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## AUTOMATIC OCCUPANT RESTRAINTS AND JUDICIAL REVIEW: HOW A FEDERAL AGENCY CAN VIOLATE CONGRESSIONAL WILL AND GET AWAY WITH IT

### INTRODUCTION

Automobile accidents are a major health problem in this country, accounting for thousands of deaths and crippling disabilities each year.<sup>1</sup> Scientific research on automobile safety<sup>2</sup> has produced a number of passenger restraint technologies<sup>3</sup> which would drastically reduce

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1. Crash injuries are the leading cause of premature death among persons age one to twenty-four, NAT'L HIGHWAY TRAFFIC SAFETY AD., MOTOR VEHICLE SAFETY ANN. REP. 36 app. (1979), and a major cause of epilepsy, paraplegia, and cerebral palsy, *Hearings on Passive Restraint Rule Before Senate Commerce, Science and Transportation Committee*, 95th Cong., 2d Sess. 405 (1977) (Statements of Epilepsy Foundation of America).

2. Research has shown that the majority of injuries automobile occupants suffer in car accidents are a result of collision of the occupants with the car's dashboard, windshield or other parts of the interior rather than from the collision of the car with opposing objects. 15 Fed. Reg. 11,148 (1969). *See generally* A. LITTLE, THE STATE OF THE ART OF TRAFFIC SAFETY 211 (1970) (reducing injury by limiting occupancy movement to prevent or reduce contact with the interior surfaces); A. WHITE, PASSENGER CAR SAFETY DYNAMICS 387 (1965) (the severity of injury in automobile accidents is rarely in direct relation to crash forces because most injuries result from passengers being thrown against objects inside the compartment). *See also* INTERNATIONAL AUTOMOBILE SAFETY CONFERENCE, 1970 INTERNATIONAL AUTOMOBILE SAFETY CONFERENCE COMPENDIUM (1970) (hereinafter cited as COMPENDIUM).

While the human body can easily withstand the force of the external collision, it often cannot tolerate the sharp blow delivered in this "second collision."

[T]he objects and surfaces struck by the [human] body do less damage if the forces involved are spread over time and area. This is elementary physics. A fall on a surface that 'gives,' such as a pile of hay, spreads the force over time. Poking someone with the end of a baseball bat instead of an ice pick spreads the force over area. . . . Damage is done not by the force, but by the distortions produced as a consequence of this force.

R. NADER, UNSAFE AT ANY SPEED 83 (1965) (quotes omitted).

3. Scientists have devised a number of ways to soften the impact of the "second collision" by devices that "package" people for transport. *See* R. NADER, *supra* note 2, at 112-13 (the cardinal principle of occupant restraint is "packaging" the passenger so that he is firmly but comfortably anchored in order to prevent him from being thrown against the inside of the vehicle or ejected). Scientists have designed safety systems involving thick padding of all interior surfaces, harness belts which duplicate medical traction hardware, and alternative passenger compartment designs that anchor passengers by limiting space. COMPENDIUM, *supra* note 2, at 978-1112.

The most promising technologies in existence today include seat belt systems, either manual or automatic, and airbags. Airbags are inflatable balloon-like containers that fill with gas when a crash occurs. These bags fill the passenger compartment space and absorb the forces of the "second collision" by spreading them over a huge area. 48 Fed. Reg. 48,626 (1983).

injury and fatality.<sup>4</sup> However, for a number of reasons,<sup>5</sup> passenger restraint technologies are not currently being used to their fullest safety potential.<sup>6</sup>

In response to this problem, the federal government has recently attempted to improve automobile safety by requiring automakers to equip all new cars with automatic<sup>7</sup> occupant restraint systems. The

4. 46 Fed. Reg. 53,425 (1981).

5. Federal legislators have documented this point:

Despite the various changes to seat belt designs to improve the convenience of seat belt usage (replacing separate lap and shoulder belts and buckles with an integrated lap and shoulder belt giving a single buckle and adding an inertia reel to give occupants freedom of movement) and to remind occupants to use their belts (adding brief audible and visual reminders), the rate of manual belt use has not change substantially over the 15-year history of [federal law mandate].

48 Fed. Reg. 48,626 (1983). People don't use seat belts for a number of reasons including ignorance and skepticism of their safety effectiveness, indifference, fatalism and doubts that driving is hazardous. People complain that belts are inconvenient and uncomfortable, and claim that they do not wear them because of laziness, fear of entrapment, and forgetfulness. *Why Hardly Anybody Buckles Up*, 36 CHANGING TIMES 82 (October 1982); See also *The Rise and Fall of Ralph Nader*, 28 CAR & DRIVER 64, 67 (September 1982) (so few people use seat belts because they consider automobiles so safe that they don't feel endangered).

6. 49 Fed. Reg. 28,964 (1984). Only twelve percent (12%) of the public currently uses manual seat belts, which is the only technology generally available on the market. 48 Fed. Reg. 48,626 (1983).

7. "Automatic" technologies are, for the purpose of this note, safety systems that require no affirmative action by passengers in order to be effective. Currently, airbags and automatic belt systems are the only automatic technologies in existence. In the past, these systems have been called "passive restraints," but for the sake of clarity, they will be referred to in this note as automatic restraints.

Airbag technology was first proposed in 1966 and only perfected in 1970. COMPENDIUM, *supra* note 2, at 985. The federal government recognized the possibility of "inflatable occupant restraint systems" in 1969, 34 Fed. Reg. 11,148 (1969), and first allowed for their use in 1970, 35 Fed. Reg. 16,927 (1970). The bag will inflate upon an impact of about 10 miles an hour, at which time a sensor triggers a chemical reaction where sodium azide changes to nitrogen, rapidly inflating the bag. After the crash, the bag quickly deflates to permit emergency egress. 48 Fed. Reg. 48,626 (1983). These systems will be referred to as "airbags."

Automatic belt systems are modified seat belts. Automatic belts are one piece harnesses that wrap around passengers as they enter the car. One end of the belt would attach between the front seats and the other to the car door; this enables the belt to move out of the way when the door is opened and move securely around the occupant when the door is shut. 48 Fed. Reg. 48,625 (1983). A number of different belt designs exist. Some designs consist of a single shoulder belt with a bolster to the occupant's knees to keep him from sliding under the belt, while others include both a lap and shoulder belt. Some designs are completely detachable to allow for emergency egress, and others allow for emergency egress by a spool release device or practical detachability to create a slack in the system. *Id.*

National Highway Traffic Safety Administration (NHTSA)<sup>8</sup> recently announced a regulation mandating installation of automatic occupant restraints in all new cars by 1990.<sup>9</sup> This controversial regulation is the result of more than a decade of planning and political maneuvering.<sup>10</sup> The new regulation represents a compromise between total abandonment of automatic restraints and direct implementation<sup>11</sup> of the most promising automatic technologies.<sup>12</sup>

Administrative decision-making in this controversial area is strongly affected by a matter which is just as controversial, namely, the nature of judicial review the regulation will face. Judicial review of most federal regulatory decision-making follows the structure set forth by the Administrative Procedure Act.<sup>13</sup> Under this act, federal courts review regulatory process as well as substantive decisions.<sup>14</sup> While the act and the Supreme Court have provided some clear limits on judicial review,<sup>15</sup> much of the scope of review remains undefined. Thus, the proper role of the judiciary in administrative decision-making continues to be a point of controversy.

This note has a twofold purpose: to critique the new automatic occupant restraint regulation and to clarify the judiciary's role in

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8. For further discussion of the powers of the NHTSA, see *infra* text accompanying notes 16-21.

9. 48 Fed. Reg. 28,962 (1984).

10. Automatic occupant restraint regulations are the product of more than a decade of debate. Although a regulation now exists which would require cars to be equipped with automatic systems by 1990, similar regulations in the past have often been changed, suspended and even rescinded. See *infra* text accompanying notes 16-103.

11. Automobile manufacturers led the fight against automatic restraints, claiming that consumers don't buy them when offered as an option, *The Rise and Fall of Ralph Nader*, *supra* note 5, at 67, and that conventional manual belts are just as effective as automatic systems if properly used, *Bureaucrats and (Other) Bags of Air*, 34 ROAD & TRACK 88 (November 1982).

12. Insurance companies as well as consumer advocates led the fight for adoption of federal regulations requiring airbags. These groups claim that the costs of automatic systems (in initial installation, and maintenance and repair) will be well outweighed by the thousands of injuries they will prevent and the savings of insurance premiums (estimated at 30%), medical bills, and funeral costs. 48 Fed. Reg. 48,629 (1983). Increased safety will also result in savings to federal government under social security, medicare, medicaid, aid to families with dependent children, disability insurance, lost corporate and personal income taxes, and loss of military personnel. This has prompted one Senator to propose government-backed incentives for automatic restraints. S. 477, 98th Cong., 1st Sess., 129 CONG. REC. S 1161 (1983).

13. 5 U.S.C. §§ 551-59, 701-06 (1977).

14. See *infra* notes 114-93 and accompanying text for a full discussion of the scope and nature of judicial review.

15. See *infra* notes 194-228 and accompanying text for analysis of judicial review of administrative decision-making.

reviewing this federal regulatory decision. It is here proposed that the NHTSA's new regulation compromises Congress' mandate to promote traffic safety. While the new occupant restraint regulation will no doubt result in some modest advances in traffic safety, Congress intended that the NHTSA impose "technology-forcing" devices on automobile manufacturers. Considering the NHTSA could have imposed more promising devices, such as airbags, to achieve greater occupant safety in the future, the agency has failed in its duties. Yet, the remedy for the NHTSA's improper decision does not lie in the federal courts. The nature of judicial review requires that administrative actions be upheld when they are the product of "reasoned decision-making." While this standard will take different forms in different situations, it is not meant to override administrative authority where the record shows that all options were considered and the public explanation is reasonable. Thus, regulation should withstand such limited judicial review.

