feature of the opinion as agencies try to implement the Court's commands. Both the circuit court and the Supreme Court faulted the agency's weaknesses. The circuit, however, broke numerous unwritten rules in its heated attack against the agency by using sharp terms, by relying on the moods and feelings of Congress, and by its remand order. It would be virtually impossible for an agency manager to comply with the lessons of the District of Columbia Cir-

196. *State Farm,* 103 S. Ct. at 2866 (citing 5 U.S.C. § 706(2)(A) (1982)).

197. *State Farm,* 103 S. Ct. at 2866. For example, an agency's enabling statute could provide that the decision to revoke a rule must be supported by "substantial evidence on the record taken as a whole." 5 U.S.C. § 706(2)(E) (1982).

198. *State Farm,* 103 S. Ct. at 2866. This definition of arbitrariness is easier to satisfy than the circuit court's vague definition keyed to the failure to seek more evidence. *See supra* text accompanying notes 188-89. The Supreme Court's definition, however, is in agreement with other District of Columbia Circuit precedent. *See, e.g.,* United States v. FCC, 707 F.2d 610 (D.C. Cir. 1983); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216 (D.C. Cir. 1983).

199. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), *cited in State Farm,* 103 S. Ct. at 2870.

200. 401 U.S. 402 (1971). This was the first Supreme Court case to explore judicial review of discretionary agency action.

201. The Supreme Court criticized the District of Columbia Circuit's requirement for additional agency procedures in *Vermont Yankee* just as it later criticized the circuit's requirement that an agency interpret and follow legislative debates in *State Farm.* Interestingly, the circuit was aware of the Court's earlier criticism. *See* Scalia, Vermont Yankee: *The APA, The D.C. Circuit, and The Supreme Court,* 1978 SUP. CT. REV. 345.

202. *Overton Park*'s holding found the absence of an explanation for an agency's choice to build a road through a city park unacceptable.

cuit's opinion.[203] Fortunately, the Supreme Court wrote a more practical opinion, squarely based on prior case law and the exigencies of agency practice.

1. The Court's Treatment of the Arbitrariness Standard

On the specific issue of what is an arbitrary and capricious revocation decision—the portion of *State Farm* most relevant to future agency deregulatory decisions—the Supreme Court identified four flaws in the typical deregulation decision that an agency must avoid in the future:

> (1) Reliance on factors which Congress did not intend to have the agency consider;
> (2) "Entire" failure to consider an important aspect of the problem;
> (3) Explanation of the decision that runs contrary to the evidence before the agency; or
> (4) Explanations so implausible that they cannot be ascribed to different views of the facts or to agency expertise.[204]

According to *State Farm,* an agency seeking to deregulate must pay close attention to detail. The agency must be record-conscious and add the proper documentation to support the key conclusion that rescission is needed or documentation to show that the modification will make the program work better.

2. The Effect of Uncertainties on "Arbitrariness" Review

An important ramification of the *State Farm* decision is the Court's determination that, if an agency's decision to rescind a rule is based less upon facts and more upon the agency's expert opinion concerning the potential effectiveness of the rule, the agency's decision to rescind may not survive an arbitrariness review.[205] One of

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203. For example, the circuit court's reliance on its own perception of Congress' moods based on committee reports and floor speeches would be a difficult standard for an agency to conform to in any future rescission decisions. Historically, agencies have followed the District of Columbia Circuit and have tried to conform to its signals, but the jumble of legislative commands on which the District of Columbia Circuit relied in *State Farm* poses a potential problem for agencies trying to follow any one guidepost of legislative commands.

204. *State Farm,* 103 S. Ct. at 2867. An expert commentator has paralleled that list with his own requirements: factual support; findings based on those facts; an explanation of the conclusion that was reached; an explanation that is logically coherent; due regard for agency precedent; consideration of alternatives and adequacy of the underlying documents. Allen, *supra* note 52, at v. Following a combination of the two lists would be a safe course for an agency, although "none of us has any very good idea what [arbitrariness would] mean." *Id.* at vi.