In order to demonstrate these points, this note is separated into five sections. The first section presents a full account of the regulatory history of occupant restraints as a backdrop for analysis of the new regulation. The regulation is then critiqued in the second section, and shown to be improper under the NHTSA's statutory mission. The third section covers the historical development of judicial review of administrative decision-making under the Administrative Procedure Act and the major decisions of the Supreme Court. In the fourth section, a model for this judicial review is proposed. This model is applied to the automatic occupant restraint regulation in the final section, in order to clarify the limited judicial function in this area.

#### REGULATORY HISTORY OF OCCUPANT RESTRAINTS

Congress delegated the authority to issue federal motor vehicle safety standards to the Department of Transportation in 1966.<sup>16</sup> Clearly defining the purpose of this delegation in the enabling legislation, Congress directed the department to promote motor vehicle safety.<sup>17</sup> The Department of Transportation must also undertake and support necessary research in an effort to prevent traffic accidents and reduce

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16. National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1426 (1982).

17. 15 U.S.C. § 1381 (1982). The congressional intent, as shown in the legislative history, was to create a federal power to force the automobile industry to improve the safety of their products. S. REP. NO. 1301, 89th Cong., 2d Sess. 3 (1966); *see* Chrysler Corp. v. DOT, 472 F.2d 659 (6th Cir. 1972). *See generally* R. NADER, *supra* note 2, at 295-346.

the injuries that result from them.<sup>18</sup> To accomplish these goals, the Department of Transportation must consider all relevant available motor vehicle data<sup>19</sup> and propose only those standards that are reasonable, practical, and appropriate to the type of vehicle for which they are prescribed.<sup>20</sup> The Secretary of Transportation subsequently created the National Highway Traffic Safety Administration (NHTSA) to undertake this task.<sup>21</sup>

The NHTSA exercised this delegated power in promulgating Federal Motor Vehicle Standard 208 (Standard 208) in 1967.<sup>22</sup> This standard required that seat belts be installed in all new passenger cars.<sup>23</sup> Seat belts were designed to prevent or minimize injury to passengers caused by impact with the interior of the car.<sup>24</sup> This so-called "second collision" of occupants with the car had been shown to be the major cause of death or serious injury in traffic accidents.<sup>25</sup> As the Sixth Circuit Court of Appeals explained, the purpose was "to assure that when the car stops dead, the passengers won't."<sup>26</sup> Since 1967, Standard 208 has required that all new passenger cars be equipped with seat belts.<sup>27</sup>

Dissatisfied with the public unwillingness to use seat belts, the NHTSA soon proposed amending Standard 208.<sup>28</sup> Although the NHTSA still believed that seat belts could drastically reduce death and injury if properly used, the data it collected since Standard 208 went into effect showed that a low percentage of car passengers were using the safety device.<sup>29</sup> The NHTSA proposed that the automobile industry create new types of restraint systems that would not require any affirmative action by car occupants to be effective. Such systems

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18. 15 U.S.C. § 1392(a) (1982).

19. 15 U.S.C. § 1392(f)(1) (1982).

20. 15 U.S.C. § 1392(f)(3) (1982).

21. 49 C.F.R. § 201.3a (1983).

22. 49 C.F.R. § 571.208 (1967).

23. 32 Fed. Reg. 2408 (1967). The seat belt requirement, 49 C.F.R. § 571.2 (1967), is but one of eighteen safety requirements announced in this rule, the others include specifications as to car lights, transmission shift lever sequence, windshield wiping and washing systems, tires, and so on. *Id.* Prior to this regulation, seat belts were only offered as standard equipment in the front seats of automobiles. S. PELTZMAN, REGULATION OF AUTOMOBILE SAFETY 2 (1975).

24. *See supra* note 2.

25. R. NADER, *supra* 2, at 81.

26. *Chrysler Corp.*, 472 F.2d at 663.

27. *See* 49 C.F.R. §§ 571.208 (1967).

28. 34 Fed. Reg. 11,148 (1969).

29. *Id.*

were termed "automatic occupant restraint systems,"<sup>30</sup> which referred to an undefined class of occupant restraint technologies which would provide sufficient safety while requiring no human action to be effective.<sup>31</sup>

The NHTSA acted on its proposal almost immediately. The NHTSA amended Standard 208 to permit certain types of automatic occupant restraint systems to replace manual seat belts in 1970.<sup>32</sup> In 1972, the NHTSA again amended Standard 208 to persuade the public to use safety devices.<sup>33</sup> Under Standard 208 as modified, automobile manufacturers were required to install either approved automatic occupant restraint systems or manual seat belts coupled with ignition interlock in all new cars built after August of 1975.<sup>34</sup>

Automobile manufacturers immediately filed suits challenging modified Standard 208. The Sixth Circuit Court of Appeals upheld the NHTSA's decision in *Chrysler Corp. v. DOT*.<sup>35</sup> However, the court held that the NHTSA's standards for automatic occupant restraint systems involved scientifically invalid tests.<sup>36</sup> The court stayed the effective date of the law until the NHTSA could formulate valid tests to insure the safety benefits of these safety devices.<sup>37</sup> As a result, Standard 208 continued to require traditional belt systems, but the automatic restraint requirement was postponed until proper testing methods could be developed.<sup>38</sup>

For the next two years, the NHTSA collected data and considered its problem. Finally, the NHTSA solved its technical problems and proposed revised automatic occupant restraint requirements in March of 1974.<sup>39</sup> A month later the NHTSA modified

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30. *Id.* The 1969 rule-making specifically mentioned inflatable systems. No specifications for automatic systems existed at that time.

31. *Id.*

32. 35 Fed. Reg. 16,927 (1970).

33. 37 Fed. Reg. 3911 (1972).

34. *Id.* The law defined an "ignition interlock system" as a mechanical or electrical component which would make the engine starting system of a passenger car inoperable unless the safety belt system for each occupied front seat outboard position was operated after the occupant was seated. 49 C.F.R. § 571.208 (S7.4) (1973). The purpose of such a system was to alert the driver of an automobile when belts were not fastened, so as to encourage usage.

35. 472 F.2d 659 (6th Cir. 1972).

36. *Id.* at 681.

37. *Id.*

38. *Id.* See also *Ford Motor Co. v. NHTSA*, 473 F.2d 1241, 1242 (6th Cir. 1973); 38 Fed. Reg. 16,072-73 (1973); 38 Fed. Reg. 20,449-50 (1973).

39. 39 Fed. Reg. 14,593 (1974).

Standard 208 to permit automatic belt systems to fulfill safety requirements.<sup>40</sup> Standard 208 specified that automatic belt systems must include a push button release mechanism for emergency egress after an accident and an ignition interlock system with a continuous buzzer to encourage use.<sup>41</sup>

As a result of this rule, the automotive industry was required to incorporate these devices designed to promote passenger usage in cars built in 1974 and 1975. Most automobile manufacturers chose to comply by installing ignition interlock systems coupled with traditional safety belts.<sup>42</sup> Consumers' irritation with the inability to start their cars without fastening the seat belts led to a legislative prohibition of any interlock requirement in 1974.<sup>43</sup> In response to this congressional action, the NHTSA eliminated ignition interlock requirements from Standard 208.<sup>44</sup> Thus, the automotive industry could comply with Standard 208 by automatic systems or manual seat belts.

At this point, the NHTSA began to question the benefits of automatic restraints. Although the life saving potential of the plan was never doubted, the high costs of the plan were.<sup>45</sup> The NHTSA again subjected Standard 208 to a comprehensive review in 1975.<sup>46</sup> After reconsidering the matter, the NHTSA decided to suspend the mandatory automatic occupant restraint requirement of Standard 208 through August of 1976. Standard 208 required that cars continue to be equipped with traditional seat belts until that time.<sup>47</sup>

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40. 39 Fed. Reg. 16,216 (1974).

41. *Id.*

42. 41 Fed. Reg. 24,070 (1976). Except for a small number of GM luxury cars equipped with airbags, automobile manufacturers chose the interlock technology. *Id.* at n.3.

43. Motor Vehicle and School Bus Safety Amendments of 1974, 15 U.S.C. § 1410(b)(1) (1982). Congress clearly intended that interlock technology could no longer be considered as an option for any alternative formulated under Standard 208. *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, PUB. L. NO. 93-492, 1974 U.S. CODE CONG. & AD. NEWS, 6046, 6073, 6108.

Congress also reviewed the automatic restraint requirement of Standard 208, and subjected any plan which allowed compliance by airbag technology to a legislative veto of both Houses of Congress by concurrent resolution. 15 U.S.C. § 1410(b)(3)(B) (1982). In 1983, the Supreme Court declared all legislative vetoes unconstitutional. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Between 1974 and 1983, Congress never exercised this power.

44. 39 Fed. Reg. 38,380 (1974).

45. 40 Fed. Reg. 16,220 (1975).

46. 40 Fed. Reg. 16,217 (1975).

47. 40 Fed. Reg. 33,977 (1975).



In June of 1976, Secretary of Transportation William T. Coleman reopened the automatic restraint issue.<sup>48</sup> On the basis of information collected at that time, he concluded that automatic restraints were technologically and economically feasible, and would be substantially effective in preventing death and injury from the "second collision" in automobile accidents.<sup>49</sup> Secretary Coleman concluded, however, that due to widespread misinformation about automatic occupant restraints, federal imposition of any such standard would lead to the same type of public resistance that had occurred with the interlock plan.<sup>50</sup> With this in mind, the Secretary proposed a large scale demonstration program to introduce automatic occupant restraints to the public.<sup>51</sup> Coleman deferred final decision on a mandatory automatic restraint standard indefinitely, pending results of the demonstration program.<sup>52</sup> Coleman also renewed Standard 208 as it stood then to require either manual seat belts or approved automatic systems.<sup>53</sup>

Brock Adams, the Carter Administration's Secretary of Transportation, rejected the Coleman plan when he came into office in 1977.<sup>54</sup> He quickly moved to do away with the demonstration program and reimpose mandatory automatic restraints.<sup>55</sup> Although Secretary Adams endorsed many of the findings of his predecessor,<sup>56</sup> he disagreed that public acceptability was relevant to the congressional mission of the NHTSA.<sup>57</sup> Thus, the logical result of the Coleman report, claimed Adams, was reimposition of mandatory automatic occupant restraints.<sup>58</sup> Secretary Adams ordered that the mandatory automatic occupant restraint requirement be implemented in a three step process. Large cars<sup>59</sup> would have to be equipped with automatic occupant restraints by September of 1981, mid-size cars<sup>60</sup> by September of 1982, and all cars by September of 1983.<sup>61</sup> In announcing the new rule, Adams stated

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48. 41 Fed. Reg. 24,070 (1976).