205. *State Farm* strongly suggests that the benefit of the doubt be given to continuation of the existing rule. The Court created a presumption that the "settled course of behavior" is correct. 103 S. Ct. at 2866.

the uncertainties in *State Farm* was the technical debate over automobile seat belt usage. The agency had concluded that it could not predict reliably even a minimal increase in expected usage.[206] Having found uncertainty, the agency concluded that the uncertainty led to doubt whether the rule would meet the goal of additional safety and decided to rescind the rule. The Court refused to accept this rationale for rescission and required more evidence of the rule's ineffectiveness.[207] The Court found abandonment of a rule too drastic a remedy for "uncertainty"—an agency should consider amendment or inclusion of alternatives before rescission.[208]

This aspect of *State Farm* is significant because uncertainties abound in many substantive regulations. Some percentage of rules simply will not work as planned, and some smaller percentage of rule-established programs will not work at all. The *State Farm* Court was probably correct, however, in fearing the use of uncertainties to justify rescissions. If the Court were to set the judicial review standard so low that existence of an uncertainty about a rule's effectiveness triggered permission for the agency rapidly to rescind the rule, the pretext of an uncertainty would be readily available for any agency wishing to effect a political policy change through the rescission of past administrations' regulations.[209] A problem may develop when an agency's rule really has failed. The agency will want to justify rescission in words that do as little political damage as possible. The courts, however, after *State Farm,* will require an explicit showing of the failure in order to sustain the rescission. Agencies may come to feel implicit tension—too explicit a statement of failure is politically damning, while too subtle

206. *Id.* at 2871 (citing 46 Fed. Reg. 53,423 (1981)).

207. *State Farm,* 103 S. Ct. at 2871. After *State Farm,* agency use of the pretext of an undesirable uncertainty about effectiveness to promote repeal of a rule is incorrect unless the agency can show a firm justification based on the existing evidence. *Id.* at 2871-72.

208. *Id.* at 2868-69, 2873. The opinion suggests that it would be best for an agency to search out additional evidence and to use it in modification or to conduct further research before acting. The haste of the agency's decision to rescind was a factor in the Supreme Court's response to the decision.

209. For example, a gap in scientific information about a technical rule occurs so frequently that its appearance is routine. In environmental or human cancer matters, for instance, more often than not an agency must make a policy decision about the technical rule that includes assumptions or extrapolations rather than straightforward facts. "It is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *Id.* at 2871.

a statement of failure may be reversible in the courts.[210]

Due process is not the sole measure of arbitrariness review. In *State Farm* the agency asserted that the arbitrariness standard of section 706 requires no more than minimum rationality, similar to the constitutional due process analysis courts apply to legislative enactments.[211] The Court rejected this comparison and held that the presumption of regularity courts give to rules fulfilling a statutory mandate is less than the presumption afforded to legislation drafted by Congress.[212] The Court, however, did not equate arbitrariness with a lack of direct supporting evidence.[213] To have done so might have elevated arbitrariness, the test for informal rulemaking, to a requirement of substantial evidence, the test for formal rules.[214] When an agency drafts an informal rule, it can clarify factual uncertainties with reasonable policy choices based on experience. This policy is well-accepted judicially and often practiced administratively.[215] When an agency is rescinding a rule, however, the agency cannot claim that the same "substantial uncertainties" are enough to justify the rescission.[216] The agency must have an explanation for the rescission that shows a rational connection between the facts—for example, problems with implementation—and the decision to rescind the regulation.[217]

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210. The Court allowed for the possibility that "serious uncertainties" could justify the rescission of a rule but only "if supported by the record and reasonably explained." *Id.; see generally* Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 560-78 (1979) (discussion of some typical problems characteristic of particular regulatory regimes).

211. *State Farm*, 103 S. Ct. at 2866 n.9.

212. *Id.; see also* McGowan, *supra* note 43, at 245.

213. *State Farm*, 103 S. Ct. at 2871.

214. Although the two tests are statutorily distinct, 5 U.S.C. § 706(2)(A), (E) (1982), courts have tended to combine them. As the Ninth Circuit has stated, "[It would be] difficult to imagine a decision having no substantial evidence to support it which is not 'arbitrary', or a decision struck down as arbitrary which is in fact supported by 'substantial evidence . . . .'" Associated Indus. v. Department of Labor, 487 F.2d 342, 349 (2d Cir. 1973). Other circuits have made similar observations of congruity. *See, e.g.*, AFL-CIO v. Marshall, 617 F.2d 636, 649 n.46 (D.C. Cir. 1979), *vacated*, 449 U.S. 809 (1980), *modified*, 452 U.S. 490 (1981); Short Haul Survival Comm. v. United States, 572 F.2d 240, 244 (9th Cir. 1978); Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191, 199 (5th Cir. 1977); Bunny Bear, Inc. v. Peterson, 473 F.2d 1002, 1005-06 (1st Cir. 1973).

215. The Court in *State Farm* refers to this as an "exercise [of] its judgment in moving from the facts and probabilities on the record to a policy conclusion." 103 S. Ct. at 2871.

216. *Id.*

217. *Id.* (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

### 3. The Risk of Collateral Estoppel or Stare Decisis

The Supreme Court in *State Farm* adopted a presumption of regularity for existing substantive regulations. As the Court stated, "a settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress."[218] This course of behavior triggers a "presumption that those policies will be carried out best if the settled rule is adhered to."[219] Though it stops short of stare decisis, this theory of presumed validity of prior agency action is likely to give agencies more difficulty when attempting to alter rules.

Agencies have preferred informal rulemaking for many years because of its perceived ease of modification.[220] The Food and Drug Administration, for example, dislikes the set of formal rulemaking procedures that accompany certain food regulations, and thus substitutes, whenever possible, a nonstatutory form of food quality regulation.[221] One can view *State Farm* as cutting off the last bastion of purely informal agency rulemaking. If the lower courts, expanding upon *State Farm,* create too great a presumption in favor of existing rules, they may prevent an agency from effectively administering its domain.[222]

In one of the first major lower court rulemaking decisions after *State Farm,* the District of Columbia Circuit added new weight to the presumption in favor of existing regulation, and perhaps created a form of rulemaking collateral estoppel. In *Chaney v. Heckler*[223] the District of Columbia Circuit held that the preamble to a

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218. *State Farm,* 103 S. Ct. at 2866 (quoting Atchison T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973)).

219. *State Farm,* 103 S. Ct. at 2866.

220. Agencies will routinely avoid formal rulemaking whenever possible. This preference was a significant aspect of early efforts toward regulatory reform legislation. *See* S. 1080, 97th Cong., 1st Sess. (1981). Agencies endorsed the Administrative Conference recommendation that Congress not require formal rulemaking in future statutes. *See* 1 C.F.R. § 305.72-5 (1983). Since formal rulemaking is much more difficult to use effectively, agencies successfully have resisted its imposition in recent years. *See, e.g.,* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973).

221. 21 C.F.R. § 102.19 (1983) allows persons to file requests for informal rulemaking in lieu of the formal food standards rulemaking process of hearings under 21 U.S.C. § 371(e) (1982). The longest and most formal rulemaking hearings in FDA history ended with Corn Prod. Co. v. FDA, 427 F.2d 511 (3d Cir.), *cert. denied sub nom.* Derby Foods, Inc. v. FDA, 400 U.S. 957 (1970); they are chronicled in Hamilton, *Rulemaking on a Record by the Food and Drug Administration,* 50 TEX. L. REV. 1132 (1972).

222. The courts, themselves, have conceded the stultifying effect of requiring more procedure. *See, e.g.,* Pactra Indus., Inc. v. Consumer Product Safety Comm'n, 555 F.2d 677, 685 (9th Cir. 1977).

223. 718 F.2d 1174 (D.C. Cir. 1983).

1972 proposed rule, which contained a policy of nonenforcement of part of the enabling statute, remained valid after the proposed rule was withdrawn. The court determined that the agency would have to give notice and seek comments before acting inconsistently with the policy contained in that preamble.[224] The holding in this case further hampers an agency's ability informally to change its policy. Now, even if an agency has overcome the presumed validity of an existing rule and properly has rescinded it, the deregulation attempt still may be thwarted by a forgotten preamble.