49. DOT, THE SECRETARY'S DECISION CONCERNING MOTOR VEHICLE OCCUPANT CRASH PROTECTION 6 (1976).

50. See *supra* note 43.

51. DOT, *supra* note 49, at 6.

52. 42 Fed. Reg. 5071 (1977).

53. *Id.* Secretary Coleman had written commitments by GM, Ford, Volkswagen and Daimler-Benz to produce over 440,000 cars with airbags and 60,000 cars with automatic belt systems to be used in the demonstration program. *How Coleman Sold Detroit on Air Bags*, 1977 BUS. WEEK 26 (January 31, 1977).

54. 42 Fed. Reg. 15,935 (1977).

55. *Id.*

56. 42 Fed. Reg. 34,289, 34,291 (1977).

57. *Id.*

58. *Id.*

59. "Large cars" refers to cars whose wheelbase measures over 114 inches.

60. "Mid-size cars" refers to cars whose wheelbase measures over 100 inches.

61. 42 Fed. Reg. 34,289 (1977).

his belief that more than sixty percent (60%) of automobiles would meet the requirement by using airbag technology.<sup>62</sup> Adams made no finding regarding use of detachable automatic belt systems at this time.<sup>63</sup>

Both automobile manufacturers and consumer groups challenged Secretary Adams' decision in the court and in the legislature. Judge Wright of The District of Columbia Court of Appeals upheld both the imposition of automatic restraints and the gradual implementation plan.<sup>64</sup> The automobile manufacturers then sought redress in Congress, which had retained the power to exercise its legislative veto over any standard which included airbags as means of compliance.<sup>65</sup> This attack was unsuccessful, for not only did Congress decline to exercise its veto power, but the Senate Committee on Commerce, Science, and Transportation affirmatively endorsed the Secretary's automatic restraint ruling.<sup>66</sup>

With implementation of mandatory automatic occupant restraints pending, controversy arose over Standard 208's automatic belt provision. When Secretary Adams mandated automatic occupant restraints, the automatic belt provision of Standard 208 still required the push button release mechanism which had been imposed in 1974 to insure easy egress in an emergency.<sup>67</sup> But, by 1978, the NHTSA feared that such a mechanism, without the support of an ignition interlock system, would be ineffective because it could be easily dismantled.<sup>68</sup> The NHTSA amended Standard 208 in 1978 to permit non-detachable belt systems that allowed for emergency egress in other ways.<sup>69</sup> Although the NHTSA could have prohibited or standardized release mechanisms to promote usage, it did not do so out of fear of adverse public reaction.<sup>70</sup>

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62. *Id.*

63. *Id.*

64. *Pacific Legal Foundation v. DOT*, 593 F.2d 1338 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 830 (1979). The court disagreed with Secretary Adams on the question of practicality. The court believed that public reaction was an important and relevant consideration. *Pacific Legal Foundation*, 593 F.2d at 1345, 1346 n.52.

65. *See supra* note 43.

66. S. REP. NO. 481, 95th Cong., 1st Sess. 2 (1977).

67. *See supra* text accompanying notes 39-44.

68. 43 Fed. Reg. 21,914 (1978). The NHTSA was put on notice of this problem by GM in a petition for review of Standard 208. *Id.*

69. 43 Fed. Reg. 52,493 (1978).

70. *Id.* There are a number of non-detachable belt designs that allow for emergency egress sufficient to comply with Standard 208. Alternatives proven by testing include systems which "spoonout" extra lengths of webbing, systems attached to a sliding anchor on the car door, and systems that allow the lap belt to be detached from the door so that length is added to the shoulder belt.

Implementation of mandatory automatic occupant restraints was close at hand when the Reagan Administration came into office in 1981. In February of 1981, Reagan appointed Drew Lewis as Secretary of Transportation.<sup>71</sup> One of Lewis' first official actions was to announce reconsideration of the mandatory automatic occupant restraint plan and to postpone its implementation on large cars.<sup>72</sup> Shortly thereafter, Lewis proposed amending the implementation plan and possibly rescinding the entire automatic occupant restraint requirement.<sup>73</sup> At this time, the NHTSA discovered that most automobile manufacturers planned to comply with the automatic requirement by using a completely detachable belt system.<sup>74</sup> Predicting minimal increase in use of safety equipment, the NHTSA rescinded the mandatory automatic occupant restraint requirements, claiming that the benefits of automatic occupant restraints no longer outweighed their costs.<sup>75</sup>

Several insurance companies immediately filed suit in federal court challenging the rescission of the mandatory automatic restraint requirement.<sup>76</sup> The District of Columbia Court of Appeals held that the rescission of the safety requirement was arbitrary and capricious.<sup>77</sup> The NHTSA had failed to consider obvious alternatives such as prohibition of detachable belts or compliance by airbag technology only.<sup>78</sup> The court called the decision to abandon automatic occupant

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71. 48 Fed. Reg. 48,628 (1983).

72. 46 Fed. Reg. 12,033 (1981). This action brought to a halt two years of research and retooling just months before automatic restraints were to be mandatory in large cars.

73. 46 Fed. Reg. 21,205 (1981).

74. 46 Fed. Reg. 53,419 (1981).

75. *Id.* The NHTSA predicted that, because of these events, the imposition of Standard 208 at this time would only cause a 5% increase in safety benefits, which was not enough to outweigh the cost of the program. The NHTSA supported their action by reference to the congressional directive that their regulations be practical and meet the needs of safety, 15 U.S.C. § 1392(f)(3) (1982), and the presidential directive that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society," Exec. Order No. 12,291, 46 Fed. Reg. 33 (1981), at § 2(b) [hereinafter cited as E.O. 12,291].

It is unclear whether the NHTSA addressed the many alternatives to rescission in its notice of October 29th. An argument could be made that the NHTSA justified foregoing the alternatives of requiring airbags only or airbags or non-detachable belts by focusing on adverse public reaction to both alternatives. 46 Fed. Reg. 53,419 (1981); *cf. Pacific Legal Foundation*, 593 F.2d at 1346 n.52 (public acceptance is an important consideration when the NHTSA is judging practicality).

76. *State Farm Mutual Automobile Ins. Co. v. DOT*, 680 F.2d 206 (D.C. Cir. 1982), *aff'd*, 103 U.S. 2856 (1983).

77. *Id.* at 240.

78. *Id.*

restraints a paradigm of arbitrary and capricious action.<sup>79</sup> The NHTSA had drawn conclusions not supportable by evidence in the record and then had artificially narrowed the range of alternatives available under its legislative mandate.<sup>80</sup> A separate concurrence called the decision to rescind "nothing more than a determined effort to achieve a particular result without regard to the facts at hand."<sup>81</sup> The court ordered the automatic requirement to become effective within a year, pending action by the NHTSA to present valid reasons to the contrary.<sup>82</sup> Unfortunately, the matter was not to end here.

The NHTSA appealed this decision to the Supreme Court, which affirmed the lower court's ruling that the rescission was arbitrary and capricious in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*.<sup>83</sup> Justice White described the agency's error made as failure to "cogently explain why it has exercised its discretion in a given manner."<sup>84</sup> Justice White ruled that rescissions are arbitrary and capricious when an agency fails to offer any reasoned explanation for foregoing technological alternatives "within the ambit of the existing standard."<sup>85</sup> In this case, the Court pointed to alternatives such as requiring compliance by airbags only, or prohibiting compliance by detachable belt systems as within the ambit of the existing standard, and found that such alternatives were inadequately considered or explained by the NHTSA.<sup>86</sup>

The Court split five to four on the decision that the NHTSA had acted arbitrarily in deciding to prohibit detachable automatic belts.<sup>87</sup> The majority held that the NHTSA had failed to consider the aspect of inertia inherent in automatic systems,<sup>88</sup> which would work in favor of usage.<sup>89</sup> The dissent, written by Justice Rehnquist, claimed that this decision was adequately explained in the notice of the final rule.<sup>90</sup> Thus, the Supreme Court remanded the case to Court of Ap-

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79. *Id.*

80. *Id.* at 242.

81. *Id.* at 240.

82. *Id.*

83. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 103 S. Ct. 2856 (1983).

84. *Id.* at 2869.

85. *Id.* at 2871.

86. *Id.*

87. *Id.* at 2874 (Rehnquist, J., and Powell, J., and O'Connor, J., and Burger, C.J., dissenting in part).

88. The Court reasoned that because the detachable belts remained effective until detached, usage would increase among people who would forget to buckle manual belts. *Motor Vehicle*, 103 S. Ct. at 2872.

89. *Id.*

90. *Id.*

peals, with directions to remand the matter to the NHTSA for further consideration consistent with the Court's opinion.<sup>91</sup>

The NHTSA responded to the Supreme Court's ruling by suspending the automatic restraint requirement for one year in order to consider the issues raised by the Court.<sup>92</sup> Under *Motor Vehicle*, the NHTSA had a number of alternatives. The NHTSA could have retained the automatic occupant restraint requirement as it stood, rescinded the automatic occupant restraint requirement, or amended the automatic occupant restraint requirement to limit compliance alternatives.<sup>93</sup>

On July 17, 1984, the NHTSA issued a new occupant restraint regulation which substantially amends Standard 208.<sup>94</sup> On the basis of extensive analysis and public comment,<sup>95</sup> the NHTSA decided to impose a performance-based standard<sup>96</sup> requiring automatic technologies,<sup>97</sup> and further provided that the whole automatic requirement would be rescinded if two-thirds (2/3) of the population of the United States became subject to mandatory seat belt use laws (MUL).<sup>98</sup> The agency's final rule is premised on three conclusions of fact: that effectively enforced MUL's are the favored alternative, that automatic systems are favored over manual systems if MUL's are not imposed, and that airbags offer the greatest potential safety technology if

91. *Id.* at 2874.