4. The Rescinding Agency's Burden with Alternatives

When a technological alternative, such as air bags, is available, rescission might be arbitrary unless the agency considers the alternative. The agency in *State Farm* failed to consider fully the air bag alternative. The Supreme Court found that, given the agency's past judgment that air bags were effective and cost beneficial, the mandatory passive restraint rule "may not be abandoned without any consideration whatsoever of an airbags-only requirement."[225] The Court did not insist on any particular new rulemaking methods to be followed by the agency[226]—it required only that one specific technological alternative be considered. The Court explicitly refused to require an agency to consider all policy alternatives.[227]

Where the Court will draw the line for arbitrary nonconsideration of an alternative is not certain. *Vermont Yankee* teaches that an agency need not explore fully all alternatives simply because they are raised.[228] *State Farm* teaches that an agency may not simply ignore a prominent technological alternative.[229] Therefore, an agency's most prudent course is to place each of the commentors'

224. *Id.* at 1191. In the preamble, the FDA had stated that it would allow doctors to prescribe drugs only for uses the FDA had approved. The challengers, death row inmates, claimed that the use of certain drugs for executions violated this policy and that the FDA should disapprove such use. *Id.* at 1176-79.

225. *State Farm*, 103 S. Ct. at 2871.

226. "We do not require today any specific procedures which NHTSA must follow." *Id.* at 2870-71.

227. The Court refused broadly to "require an agency to consider all policy alternatives in reaching decision," but where an alternative had been judged effective and cost beneficial and was within the ambit of the existing standard, a court could compel an agency to consider that alternative. *Id.* at 2871.

228. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), *cited in State Farm*, 103 S. Ct. at 2870-71.

229. *State Farm*, 103 S. Ct. at 2870-71. The option of air bags had gone so far in the agency's technical assessment process that it became a foster child of the agency managers and could not be abandoned lightly.

alternatives into the final rule's preamble.[230] Then, the length of discourse discarding the alternatives should be proportional to the threat of reversal that the agency perceives to exist for not having adopted that option.

5. Lessons for Agencies on Interpreting Legislative Intent

Another important lesson for agencies from *State Farm* is that an agency should follow what Congress does, not necessarily what it says. In *State Farm* the Supreme Court rejected the portion of the District of Columbia Circuit's opinion that criticized the agency for not heeding congressional debates over passive restraint design and cost. The circuit court believed that these legislative materials indicated Congress' approval of some type of required passive restraint device.[231] The Supreme Court set an important principle in what might be called substatutory interpretation; the District of Columbia Circuit's reliance on "legislative acts and non-acts," such as the passive restraint debates, was wrong.[232] The circuit court's extrapolation produced misguided analysis and questionable inferences.[233] An agency, therefore, can wait until Congress has produced a statute before the agency rulemaking is affected by official legislative action. The *State Farm* decision does not suggest that agencies should ignore Congress. The Supreme Court was simply "not . . . so quick to infer a congressional mandate for passive restraints."[234] Although the Court may have believed that agency recognition of Congressional debate was desirable, it refused, as in *Vermont Yankee,*[235] to force the

230. The legendary preamble of all time may be the OSHA Cancer Policy Preamble that consumed over 250 pages before addressing the rule itself. 45 Fed. Reg. 5002 (1980). An executive order now requires the consideration of alternatives, but provides that such consideration may be included in a "regulatory analysis document" and not in the preamble published in the Federal Register. Exec. Order No. 12,291, § 3(d)(4), 46 Fed. Reg. 13,193 (1981). Since *Vermont Yankee,* however, courts have not required agencies to reply substantively to each comment they receive. *See* South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874, 885-86 (4th Cir. 1983); Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1171 (D.C. Cir. 1979), *cert. denied,* 449 U.S. 823 (1980); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

231. *See* State Farm Mutual Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 222-28 (D.C. Cir. 1982), *vacated and remanded,* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 103 S. Ct. 2856, 2867 (1983).

232. 103 S. Ct. at 2867.

233. *Id.*

234. *Id.* at 2868.

235. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). In *Vermont Yankee* the Court refused to require procedures beyond those that the APA required. *See also* Byse, Vermont Yankee *and the Evolution of Administra-*

administrative agency to look beyond a statutory mandate. If the statute provides for an agency action, it is a mandate; if not, it may be desirable action but is not required.[236]

The teaching of *State Farm* on legislative intent is that an agency has a qualified immunity from reversal when it modifies a rule contrary to legislators' speeches and resolutions opposing modification, so long as the agency meets the procedural requirements of modification[237] and so long as Congress has not yet turned its speeches into statutory action.[238] Congressional comments on existing laws, made after enactment, are not controlling on the agency's choice of its course of action.[239] Agency managers, of course, never will be immune to vibrations from Capitol Hill, nor should they be. Congressional pressure for or against a rule provides a significant perspective for an agency when choosing whether to keep or rescind a particular rule.

Congress still retains the ultimate control over agency decisions made under delegations of legislative power. *Immigration Naturalization Service v. Chadha,*[240] which invalidated the legislative veto, made a small contribution to the independence of the agencies by compelling Congress to undertake a formal statutory change in order to "veto" an agency decision. *Chadha* and *State Farm* are consistent because both decisions urge Congress to overrule agencies only by properly adopted legislation. The Supreme Court, then, has made it easier for an agency to pursue a policy opposed by Congress. Congress can no longer look to the courts in

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*tive Procedure: A Somewhat Different View,* 91 HARV. L. REV. 1823 (1978); Scalia, *supra* note 201; Stewart, Vermont Yankee *and the Evolution of Administrative Procedure,* 91 HARV. L. REV. 1805 (1978); Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418 (1981).

236. The relation between *Vermont Yankee* and *State Farm* in their direction te tbe agency can be overstated. In *State Farm* the Supreme Court took care to restrain from drawing parallels between the two cases because of overstatements about *Vermont Yankee* in the briefs. *State Farm,* 103 S. Ct. at 2870-71.

237. The procedural requirements include notice and comment and the steps necessary to establish an adequate administrative record. *See infra* text accompanying notes 245-51.

238. Clearly, if Congress had modified the statute at issue in *State Farm,* the agency would have been compelled to follow it. Even the District of Columbia Circuit recognized that intervening action by Congress in the form of legislation would bave concluded debate about intentions and policies. State Farm Mutual Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 242 (D.C. Cir. 1982), *vacated and remanded,* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Aute. Ins. Co., 103 S. Ct. 2856, 2868 (1983).

239. Nor are these comments controlling on the standard for judicial review. *State Farm,* 103 S. Ct. at 2867.

240. *Id.* at 2764.

every instance to strike down any agency deregulation that legislators dislike. The courts now will require statutory change as a basis for reversing an agency's procedurally correct modification or rescission action.[241]

### D. *The Problem for Any New Administration*

At some future time, a post-Reagan administration may wish to strengthen the agency rules of the 1981 to 1984 period. A modification increasing the tautness of regulation will be as onerous as an easing of the "regulatory ratchet"[242] because of the judicial review developments from 1982 to 1984. An analysis of the burdens a new administration will face will shed some light on the utility of the alternatives to rescission.[243]

It is likely that a new administration will have a more permissive approach to regulation than the Reagan Administration. Before the new managers of the bureaucracy begin modifying a rule to strengthen its coverage or degree of control, the agency first must look at past rules. Since the *Chaney* decision,[244] the agency also must examine past preambles. The new managers must rescind those rules and preambles that conflict with the new approach by using notice and comment rulemaking. Even if the regulated parties initially accept the new rules, a challenger can attack the procedural compliance of the changes years later.[245] That danger is a result of tighter judicial review as well as the vulnerability of amended rules that have lost some of their original rationale.