92. 48 Fed. Reg. 39,908 (1983). In *Motor Vehicle*, the Court noted that such a suspension would be necessary and allowed the NHTSA to suspend the automatic restraint requirement without prior public notice or comment. The NHTSA published notice of proposed rule-making on October 19, 1983. 48 Fed. Reg. 48,622 (1983).

93. 48 Fed. Reg. 48,632 (1983). The NHTSA further requested information on new compliance alternatives, public acceptance, cost, and the state of technology. Due to the one year deadline which was accepted by the Supreme Court, the NHTSA attempted to expedite these proceedings by closing the docket in December of 1983 and setting a deadline of April 12, 1984 for further action.

94. 49 Fed. Reg. 28,962 (1984) (to be codified at 49 C.F.R. § 571.208).

95. 49 Fed. Reg. 29,965-83 (1984). Commentators included automobile manufacturers, insurance companies, consumer advocates, economists, scientific researchers, and the general public. Comments covered many aspects of proposed alternatives including usage, effectiveness, benefits, public acceptance, costs, effects on insurance premiums, and testing procedures. The proposed alternatives included retention of the standard as it existed prior to the attempted rescission, limiting compliance alternatives, mandatory seat belt usage laws, and total rescission as was attempted in *Motor Vehicle*. *Id.*

96. 49 Fed. Reg. 29,009 (1984) (the final rule allows compliance by any systems that pass testing criteria, vesting automakers with the option to choose).

97. At the present time, only airbags and automatic belt systems would fulfill the requirements of Standard 208. 48 Fed. Reg. 28,096 (1984).

98. *Id.* at 28,997.

development continues.<sup>99</sup> In the event that the MUL's requirement is not met, automakers can comply with Standard 208 by installation of airbags, passive interiors,<sup>100</sup> detachable belts, or nondetachable belts, so long as crash test standards are met.<sup>101</sup> In addition, incentives are built into the phase-in<sup>102</sup> process to promote the development of airbag technologies.<sup>103</sup> Thus, the NHTSA's new regulation imposes a compromise between rescission of all automatic requirements and implementation of the most promising technologies.

#### THE IMPROPRIETY OF THE NEW OCCUPANT RESTRAINT REGULATION

The NHTSA's new occupant restraint regulation, which reimposes the standard the agency sought to rescind in 1981 with further provision for total rescission on enactments of MUL's,<sup>104</sup> adopts a political compromise which is improper under the law. Congress created the NHTSA to promote traffic safety by imposing technology-forcing safety standards on an unwilling automobile industry. When the NHTSA failed to require installation of safety technologies which would clearly provide greater potential benefits, such as airbags or nondetachable belt systems, the agency was disloyal to its mission. Thus, the lenient compromise regulation is improper.

Congress clearly intended that the NHTSA implement technology-forcing regulation. Congress' stated purpose in delegating regulatory authority was "to promote motor vehicle safety."<sup>105</sup> Although Congress directed the agency to produce standards that were "reasonable, practical and appropriate,"<sup>106</sup> the *Chrysler* decision makes it clear that the agency need not be limited to technologies in existence.<sup>107</sup> In fact, the regulatory history of seat belts makes it

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99. *Id.* at 28,962.

100. "Passive interiors" is a new term coined by the NHTSA to refer to automatic systems that do not rely on belts or airbags. *Id.* at 28,963.

101. *Id.* at 24,009.

102. The automatic requirements will be phased-in over a three year period beginning in 1986. By September 1, 1986, ten percent of all new cars would have to be equipped with automatic systems. The requirement increased to twenty-five percent by September 1, 1987, forty percent by September 1, 1988, and one hundred percent by September 1, 1989. *Id.* at 28,963.

103. The NHTSA refused to require airbags as the sole means of compliance, despite certain and dramatic safety benefits. The NHTSA cited problems with cost, technical bugs, adverse public reaction, and lack of performance standards as the basis for foregoing this alternative. *Id.* at 29,001.

104. See *supra* text accompanying notes 71-75.

105. 105 U.S.C. § 1381 (1982).

106. 15 U.S.C. § 1392(f)(3) (1982).

107. *Chrysler Corp.*, 472 F.2d at 659.

clear that federal regulation was legislated in the first place to stimulate research and development that the automobile industry was unwilling to undertake on its own.<sup>108</sup> The fact that automatic restraints were first envisioned in the sixties and developed in the seventies,<sup>109</sup> but are still not in use, supports the claim that more stringent federal law is required.

The NHTSA could have more effectively promoted safety by imposing a standard requiring, without exception, installation of air-bags or nondetachable belts in all new cars. While the NHTSA considered this alternative in the most recent rule-making process, the alternative was rejected due to claimed high costs, potentially adverse public reaction, and technical problems.<sup>110</sup> The issues of cost and public reaction are highly speculative, and the agency cannot claim that its findings are sufficient on these points alone to support rejection. Issues of technical problems with design, effectiveness, and testing standards would be best solved under the pressure of an impending federal requirement, and must be addressed in any case where compliance using these technologies is allowed. Because these technologies are cited by the NHTSA as the most promising in that they will ultimately produce the greatest safety benefits due to user ease,<sup>111</sup> federal regulation mandating their use should have occurred.

The new occupant restraint regulation is improper because it not only fails to impose technology-forcing standards, it also undercuts the basic idea of automatic restraints. In the first place, the standard allows compliance by wholly detachable systems. The NHTSA has faulted these systems in the past because they are relatively easy to dismantle, and therefore their increased usage may be minimal.<sup>112</sup> On the basis of figures collected by the NHTSA in 1981, most automobile manufacturers can be expected to offer detachable belt systems exclusively, resulting in minimal safety gains.<sup>113</sup> Secondly, by providing for rescission of the entire automatic restraint regulation if mandatory seat belt usage laws are enacted, the NHTSA further defers development of the most promising systems. The new regulation will likely result in increased lobbying efforts by the automobile industry in highly populous states, and perhaps implementation of

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108. R. NADER, *supra* note 2, at 81.

109. See *supra* notes 28-31 and accompanying text.

110. 48 Fed. Reg. 29,000 (1984).

111. 48 Fed. Reg. 28,991 (1984).

112. See *supra* text accompanying notes 71-75.

113. See *supra* text accompanying notes 74-75.

safety devices that provide minimal benefits. Although the new rule claims to support development of the most promising technologies, it will actually result in deferring their development.

Thus, the NHTSA's new regulation is improper. Congress intended the agency to impose the most promising safety standards on an unwilling automobile industry. The new regulation not only fails to do this, it undercuts development. Yet, even though the agency doesn't fulfill the spirit of the law, the action may not be overturned by the intra-system check of judicial review.

#### JUDICIAL REVIEW OF RULMAKING: THE ELUSIVE CONCEPT OF "REASONED DECISION-MAKING"<sup>114</sup>

Commentators continuously argue over the nature of judicial review of administrative decision-making.<sup>115</sup> Although Congress long ago announced the framework for such review in the Administrative Procedure Act,<sup>116</sup> the actual job of review as well as the degree of

114. This phrase will be used as a term of art to describe the judicial requirements for review of administrative decision-making. See *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 103 S. Ct. 2246 (1983).

115. See *infra* text accompanying notes 117-24.

116. Section 706 of the Administrative Procedure Act sets forth the scope of review:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to [formal procedure]; or

(F) unwarranted by facts to the extent that the facts are subject to trial de novo by the reviewing court.



scrutiny to be used has been a matter of dispute for a number of years. Many commentators continue to disagree over the nature of judicial review.

Some commentators argue that administrative agencies should have great freedom to use rule-making to shape their policies and programs.<sup>117</sup> They claim that judicial attempts to judge the correctness of an administrative decision are wrongful invasions into the sphere of power that Congress has delegated to agencies.<sup>118</sup> Although courts should not allow administrators as much freedom to legislate as traditional legislators,<sup>119</sup> these commentators claim that agency

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In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1982).

117. "The agencies' great familiarity with issues repeatedly faced, and the institutional resources at their call, are entitled to great deference from a court which makes only a limited and largely accidental excursion into the field." Gardner, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979). See also Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 459 (1979) (judicial review is very limited, judiciary should not act to coordinate policy or reform the regulatory process); Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1832 (1978) (the insensitivity of reviewing courts to the agency's need to allocate its scarce resources in the way it deems best); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975) (limited judicial role of "containment"); Wright, *Court of Appeals Review of Federal Regulatory Agency Rule-Making*, 26 AD. L. REV. 199, 200 (1974) (judicial role is merely to insure that agency is not "shooting in the dark").

118. One court has stated:

At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence of the agency. Such a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

119. Even some of the earliest cases, which allowed a very narrow review, recognized that the judiciary had a duty to limit agencies to their legislative missions. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 182 (1935) (so long as an agency acts within its constitutional and legislative bounds its rules will only be subjected to a rational basis test); *United States v. Butler*, 297 U.S. 1, 63 (1935) (judicial function ends when courts measure regulatory action against constitutional and legislative delegation, courts should not comment on policy of the law); accord *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585 (1907). See also 5 U.S.C. § 706, *supra* note 116; cf. *City of Chicago v. Federal Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1971).

power is effectively checked by the legislative<sup>120</sup> and executive<sup>121</sup> branches, and so should be subject to minimal judicial scrutiny. Thus the role of the reviewing court should be merely to insure that the agency is not "shooting in the dark" with their decisions.<sup>122</sup>

Other commentators support strict judicial oversight of administrative decision-making. They claim that all regulation, even the most highly technical, involve political issues.<sup>123</sup> Choosing among competing economic and social policies is a function which Congress cannot abdicate, they argue, and therefore courts should give narrow interpretation to enabling statutes and void decisions when agencies attempt to set policy.<sup>124</sup> Although broad delegations of power give agencies broad decision-making power, this power is not without bounds.<sup>125</sup> These commentators argue that judicial review should

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120. Formal congressional checks on administrative decision-making include legislation to limit powers delegated, withdrawal of powers, withholding funding, counteracting regulations with new legislation, and periodic monitoring by congressional committee. Informally, congressmen can use their notoriety to bring issues they are interested in before the public by making speeches, getting information to the press, or bringing pressure on the agency to disclose information. Recently, there has been proposed legislation, referred to as "sunset legislation," requiring periodic reevaluation of all delegations by Congress to administrative agencies. Babcock, *The Congressional Responses to Chadha*, 9 AD. L. NEWS 1 (1983).

121. Formal executive checks on administrative power include the power to appoint top-level administrators, and the power to coordinate regulation. President Reagan has expanded this power to require that all major regulations pass a cost-benefit analysis performed by the Office of Management and Budget. E.O. 12,291, *supra* note 75 See generally Bliss, *Regulatory Reform: Toward More Balanced and Flexible Federal Agency Regulation*, 8 PEPPERDINE L. REV. 619 (1981); Davis, *Regulatory Reform and Congressional Control of Regulation*, 17 NEW ENG. L. REV. 1199, 1204 (1982); Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 295; Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981).

122. Wright, *supra* note 117, at 200.

123. See Raven-Hansen, *supra* note 121, at 285; Schwartz, *Of Administrators and Philosopher-Kings: The REPUBLIC, The LAWS, and Delegations of Power*, 72 NW. U.L. REV. 443, 448 (1977) (restrictionless delegation has tended to make regulatory process a political contest).

124. "The delegation . . . is not, of course, unbounded, and it is the duty of the reviewing court to determine whether the course followed by the Commission is consistent with its mandate from Congress." Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade, 412 U.S. 800, 806 (1973). See also *City of Chicago*, 458 F.2d at 742; Freedman, *Review: Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976); Schwartz, *Some Recent Administrative Law Trends: Delegations and Judicial Review*, 1982 WIS. L. REV. 208; Schwartz, *supra* note 123; Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. REV. 257 (1982).

125. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 144 (1965).

involve thorough scrutiny of the factual basis upon which an agency acts. Courts should approve only those regulations which agencies justify on a full record demonstrating that the agency measured competing considerations as Congress intended.<sup>126</sup>

Courts faced with review of agency action usually take a middle position. They traditionally point to the Administrative Procedure Act as the "formula upon which opposing social and political forces have come to rest,"<sup>127</sup> and then do the best they can to review all the facts and the options before the agency. These courts give some deference to the administrators' judgment,<sup>128</sup> but undertake an independent review of the decision. This "muddling through" method of review usually results in high judicial costs, long delay and unpredictable results. In order to get better insight into why courts choose this middle position, the job of the reviewing court must be investigated.

### *The Nature of Judicial Review*

Regardless of how a reviewing court views its role in the system, certain basic tenants are respected. First, courts realize that administrative decisions usually involve complex scientific and technical expertise.<sup>129</sup> When an agency relies on its own expertise, particularly in an area with which judges are not familiar, courts should give great deference to the agency's decision.<sup>130</sup> Second, courts should not substitute their own views for those of an agency.<sup>131</sup> Administrators must often make tough decisions involving allocation of scarce resources in the pursuit of unattainable congressional goals. For this reason, courts should be hesitant to order an agency to undertake specific actions, even if the court believes the actions would advance the agency's statutory mission.<sup>132</sup> Third, courts should be most willing to intervene in the administrative process when agencies seek to make rules without public process, since public participation is fundamental

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126. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 261 (1978).

127. *Wong Yank Sung v. McGrath*, 339 U.S. 33 (1950).

128. One commentator exclaims "the Administrative Procedure Act is positively misleading in some particulars, and anyone relying on it for an account of the scope of judicial review of administrative action during the decade of the 1970's would be sorely embarrassed." Rodgers, *Judicial Review of Risk Assessments: The Role of Decision Theory in Unscrambling the Benzene Decision*, 11 ENVTL. L. 301 (1981).

129. Jasanoff & Nelin, *Science, Technology, and the Limits of Judicial Competence*, 22 JURIMETRICS J. 266 (1982).

130. See, e.g., *Baltimore Gas* 103 S. Ct. at 2246.

131. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

132. See *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958).

to administrative rule-making.<sup>133</sup> In general, the role of the judiciary is to monitor informal rule-making to protect constitutional rights and effectuate congressional intent, but not to unduly interfere.<sup>134</sup> These general principles are the starting point for courts undertaking review of administrative action.

Beyond these basic tenets, the Supreme Court has clarified the judicial role in a number of recent opinions. *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>135</sup> marked the Supreme Court's first consideration of the nature of review of administrative decision-making. In the context of an informal decision by the Secretary of Transportation approving a highway project through a park,<sup>136</sup> the Court called the court's job a "plenary review."<sup>137</sup> Even though the action was the product of an informal procedure without formal findings or production of any sort of record, the Court held that the agency's action was not insulated from review.<sup>138</sup> Reviewing courts are to engage in a "thorough, probing and in-depth review"<sup>139</sup> to determine whether the administrator acted within the scope of his authority,<sup>140</sup> whether his decision was arbitrary, capricious, or an abuse of discretion on the basis of the facts before him when the decision was made,<sup>141</sup> and whether he followed the necessary procedural requirements in making his decision.<sup>142</sup>

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,<sup>143</sup> the Supreme Court gave lower courts more advice

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133. "The fulfillment of [congressional purpose] is impossible without direct public participation through democratic administrative processes." Note, *A Generic Approach of Intervention in Administrative Proceedings—Increased Participation and Efficiency Through Regulatory Reform*, 38 WAYNE L. REV. 1427 (1982). See *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (1965) (public's interest must be actively protected by agency); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) (republished by Wm. W. Gaunt & Sons, Inc. in 1973); L. JAFFEE, *supra* note 125, at 19 (public is not likely to accept power exercised in camera); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rule Making*, 60 CALIF. L. REV. 1276 (1972); Wright, *supra* note 117, at 379 (section 553 contemplates public dialogue).

134. See *supra* note 116.

135. 401 U.S. 402 (1971).

136. *Id.* at 406.

137. *Id.* at 420.

138. *Id.* at 418.

139. *Id.* at 415.

140. *Id.* See *infra* text accompanying notes 162-68.

141. *Overton Park*, 401 U.S. at 416. See *infra* text accompanying notes 174-76.

142. *Overton Park*, 401 U.S. at 417. See *infra* text accompanying notes 181-84.

143. 435 U.S. at 519 (1978).

on review of administrative decision-making. In the context of the Atomic Energy Commission's decision on the problem of nuclear waste and the licensing of nuclear power plants,<sup>144</sup> the Court limited the scope of review of administrative decision-making by placing a flat ban on judicial imposition of procedure above that required by the Administrative Procedure Act.<sup>145</sup> Noting the flexibility built into the Administrative Procedure Act to allow agencies to discharge their multitudinous duties,<sup>146</sup> the Court totally banned reversal for lack of procedure where an agency fulfilled the requirements of the Administrative Procedure Act and its own enabling statutes and rules.<sup>147</sup> The Court further directed that where an agency provides a contemporaneous explanation of its decision, reviewing courts must look to this source and this source alone to judge whether the rule has been adequately justified.<sup>148</sup>

The Supreme Court further clarified the job of the reviewing court in *Motor Vehicle*.<sup>149</sup> In this case, the Court found the Secretary of Transportation's attempt to rescind the automatic restraint requirements to be arbitrary and capricious for failure to justify adequately not choosing one of the many alternatives within the ambit of the existing rule.<sup>150</sup> Focusing on substantive review of ad-

144. *Vermont Yankee*, 435 U.S. at 522.

145. *Id.* at 524. "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." Under section 553 of the Administrative Procedure Act, in order to promulgate a rule all an agency need do is publish notice in the Federal Register, give anyone interested the opportunity to submit written comments on the proposed rule, and include with the final rule a concise general statement of the rule's basis and purpose. 5 U.S.C. § 553 (1977).

146. *Vermont Yankee*, 435 U.S. at 543.

147. *Id.* at 546. The Court ruled that to hold any differently would result in unpredictability, unfair second-guessing and unwarranted judicial interference. *Id.*

148. *Vermont Yankee*, 435 U.S. at 549. The debate still rages over the meaning and potential impact of *Vermont Yankee*. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:35-37 (1978 & 1982 Supp.); Beatson, *A British View of Vermont Yankee*, 55 TUL. L. REV. 418 (1981); Breyer, *Vermont Yankee and the Court(s) Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Byse, *supra* note 117; Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3; Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183 (1979); Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny* 67 GEO. L.J. 699 (1979); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345; 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); Comment, *Counter Revolution in the Federal Courts of Appeal—The Aftermath of Vermont Yankee*, 15 U. RICH. L. REV. 723 (1981).

149. *Motor Vehicle*, 103 S. Ct. at 2856.

150. *Id.* at 2871.

ministrative decision-making, the Court directed reviewing courts to reverse an agency decision if:

The agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.<sup>151</sup>

In *Motor Vehicle*, the Court attempted to strike a balance between the active judicial role advocated in *Overton Park*<sup>152</sup> and the call for restraint in *Vermont Yankee*<sup>153</sup> by deciding that a rule of long-standing deserves greater deference than a newly promulgated rule.<sup>154</sup> Furthermore, the Court held that total rescission of such a rule is arbitrary and capricious when the agency makes no contemporaneous statement to justify foregoing clear technological alternatives within the scope of the proposal.<sup>155</sup> Thus, judicial review of total abandonment of a decision in long-standing will differ from an *Overton Park* review in that agencies must specifically explain why clear alternatives are foregone.