To avoid a successful challenge, an agency strengthening a rule first must conduct a close examination of the past rule and preamble text. Next, the agency must support the modification in the factual record. The agency should complete one or more studies of the stronger rule. The agency must weigh possible increased compliance costs with the probability of achieving the goals of the

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241. One could argue that the Supreme Court was as wrong in its view of legislative signals as the District of Columbia Circuit had been. The Supreme Court may have heen too stringent in requiring express legislation changes, since in pragmatic terms, Congress sends many signals, and agencies obey them without alteration of statutes. The inhibition of this process, therefore, may be a futile attempt to change reality.

242. *But see* E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 197 (1982) ("Slowing the upward rate of the regulatory ratchet wheel . . . is not the same as turning it back.").

243. *See supra* part V.

244. 718 F.2d 1174 (D.C. Cir. 1983).

245. *See* Allen, *Thoughts on the Jeopardy of Rules of Long Standing to Procedural Challenge*, 33 AD. L. REV. 203, 207 (1981).

new rule.[246] The agency also must prepare a factual record with the understanding that opponents will test it in the courts. The agency should assume no facts. If the rule concerns the frontiers of science, the agency should cast any assumptions as policy choices[247] or as facts determined only through the agency's years of expertise,[248] to shield such choices from intrusive judicial review. Finally, the agency head must write the preamble to the final rule to counect the facts found with the new, stronger rule. The agency manager must explain adequately the connection and include such relevant factors as the criteria of the statute that guided the agency's modification. Of course, the agency must exclude impermissible considerations.[249] The preamble to the proposed stronger rule should emphasize the agency's policy reconsideration of the need for more protection. If Congress had considered changing the statute in the area covered by the rule but failed to do so, then *State Farm* suggests that the agency must address that issue by noting that Congress has not modified the statute.[250]

An agency head reading this detailed exposition of additional duties should not despair. An agency still can change its rules. Indeed, one can speculate that the more liberal members of the judiciary will temper their review if the agency's proposed changes create stronger public protective measures. An agency head in a future administration who denounces the cumbersome rule-changing process described here need only reflect on the fact that APA reforms—reforms that would have altered this judicially added set of modification requirements—were defeated by opponents of the Reagan Administration[251] and were stymied even during the Carter

246. In *State Farm* the Supreme Court observed that the agency had been correct in its effort to look at costs of the rule, but the Court differed with assumptions underlying the outcome of that cost-benefit discussion. 103 S. Ct. 2856, 2873 (1983); *see also* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980).

247. *State Farm*, however, may limit some of the expansive uses of the argument that a factually weak choice is a policy decision. *See* 103 S. Ct. at 2871.

248. Expertise in determining facts still merits some judicial deference. McGowan, *supra* note 43, at 245.

249. For example, if a farm safety law forbade the consideration of costs to farmers of safety services, the agency should exclude cost analyses as a determining factor and mention the statutory exclusion of the preamble. "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ." *State Farm*, 103 S. Ct. at 2867.

250. After *State Farm*, no discourse short of statutory change will result in a net force against an existing rule. Postenactment legislative opinions carry little weight. *Id.* at 2867.

251. *See* J. O'REILLY, *supra* note 115, § 1.05 (brief account of the reform battle).

Administration.[252] Reform is not a short-term objective.

### *E. Summary*

After *State Farm* the courts have more latitude in assessing deregulation under the dominant "arbitrary and capricious" standard.[253] For example, the courts have directed much of their criticism of deregulation at the explanations given by the agencies. The courts have remanded some deregulatory changes because of weak factual rationales expressed in a rule's preamble. *State Farm* is consistent with this effort because of its remand for articulation of the agency's evidence.[254] This trend is a revival of the 1970's "hard look" movement.[255] In the 1970's cases the courts reversed the agencies because the factual presentation of the rule was too obscure to allow judicial review.[256] The new trend, however, has gone further in supporting reversal. An agency manager now must do more than merely state the basis of the rule; expectations of judicial deference no longer shield the agency's policy conclusions from review. A prudent agency manager will check the supporting documents and regulatory and environmental analyses, index the record, and use any other means necessary to assure that the rule will pass the stricter examination of its substance that the courts now will apply. The growth of the Federal Register will not be a result of increased length of the rules, but a result of larger volumes of preamble statements.[257] The Supreme Court appears to have confirmed the strict review of deregulation against a "hard

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252. Earlier reform acts failed to draw enough democratic support in the Congress to assure passage. S. 262, S. 755, & H.R. 3263, 96th Cong., 1st Sess. (1979).