These Supreme Court decisions together with the Administrative Procedure Act<sup>156</sup> constitute what might best be referred to as the requirement that agencies engage in "reasoned decision-making."<sup>157</sup> Although courts cannot change the structure of decision-making by requiring new procedures which would enhance judicial review under *Vermont Yankee*, they must still engage in a substantial inquiry to judge the propriety of agency actions. The review announced in *Overton Park* remains the model, directing courts to inquire into three separate areas: authority, procedural regularity, and rationality.<sup>158</sup> Each of these areas must be addressed in light of the principle of "reasoned decision-making."

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151. *Id.* at 2867.

152. *See supra* text accompanying notes 135-42.

153. *See supra* text accompanying notes 143-48.

154. *Motor Vehicle*, 103 U.S. at 2866.

155. *Id.* at 2871. "We hold that . . . the mandatory [automatic] restraint rule may not be abandoned without any consideration whatsoever of an airbag-only requirement." *Id.*

156. *See infra* text accompanying notes 174-85. This note will not deal with formal adjudication under the Administrative Procedure Act.

157. As Judge Bazelon said, "[W]hen administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process. . . ." *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

158. *Overton Park*, 401 U.S. at 416.

*Judicial Review of Authority*

The scope of the power delegated by Congress to an administrative agency is a matter of statutory interpretation which rests with the judiciary.<sup>159</sup> Because the legislature grants authority to agencies using broad language and agencies usually do not adopt standards to limit their own power,<sup>160</sup> the judicial role is to interpret for the administrator "what job is to be done, who must do it, and what is the scope of his authority."<sup>161</sup> Judges are experienced with statutory interpretation and this review involves questions of law which judges can feel confident deciding.<sup>162</sup>

Review of statutory authority changes over time. On initial review of a congressional delegation, the judiciary generally defines the scope of the agency's discretion.<sup>163</sup> This interpretation is crucial to the agency, since it will set the tone for review of authority in subsequent cases.<sup>164</sup> Whenever authority is in question, courts must judge whether an agency has "exceeded its discretion" by making a choice outside the range which the law permits,<sup>165</sup> or "abused its discretion" by making a choice within the range permitted but for improper reasons.<sup>166</sup> If a court finds that the agency has either exceeded or abused its discretion by acting in a manner not "committed to agency discretion" by the law,<sup>167</sup> the court must overturn the decision and remand the case to the agency for resolution.<sup>168</sup>

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159. *Id.* at 412.

160. Federal legislation is usually strikingly broad and unspecific because (1) legislators often cannot specify at the outset what precise policies are to be followed, (2) legislators lack the resources to clarify directives, (3) legislators lack the incentives to clarify directives, (4) legislators want to avoid resolving controversial policy issues, (5) legislators' experience in areas varies, and (6) language limits specificity. Stewart, *supra* note 117, at 1677 n.26. Although the very justification of fair process is the development of a detailed body of law promulgated by agency experts, no such law has been fashioned or inconsistently applied, so that congressional intent has been frustrated. See B. GOLDWATER, *THE COMING BREAKPOINT* (1976); B. SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* 144 (1959); Schwartz, *supra* note 123, at 448.

161. *Bowles v. Willingham*, 121 U.S. 503, 515 (1944).

162. Some commentators worry that courts often abdicate this role of statutory interpretation. Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 AD. L. REV. 183, 184 (1981); Stewart, *supra* note 117, at 1673.

163. L. JAFFE, *supra* note 125, at 336.

164. *Id.*

165. Rodgers, *A Fresh Look at Agency "Discretion"*, 57 TUL. L. REV. 776, 777 (1983).

166. *Id.*

167. *Id.*

168. Under *Overton Park*, a court is not free to exchange its view of the correct results with the agency's. Instead, it must send the matter back to the agency for further action. *Overton Park*, 401 U.S. at 413. See *Motor Vehicle*, 103 S. Ct. at 2874.

Consider, for example, the authority of the NHTSA to promulgate the automatic occupant restraint regulation. The NHTSA is empowered to establish motor vehicle safety standards to reduce death and injury from traffic accidents.<sup>169</sup> In the exercise of this power, the agency may proceed using informal rule-making<sup>170</sup> because it needs to resolve factual controversies and expose major issues of policy.<sup>171</sup> Congress passed the Safety Act in 1966 to force unwilling automobile manufacturers to make their cars safer,<sup>172</sup> justifying the NHTSA's creation of standards which force the automobile industry to develop new safety technologies.<sup>173</sup> Although Congress directed the NHTSA to create only reasonable standards in regard to feasibility, costs, and lead time, the legislative history makes it clear that safety is to be their most important consideration.

### *Judicial Review of Procedure*

Judicial review of informal rule-making procedure is narrow. Section 553 of the Administrative Procedure Act sets forth all of the procedural requirements an agency must follow to promulgate rules by informal methods.<sup>174</sup> This law requires only that the agency publish

169. 15 U.S.C. § 1381 (1982).

170. See *supra* note 117.

171. *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 336 (D.C. Cir. 1968).

172. *Chrysler Corp.*, 472 F.2d at 663.

173. "When the Safety Act was passed in 1966, the Senate committee noted that the NHTSA must consider reasonableness of cost, feasibility, and adequacy of lead time. The committee made it clear, however, that safety shall be the most important consideration in the issuance of standards under the Safety Act." Marshall, *The Automobile Industry and the Department of Transportation: Striving for Practical Solutions*, 1982 DET. C.L. REV. 81, citing S. REP. NO. 1301, 89th Cong., 2d Sess. 6 (1966).

174. Informal rule-making is governed by section 553 of the Administrative Procedure Act, which requires:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States;  
or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;



notice of its proposed rule-making in the Federal Register, allow interested persons to submit their view by written comments,<sup>175</sup> and incorporate a concise, general statement of the basis and purpose of the rule with the substantive regulation when announced.<sup>176</sup> While agencies can supplement these procedures as they see fit, courts cannot require them to use additional procedures except in extreme cases.<sup>177</sup>

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(2) references to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interest person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553 (1977).

175. 5 U.S.C. § 553(b), (c) (1977). Although the wording of this section is less than clear, it is clear that the agency need not give the public an opportunity to present their claims orally in order to comply.

176. 5 U.S.C. § 553(c) (1977). Although the law clearly requires that the substantive rule be published, 5 U.S.C. § 553(d) (1977), it does not specifically state that the basis and purpose statement also be published. This is thought to be included in the substantive rule and uniformly published with it.

177. *Vermont Yankee*, 435 U.S. at 524. In the 1970's there was a movement in the District of Columbia Court of Appeals to remand decisions where the reviewing

Again, analogy to the automatic restraint regulation is illustrative. Since the NHTSA's enabling statute requires no procedures above and beyond the requirements of the Administrative Procedure Act, the agency is generally free to shape its own procedures.<sup>178</sup> Prior to promulgating a rule, the NHTSA need only publish notice of proposed rule-making in the Federal Register which is broad enough to include all possible alternatives.<sup>179</sup> After allowing the public to submit written comments, the NHTSA must write a general statement of basis and purpose in which it takes notice of most of the comments submitted and attempts to respond to criticisms.<sup>180</sup> When the regulation becomes subject to judicial contest, the NHTSA can then offer the court a voluminous document which includes all the scientific data it has collected, all the public comments, and its contemporaneous justification for deciding as it did.

### *Judicial Review of Substantive Regulation*

Even if an administrative decision is a valid exercise of authority made after proper procedure is followed, it can still be remanded if it is irrational. Courts will reverse agency decision-making if, on the basis of the facts before the administrator when he acted, his decision is arbitrary and capricious.<sup>181</sup> Courts must engage in a substantial inquiry into the decision to consider whether the actual decision was based on consideration of all the relevant factors.<sup>182</sup> If a court finds that the administrator has made a clear error in judgment, or has failed to consider obvious alternatives, the decision must be

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court felt that there was insufficient procedure. Courts would order oral hearing, cross-examination, and suggestions on improving the record for judicial review purposes. See *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976); *Portland Cement Ass'n v. Ruckelshaus*, 426 F.2d 375 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). See also Stewart, *supra* note 117, at 1805; Williams, *Hybrid Rulemaking Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975). Student notes have often proposed court-imposed procedure as a way to improve the procedure. See, Note, *A Specific Proposal for Hybrid Rulemaking*, 7 COLUM. J. ENVTL. L. 69 (1980); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782 (1974). *Vermont Yankee* moots such arguments by its absolute ban on imposition of procedures beyond those required by the Administrative Procedure Act.

178. The Traffic and Motor Vehicle Safety Act requires the Department of Transportation to promulgate safety standards by procedures set forth in the Administrative Procedure Act, 15 U.S.C. § 1392(b) (1982).

179. See *supra* text accompanying notes 16-93.

180. See, e.g., 46 Fed. Reg. 53,419 (1981).

181. *Overton Park*, 401 U.S. at 415-16.

182. *Id.*

reversed.<sup>183</sup> Although this inquiry must be careful and searching, it must also be narrow because the court cannot substitute its own judgments for that of the agency.<sup>184</sup>

The NHTSA's automatic restraint regulations are also subject to judicial review. Automatic restraints have already been the subject of much litigation, and have been upheld upon substantive review.<sup>185</sup> Since the NHTSA has shown in the past that technology exists which would insure increased passenger safety, the new regulation requiring automatic restraints might expect to carry a presumption of validity. However, rescission by default may face the same problems as the action attempted in *Motor Vehicles*.

*Motor Vehicle* changes the nature of review when rescission of long-standing regulation is attempted. While the standard of "reasoned decision-making" was nominally retained,<sup>186</sup> the Court called for stricter review of the rescission of a pre-existing regulation. When reviewing rescission of a rule which allows more than one method of compliance, courts must distinguish "policy alternatives" from "technological alternatives within the ambit of the existing standard."<sup>187</sup> Rescission of each "technological alternative" must be independently justified in order to pass judicial scrutiny.<sup>188</sup> Prediction of what method will actually be chosen for compliance is irrelevant to this judicial requirement, even where the agency fails to justify rescission of alternatives representing only one percent of predicted compliance.<sup>189</sup>

Apart from this quantitative change in documentation, *Motor Vehicle* also announced a qualitative change in judicial review. In *Motor Vehicle*, the Court held that rescission of one of the alternatives for which justification was documented was inadequately justified.<sup>190</sup> The

183. *Id.* *Motor Vehicle*, 103 S. Ct. at 2871.

184. *Overton Park*, 401 U.S. at 416; L. JAFFEE, *supra* note 125, at 182 (once an agency shows that it considered the relevant factors, courts should not interfere).

185. *See supra* notes 16-93 and accompanying text.

186. The Court ruled that the safety standard must be judged under the arbitrary and capricious standard announced in *Overton Park*. *Motor Vehicle*, 103 S. Ct. at 2865.

187. *Id.* at 2871.

188. Where a "technological alternative" is abandoned without any justification, the rescission is arbitrary and capricious. *Id.*

189. An agency cannot justify rescinding an otherwise worthwhile regulation because one compliance alternative would be ineffective, although this might justify further limiting compliance. *Id.* at 2869.

190. *Id.* at 2874. This part of the decision was dissented to by Justices Rehnquist, Powell, O'Connor and Chief Justice Burger. These Justices agreed with the rest of the Court's opinion, that the NHTSA acted arbitrarily in its rescission action. *Id.*

Court found that the NHTSA's justification, which was based on lack of field testing,<sup>191</sup> did not support rescission of the alternative but only indicated that further testing was in order.<sup>192</sup> The Court went so far as to attack the NHTSA's reasoning by creating its own contradicting arguments.<sup>193</sup> Thus, *Motor Vehicle* supports the proposition that when a reviewing court judges justifications as to particular "technological alternatives" in a rescission decision, it should use stricter scrutiny.

Consequently, judicial review of administrative rule-making is defined by the "reasoned decision-making" criteria. Administrative actions are reviewed for authority, procedure, and substance. The intensity of review depends upon the regulatory history of the issue and the quality and quantity of documentation presented by the agency. With this framework in mind, a model of judicial review is proposed.

#### A MODEL OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

A delicate balance of power is built into the United States Government system. Congress delegates power to administrative agencies to implement programs which involve detailed scientific problems. Congressional delegation puts decision-making power in the hands of experts who can use their special qualifications to regulate effectively some areas of the private sector.<sup>194</sup> These administrations carry out long-term programs which promote the policies mandated by the legislature in an atmosphere insulated from political pressure.<sup>195</sup> Congress created informal rule-making procedures to allow fair, expeditious, and orderly promulgation of regulations.<sup>196</sup> Congress further provided that the exercise of administrative power be subject to judicial review, to insure that after following notice and comment procedures agencies make rational decisions that are within their delegated responsibilities.<sup>197</sup> If agencies existed in a vacuum, this

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191. *Id.* at 2872.

192. *Id.*

193. The Court said the NHTSA failed to take into account "the critical difference" between the detachable automatic belts and traditional seat belts, and that since the new system involved no affirmative action, it was supported by an "inertia" factor. *Id.* at 2872. This analysis appears nowhere in the notice of rule-making.

194. Some commentators say that administrative expertise is a "myth" for administrators are appointed for political reasons, and most often favor private industry. Schwartz, *supra* note 117, at 115.

195. Bruff, *supra* note 117, at 465.

196. LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, H.R. 1980, 79th Cong., 2d Sess., reprinted in 1946 U.S. CODE CONG. & AD. NEWS 1195, 1198.

197. See *supra* text accompanying notes 116-21.

congressionally-created system would always produce efficient and effective regulations, for there would be full disclosure of all important information to the public who could aid in decision-making through fast and flexible procedure.<sup>198</sup>

Unfortunately, agencies do not exist in a vacuum, as the automatic occupant restraint controversy illustrates. Rather than exemplifying a swift and efficient process of decision-making, regulatory controversies tend to drag out over long periods of time.<sup>199</sup> What is supposed to be a power to regulate insulated from political pressure has become a contest to control policy between political leaders. A system that was meant to be expeditious and orderly has become slow and complex.

In this politically influenced context, review for "reasoned decision-making" becomes meaningful. In the name of "reasoned decision-making," courts assume that drastic change in agency policy is unjustified on the facts and inconsistent with congressional mandates.<sup>200</sup> In this way, judicial review promotes stability in the regulatory process. More intense review where administrative decisions involve drastic change in prior policies protects the delicate balance Congress originally built into the regulatory system. Review for "reasoned decision-making" protects the particular congressional policies agencies were created to effectuate from deregulation<sup>201</sup> at the whim of the executive. Stricter judicial review also protects the interests of regulated industries and the public, who rely on stability in regulation to plan for the future. In short, more intense judicial scrutiny of drastic changes in administrative policy is valuable because it promotes stability. This stability will be demonstrated by reviewing the legal basis for stricter review of drastic changes in policy, and by investigating the application of "reasoned decision-making" review in the context of the automatic restraint regulation.

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198. See Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability*, 7 PEPPERDINE L. REV. 553 (1980).

199. Automatic occupant restraints were first proposed in 1969, and are still in controversy fifteen years later. See *supra* text accompanying notes 28-93.

200. Congress established a presumption against changes in policy. *Motor Vehicle*, 103 S. Ct. at 2866.

201. "Deregulation" is a term whose meaning is often unclear. Although "deregulation" may be used to mean any action which has the effect of limiting federal bureaucracy, in this context it will have narrower meaning. "Deregulation" will be used here to refer to affirmative attempts to *retract existing regulations*, so as to limit government intervention into the private sector.

*The Legal Basis for More Intense Scrutiny of Drastic Change*

The level of judicial scrutiny under "reasoned decision-making" review varies with the extent that an agency's action affects previous long-standing policy. This sliding scale concept<sup>202</sup> of the intensity of judicial review is clearly grounded in legal precedent. While some might claim that courts should not intrude in agency action to any great extent in light of the *Vermont Yankee* decision, the concept of the sliding scale was recently reaffirmed in the *Motor Vehicle* case.

The Court has continuously expressed a preference for long-standing regulations.<sup>203</sup> The Court has required that courts who review agency decision-making "determine whether the course followed by [an agency] is consistent with its mandate from Congress."<sup>204</sup> In order to serve this function, an agency "must set forth clearly the grounds on which it acted."<sup>205</sup> As a corollary of this rule, agencies may articulate the basis of their decisions by reference to other decisions, for prior decisions provide a guide to action that agencies may be expected to take in future cases.<sup>206</sup> For this reason, "[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."<sup>207</sup> Consequently, there is a presumption that policy is best carried out by adherence to the settled rule.<sup>208</sup>

Agencies can change established rules on regulations when new circumstances make those rules unnecessary to effectuate congressional intent.<sup>209</sup> However, courts will only accept this justification if the grounds for departure are clearly set forth so that the reviewing court can adequately judge the consistency of the change with the agency's mandate.<sup>210</sup> Under this rule, the review of drastic change in policy requires more intense scrutiny.

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202. "Sliding scale" will be used to refer to the proportional relationship between the intensity of review and the degree of change in policy an administrative action represents. This analysis goes further than just proposing that drastic reversal of policy will be more intensely reviewed. What is proposed here is that every change in policy is reviewed more strictly than no change, and that the more drastic the change the stricter the review.

203. *Wichita Bd. of Trade*, 412 U.S. at 806.

204. *Id.*

205. *Id.* at 807.

206. *Id.*

207. *Id.*

208. *Id.* at 808.

209. *Id.*

210. *Id.*

This more intense scrutiny of administrative decision-making may arguably contradict the spirit of *Vermont Yankee*,<sup>211</sup> however, the rules can be distinguished. In *Vermont Yankee*, the court rejected the lower court's decision to impose additional procedures on an agency action above and beyond those specified in the APA.<sup>212</sup> The court said that judicially imposed procedures would create unpredictability and lead to administrative waste.<sup>213</sup> More intense review of administrative decision-making, such as is involved in the sliding scale concept, would force agencies to use more procedure to change regulations. Under the sliding scale concept, lower courts can impose more procedure by an indirect method, and so can do indirectly what *Vermont Yankee* directly prohibits. More intense review results in delay and forces agencies to document extensively their decisions, at high costs to the agencies. A sliding scale of intensity of review would contradict the spirit of *Vermont Yankee*, limiting it to its facts.

These arguments are addressed in *Motor Vehicles*.<sup>214</sup> *Motor Vehicle* says that it is erroneous to interpret *Vermont Yankee* so broadly as to prohibit intense judicial scrutiny.<sup>215</sup> *Vermont Yankee* is not "a talisman under which any agency decision is by definition unimpeachable."<sup>216</sup> More intense scrutiny of administrative actions that drastically change long-standing policy is justified because "[r]evocation [of regulation] constitutes a reversal of the agency's former views as to the proper course."<sup>217</sup> The agency's settled course is presumed to carry out the policies mandated by Congress, and requires that the agency supply "reasoned analysis for the change."<sup>218</sup>

Although the Court continues to claim that the standard of review has not changed,<sup>219</sup> the intensity with which it applies to that standard is different when a long-standing policy is at issue. On the basis of the *Motor Vehicle* decision, courts should investigate administrative action to the point where they can decide how great a shift in policy the action represents and then pursue the corresponding intensity of review.

Thus, judicial review of drastic change in administrative policy deserves more intense judicial review. This review does not violate

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211. *Vermont Yankee*, 435 U.S. at 547.

212. *Id.* at 524.

213. *Id.* at 546.

214. *Motor Vehicle*, 103 S. Ct. at 2870-71.

215. *Id.* at 2870.