253. 5 U.S.C. § 706(2)(A) (1982); *see supra* text accompanying note 204.

254. 103 S. Ct. at 2869 (quoting Burlington Truck lines v. United States, 371 U.S. 156, 167 (1962)).

255. *See* J. O'REILLY, *supra* note 115, §§ 15.04, .06.

256. *See, e.g.*, Camp v. Pitts, 411 U.S. 138, 140 (1973); National Lime Ass'n v. EPA, 627 F.2d 416, 430 (D.C. Cir. 1980); Harborlite Corp. v. ICC, 613 F.2d 1088, 1092-93 (D.C. Cir. 1979); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

257. The new, higher quality standard for informal rulemaking preambles will be a matter of great attention for agencies following the *State Farm* decision. Though the Supreme Court disagreed with the lower court view of the threshold for reversal, it did reverse the agency because of inadequacies in the treatment of air bags factual issues in the agency's preamble documents. 103 S. Ct. at 2868-70. The preamble is the principal vehicle within which an agency articulates its basis, and if that preamble is silent, a court will not supply the missing links of support for the text of the rule. *Id.* at 2867 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). Preamble lengths have increased in the last several years. *See* J. O'REILLY, *supra* note 115, § 7.01.

look" background.[258]

## VII. CONCLUSION

The judicial review of deregulatory actions has moved quite far from the placid, deferential review that courts once gave agencies during the halycon days of rulemaking. Regulated groups have noted carefully the courts' hostility to change. When a future administration attempts to adopt stronger rules, these groups will use the established deregulation precedents to restrain the ability of the agencies to modify the scale of regulation.

The time and difficulty of changing "informal" rulemaking is now greater than at any time since formal and informal rulemaking procedures were created in 1946. Efforts to amend the 1946 APA failed for other political reasons, but had they been adopted, some of the cases from 1982 to 1984 might have had different outcomes. Therefore, future agency managers may resurrect the regulatory reform movement as a means of overcoming the new form of stare decisis that the courts have created.

Commentators have predicted this "stare decisis" effect of rules as a consequence of the judicial resistance to deregulation in the 1982 to 1984 period.[259] These predictions have proved correct in the short term. The *State Farm* decision encourages courts to preserve existing regulations against forces of change. The presumption of validity for existing rules means that the rescission or modification of a regulation will cost the agency dearly. Courts, especially the District of Columbia Circuit, will be defending the existing rules with more vigilance than ever before.

Courts may be resurrecting the "entitlements" concept[260] of due process and applying it to rulemaking in the latter half of the 1980's. The beneficiaries of safety or economic regulation may assert "rulemaking entitlements" to deter the reform of agency rules. Conceptually, it is difficult to correlate life sustaining adjudications of benefit entitlements with industry preserving, or air quality protecting, maintenance of existing rules. While the Supreme Court in *State Farm* did not go so far as to create a new entitlements con-

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258. 103 S. Ct. at 2869-70.

259. "[T]he problems of repealing rules cannot he separated from the broader question whether rules . . . create new categories of vested interests that have a presumptive right to the continuation of regulation." DeLong, *Repealing Rules*, REG., May-June 1983, at 26, 30.

260. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (due process entitles a welfare recipient to a pretermination hearing on continued eligibility to receive benefits).

cept, the Court's direction may permit lower courts to do so.

For challenges of the status quo, be they administrative managers or outsiders, the entitlements approach would be a difficult barrier to pass. The courts will not enshrine the Code of Federal Regulations like the Constitution, of course, but future administrations will find it much more difficult to alter rules to meet their political and policy desires. The appellate judges who "teach" the agencies have been grading the current administration poorly, but future agency managers will find that the school rules have become more difficult for all students alike.