216. *Id.*

217. *Id.* at 2866.

218. *Id.*

219. *Id.*

*Vermont Yankee*, and is consistent with the Court's teachings in *Motor Vehicle*. This more intense review is warranted by the protection built into "reasoned decision-making" for stability in regulatory process.

*The Reasons Behind Stricter Review of Drastic Change*

More intense review of administrative actions that involve a substantial change in policy is justified by the beneficial effect such review has on the United States system of government. More intense review of administrative change in policy promotes stability. Although stricter review does not prohibit changes in policy, it slows down the process to require greater disclosure of information at high cost to the agencies. More intense review has two particularly beneficial effects: first, it protects the congressional intent embodied in delegated authority from deregulation by the executive, and second, it protects the public's expectation of continuing regulation so that it can make rational decisions about the future.

More intense judicial review of drastic policy change protects the delicate balance of power between the branches of government. The executive, who has great power over administrative action,<sup>220</sup> can damage the congressional intent behind delegation of power. This occurs though executive pressure on agencies to rescind long-standing regulations. Because an agency's actions are not directly reviewable by Congress,<sup>221</sup> were it not for judicial review there would be very little protection for congressional policy making. When an agency's proposal rule or regulation embodies a drastic shift in policy, there is great danger that the executive is avoiding existing regulations in order to reduce federal bureaucracy.<sup>222</sup> This tension between

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220. Under Executive Order No. 12,291, the executive branch prohibited all major rules which could not withstand its own cost-benefit analysis. *E.O. 12,291, supra* notes 75, 121.

221. Now that the legislative veto has been judged unconstitutional, Congress cannot directly review administrative decisions. *See supra* note 120. *But see How Congress May Replace the Legislative Veto*, 1983 BUSINESS WEEK 29 (July 11, 1983). They can, however, legislatively alter an agency's "mandate" or purpose, but this is highly unlikely.

222. In a recent case holding an attempt at deregulation arbitrary and capricious, where the rule had existed for over forty years, the court said:

We recognize that a new administration may try to effectuate new philosophies that have been implicitly endorsed by the democratic process. Nonetheless, it is axiomatic that the leaders of every administration are required to adhere to the dictates of statutes that are the product of democratic decision making. Unless officials of the executive branch can convince Congress to change the statutes they find objectionable, their duty is to implement the statutory mandates in a rational manner.

*International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 796 (D.C. Cir. 1983) (NLRB; rescission of home work rule disallowed).



congressional policy and executive policy should be limited by intense judicial review.

It would be improper and unwise, on the other hand, to prohibit all mechanisms of deregulation by the executive branch.<sup>223</sup> More intense judicial review of deregulation by the executive, however, is proper because it insures that deregulations will be more fully considered on the basis of the factual circumstances and the agency's congressional mandate. By forcing an agency which rescinds a regulation to disclose its reasoning in such a way that the court can understand why the change is necessary, courts can measure the agency's action against the congressional policy to which the agency is subject.<sup>224</sup> This slows regulatory change and insures rationality. If the executive is dissatisfied with the prospect of more intense judicial review, he can appeal to the legislature to take action to deregulate. Thus, every decision to rescind a standing regulation which represents long-standing policy would be subject to careful investigation by either Congress or a court. Any changes would be fully examined in light of the current factual circumstances and legislative purpose.

Further, more intense review of administrative action that drastically changes long-standing policy protects public expectations. Regulated industry relies on long-standing policy of federal regulations in business planning decisions.<sup>225</sup> Often, industry must undertake long-term research and development to conform with regulation which it expects to be effected in the future.<sup>226</sup> When a regulation that is about to go into effect is rescinded, industry bears the cost of research and development as well as the cost of retooling its production systems.<sup>227</sup> Beyond the financial interest of regulated industry, the

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223. A reviewing court may not set aside an agency's rule. "Merely because the Commission has on an earlier occasion reached another result; administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

224. An agency must examine all relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

225. See Magat, *Symposium: Managing the Transition to Deregulation*, 44 LAW & CONTEMP. PROBS. 1 (1981).

226. In the automatic occupant restraint controversy, for example, the automobile industry has spent over fifteen years developing airbag technology at a great cost. See Graham & Gorham, *Commentary: NHTSA and Passive Restraints: A Case of Arbitrary and Capricious Deregulation*, 35 AD. L. REV. 193, 196 (1983).

227. There was much waste in retooling costs when the automatic occupant restraint requirement was rescinded just months before it was to go into effect. Graham & Gorham, *supra* note 226, at 202.

general public benefits when long-standing policies are protected because great policy shifts in regulations can adversely effect the economy, the environment, and public health and safety.<sup>228</sup> Violent change at the whim of an agency could do injury to these social concerns.

Thus, more intense judicial review is good because it stabilizes regulatory process. Both the balance of power within government and the public's expectations benefit from the stability such judicial review brings. This stability can best be shown in the context of the automatic occupant restraint controversy.

*"Reasoned Decision-Making" and the Automatic Occupant Restraint Problem*

The ongoing controversy over automatic occupant restraints is a good context in which to consider the bounds of the concept of "reasoned decision-making" review. Subject to judicial scrutiny a number of times in the past fifteen years,<sup>229</sup> the controversy over federal requirement of automatic occupant restraints involves a struggle between opposing branches of the federal government as well as between opposing interests in the private sector.<sup>230</sup> Consideration of the controversy in the context of the claim of stability offered by the sliding scale concept of "reasoned decision-making" review is in order.

The NHTSA had three basic options in responding to *Motor Vehicle*. First, the NHTSA could have attempted to rescind totally the automatic occupant restraint requirement. Although the NHTSA has attempted to do this in the recent past and has failed, it did not fail because its decision was incorrect as a matter of law. The reason the judiciary would not allow the NHTSA to rescind its safety standard in its last rule-making was because the agency *failed to document "reasoned decision-making"* on the issues involved.<sup>231</sup> Prospectively, the Supreme Court returned the matter to the NHTSA not for a different decision on the matter but only for reconsideration of its prior decision.<sup>232</sup>

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228. *Joseph*, 404 F.2d at 210.

229. *Motor Vehicle*, 103 S. Ct. at 2856; *Pacific Legal Foundation*, 593 F.2d at 1338; *Ford Motor Co.*, 473 F.2d at 1241; *Chrysler Corp.*, 472 F.2d at 659.

230. In the private sector, automobile manufacturers have traditionally opposed the federal mandate while consumer groups and insurance companies have welcomed it. See *supra* notes 11-12.

231. *Motor Vehicle*, 103 S. Ct. at 2896.

232. *Id.*

Had the NHTSA decided to totally abandon automatic restraints, however, their decision would have been subjected to the intense judicial scrutiny announced in *Motor Vehicles*.<sup>233</sup> The agency would have had to change its rule-making record so that clear justification for forsaking all alternatives short of total rescission was documented. Under this strict standard, total rescission would have been almost impossible to justify as even the weakest automatic restraint requirement would result in a great increase in traffic safety.

Secondly, the NHTSA had the option of enacting weak regulation. The NHTSA's compromise regulation, which is flexible in compliance options and includes a provision for rescission upon passage of MUL's, will be subjected to relatively intense review, but not as strict as was the case in *Motor Vehicle*.<sup>234</sup> Although the new regulation may result in total rescission of automatic restraint regulation, by following this plan the NHTSA has clearly taken an affirmative step toward increased traffic safety. In arguing for less strict judicial scrutiny, the agency can rely on *Chrysler Corp.*<sup>235</sup> to show how this standard has already passed judicial scrutiny, and only involves implementation of an existing rule. However, since the new legislation may result in total abandonment of long-standing federal regulation, it should receive strong judicial scrutiny.

Third, the agency could have enacted a forceful regulation. Had the NHTSA implemented a regulation requiring either airbags or nondetachable belts, judicial scrutiny should have been the weakest. As this action could not have been viewed as an abandonment of automatic restraints but only as a reaffirmation of the idea accepted long ago, review might best follow the spirit of *Vermont Yankee*. If this had been the case, the agency could have argued that limiting compliance options was not a *Motor Vehicle*-type of rescission but rather the only proper way to enforce the spirit of automatic restraints.

Through application of the sliding scale model of judicial review in the automatic restraints controversy, the strengths and weaknesses of the system become clear. Total abandonment of the automatic restraint concept would likely work the most harm on regulatory stability, and so should be subject to the strictest review. Compromise

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233. See generally Sunstein, *Deregulation and the Hard-look Doctrine*, 1983 SUP. CT. REV. 177.

234. Commentators currently disagree on this point. For a worthwhile discussion of this controversy, see Edwards, *Judicial Review of Deregulation*, 11 N. KY. L. REV. 229 (1984).

235. See *supra* text accompanying notes 35-38.

regulation, which is evaluated on its merits and not its form, should command strong but less strict scrutiny. Compromise supports stability in government and industry while delaying radical change in long-standing regulation. Finally, a regulatory decision implementing long-standing ideals is subject to the weakest scrutiny and so allows expectations to be met quickly. While uncertain degrees of scrutiny may interfere with decision-making, the benefits of the sliding scale model clearly outweigh this fault.

### CONCLUSION

Thus, the NHTSA can abandon the automatic restraints concept so long as they advance traffic safety, regardless of their congressional mandate. In refusing to adopt a strict regulation mandating airbags or nondetachable belts, the NHTSA changes long-standing expectations of industry and violates congressional intent. The adoption of a compromise regulation was improper because the NHTSA failed to implement technology-forcing safety standards. Yet, remedy for this wrong does not lie in the courts. Judicial review of administrative decision-making relies on the concept of "reasoned decision-making," so that the judicial role in decision-making is very limited. However, the Supreme Court has implemented a grading of degree of scrutiny designed to protect stability in federal regulation. The new regulation will withstand scrutiny because, even though it is improper, it changes policy with the least injury to regulatory stability. Thus, the NHTSA can violate congressional will (by not implementing technology-forcing standards) and get away with it.

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